Legal Writing
The Journal of the Legal Writing Institute

VOLUME 13 ____________________________________________ 2007

ARTICLES

Teaching Legal Writing through Subject-Matter Specialties: A Reconception of Writing across the Curriculum.........................Susan E. Thrower 3

The Third Paradigm: Bringing Legal Writing “Out of the Box” and into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine ..................Laurie C. Kadoch 55

Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality ..................Mitchell Nathanson 79

Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism ..................Sophie Sparrow 113

The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing..........Cara Cunningham Michelle Streicher 159

Teaching Foundational Clinical Lawyering Skills to First-Year Students..................Stefano Moscato 207

Legal Research Training: Preparing Students for a Rapidly Changing Research Environment ..................Sanford N. Greenberg 241
Avoiding Common Problems in Using Teaching Assistants: Hard Lessons Learned from Peer Teaching Theory and Experience ............................................. *Ted Becker*

*Rachel Croskery-Roberts*  269

**ESSAY**

CCISSR: The Perfect Way to Teach Legal Writing................................. *George D. Gopen*  315
TEACHING LEGAL WRITING THROUGH SUBJECT-MATTER SPECIALTIES: A RECONCEPTION OF WRITING ACROSS THE CURRICULUM

Susan E. Thrower*

I. INTRODUCTION

As long as formal education has existed, educators have pondered how to better engage their students and produce deeper, longer-lasting learning—learning that sparks more learning and leads to proper execution of the learned subject. In the last century, professional educators and psychologists have studied ways that humans learn and have described those ways in a body of learning theory that continues to develop and inform all pedagogy. Most recently, legal educators have struggled with the proper content of legal education. Should instruction be limited to theory and doctrine that focuses students on the sources and rules of law? Should law schools emphasize skills that prepare students to enter the practice world? Should law schools develop a mix and, if so, what should the balance be? Writing-across-the-curriculum programs, embraced by many, yet viewed with suspicion by equal numbers, attempt to achieve that balance.

As these questions have inspired academic debate, individual legal educators have quietly gone about the business of blending both theory and skills into their course offerings. Some of these educators have been primarily doctrinal teachers who have assigned writing projects to their students. Others have been doctrinal professors who have collaborated with their school’s legal writing faculty to create joint assignments. Others have been legal writing faculty who have taught practicum courses as an accompaniment to upper-level doctrinal courses. All could characterize their initiatives as “writing across the curriculum.”

Efforts to increase and integrate skills instruction with doctrinal information have been, at the least, efforts to increase student learning. Even so, these efforts largely have emphasized doc-

* © 2007, Susan E. Thrower. All rights reserved. Associate Professor & Director of Legal Analysis, Research & Communication, DePaul University College of Law. The Author wishes to thank Terri LeClercq and Sheryl Buske for their suggestions that the Author write this Article and Leslie Ward for her research assistance.
trine, with skills instruction as the adjunct in the form of some required writing assignments inserted into the syllabus of a doctrinal course. This model—writing within the doctrinal course—has become the standard model of writing-across-the-curriculum efforts, which likely has more to do with situational factors than with learning theory. Any law school usually has comparatively many more doctrinal courses than skills courses, so it would be only natural to suggest that all those doctrinal professors pick up a laboring oar and help increase skills training. There is another way.

Educators can, and have, shifted the focus from importing written skills into the doctrinal course to exporting doctrine into the legal writing classroom. Some have taught legal writing skills with a purposeful doctrinal focus: to make one area of law the basis for all or most of the assignments for the entire writing course. Without a designated subject matter, most legal writing courses involve assignments from many subject areas. Students may start out the school year working on a torts problem; their second assignment might be a criminal matter; and their final assignment might involve constitutional law. At DePaul University College of Law, however, some legal writing sections are purposely specialized: they are populated with students who have identified an interest in a particular area of law; they are staffed with legal writing professors who have practice experience in that area of law; and they involve assignments that feature that specialized topic. Thus, students learn the skills of writing and analysis while working through the nuances of a legal specialty to which they anticipate a long-term commitment. The purposeful specialization continues in DePaul’s upper-level writing curriculum, allowing students to continue their focused curricula after their first year. Complementing this system, professors of the first-year specialized writing sections often teach upper-level doctrinal electives, an outlet that both informs and improves the professors’ legal writing instruction.

Exporting doctrine into the legal writing classroom is an innovative way to achieve writing-across-the-curriculum goals to enhance and increase student learning of skills, particularly the skill of writing. In addition, the union of doctrine and writing within the confines of the legal writing classroom is congruent with, and extends, current learning theory. That body of work focuses on using social interaction to encourage students’ modification of their ideas; using authentic learning tasks to increase students’ sense of
realism; and using topics in which students have a high interest in order to produce their best writing. Assigning subject matter specific work to students who have an interest in those subjects creates micro-social discourse communities within the legal writing classroom; this dynamic increases both students’ active engagement in their work and their learning. Accordingly, this instructional model is a subset of the learning to write in the discipline approach to the writing-across-the-curriculum movement. It is the next logical step, if an untraditional-looking one, in legal education.

This Article explores the methods of, and reasons for, teaching legal writing through specialized sections. It first explains DePaul’s writing program and the way that DePaul’s specialized writing sections fit into that program. It then explores the theoretical basis for specialized instruction, explaining the learning theories that inform and support it. It details the multiple justifications for specialized instruction, both theoretical and practical, and concludes with an exploration of practical benefits and burdens for professors who may wish to adopt the model at their law schools.

II. INSTRUCTION AT DEPAUL UNIVERSITY
COLLEGE OF LAW

A. The Legal Writing Program

At DePaul, students take a required three-semester course in Legal Analysis, Research, and Communication (LARC). LARC I and II, which students take during the first year, are taught in small sections of twelve to fifteen students. These sections are either “general” or “specialized.” Students in “general” sections work on assignments in a variety of subject areas, often tackling issues drawn from contracts, torts, criminal law, and civil procedure. Students in “specialized” sections work on assignments that are drawn primarily from a particular area of law, such as intellectual property or family law.¹ LARC I and II faculty are full-time professors, and LARC III faculty are adjunct professors. All teachers use a uniform syllabus. Faculty members may create their own assignments, but each faculty member must deploy assignments

¹ Infra sec. II(E)(1) (discussing first-year LARC curriculum at DePaul).
over the course of the year that cover programmatic requirements.\textsuperscript{2} All sections of LARC III are general sections.

In addition to requiring three semesters of LARC, DePaul offers a wide menu of upper-level writing electives. These electives include both general and specialized courses.\textsuperscript{3} Over the last several years, DePaul’s LARC program has evolved in response to a combination of market pressure, student demand, and pedagogical need. The result is a purposeful curriculum that unites current learning theory with practical approaches to instruction and that stretches over all three years of a student’s legal education.\textsuperscript{4}

\textbf{B. Creation of the Certificate Programs}

In the 1990s, wanting to attract students who had a particular interest in specific areas of law and identifying a potentially successful recruiting approach to law student admissions, administrators at DePaul explored the possibility of offering certificate programs. Through what would become its current program, DePaul offered its students the opportunity to specialize in a particular area of law, akin to the way undergraduate students major in a field of study. The faculty approved the initial certificate program in intellectual property law during the 1999–2000 academic year as a corollary to the creation of the Center for Intellectual Property Law and Information Technology.\textsuperscript{5} Certificate programs in health law, international law, tax law, criminal law, and family law quickly followed.\textsuperscript{6} A program in public interest law was launched in 2003, rounding out a law school program with opportunities for seven specialties.\textsuperscript{7}

DePaul is in good company: many law schools have programs by which students can earn a certificate in various fields of law.\textsuperscript{8}

\textsuperscript{2} \textit{Infra} sec. II(E)(1).
\textsuperscript{3} \textit{Infra} secs. II(E)(2)–(3).
\textsuperscript{4} For information on the initial evolution of DePaul’s legal writing course, see Margit Livingston, \textit{Legal Writing and Research at DePaul University: A Program in Transition}, 44 Alb. L. Rev. 344 (1980).
\textsuperscript{6} Id.
\textsuperscript{7} E-mail from Steven Greenberger, Associate Dean for Academic Affairs, DePaul U. College L., to Susan Thrower, Asso., Prof. & Dir. Leg. Analysis, Research & Commun., DePaul U. College L. (July 31, 2006) (copy on file with Author).
\textsuperscript{8} “Law schools, themselves, have not escaped the tendency toward hyper-
These programs take many forms. Some are fully developed programs administered by institutes or centers and culminating in the award of a graduation certificate memorializing the accomplishment. Others are formal tracking models or less formal curricular offerings that permit students to concentrate in particular fields of study. Certificate programs and concentrations are now common in the fields of labor law, health law, intellectual property, dispute resolution, criminal law, and social justice.

specialization that has characterized the profession for at least a generation.” Larry Cata Backer, Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State, 20 Penn St. Int'l L. Rev. 465, 481 (2004) (noting the creation of specialty and certificate programs in an effort to distinguish one school from others); Stacy A. Tovino, Incorporating Literature into a Health Law Curriculum, 9 J. Med. L. 213 (2005) (urging law schools to incorporate the law and literature movement into their specialized health law curricula).

For an argument that these programs should be promoted when appropriate, see Backer, supra n. 8 at 67–68.

E-mail from Maria Crist, Prof. Lawyering Skills & Dir. Leg. Profession Program, U. Dayton Sch. L., to Susan Thrower, Assoc. Prof. & Dir. Leg. Analysis, Research & Commun., DePaul U. College L. (June 16, 2006) (copy on file with Author) (describing the University of Dayton School of Law’s system under which students choose a track at the beginning of the school year. The track guides the students’ instruction and curricular choices, though students may opt out of their chosen track. The three tracks are transactional/general practice, advocacy/litigation, and intellectual property law.).

10 E.g. Ann M. Griffin, What’s Your Major?—A Question for Law Students in Michigan? 80 Mich. B.J. 72, 72 (Jan. 2001) (In Michigan, Michigan State University-Detroit College of Law offers concentrations in international and comparative law and in tax law; Thomas M. Cooley Law School offers concentrations and certificate awards in four areas of law.).

11 E.g. Heather Nolan & Ethan Zelizer, Student Authors, Practice Areas in Demand in the Chicago Legal Market, 16 CBA Rec. 42, 43 (Apr. 2002) (noting the Chicago-Kent College of Law’s certificate program in labor and employment law).


14 E.g. Sharon Press, Institutionalization of Mediation in Florida: At the Crossroads, 108 Penn St. L. Rev. 43, 56–57 nn. 94–95 (2003) (noting that, at the time of publication, twenty-four law schools provided dispute resolution programs and that U.S. News and World Report included a ranking of dispute resolution programs in its list of “America’s Best Graduate Schools”).

15 See e.g. Michael Ariens, Law School Branding and the Future of Legal Education, 34 St. Mary’s L. J. 301, 350 n. 223 (2003) (St. Mary’s University School of Law offers students a certificate of concentration in criminal law.).

16 E.g. Kevin R. Johnson & Angela Onwuachi-Willig, Cry Me a River: “The Limits of a
Part of this trend toward specialization, and likely predating it, is the targeted approach that some law schools take of offering students the opportunity to acquire a deeper experience in an area of law through “cornerstone” and “capstone” courses. A cornerstone subject provides foundational knowledge. Courses such as corporate law and estate planning target second-year students and attract both the “generalist” who wants a survey course and the “specialist” who pursues an in-depth experience. A “capstone” course is a cross-disciplinary course that students take after learning the basics of a doctrine or theory. It builds on and expands that knowledge by permitting students to apply it in actual practice. A capstone course empowers the student “to manage the complete representation of a client’s complex matter within the student’s area of concentration.” Two types of capstone courses have been previously studied: (1) those that build on doctrinal knowledge, with a capstone evaluation product focused on one subject or on cross-disciplinary subjects; and (2) those that emphasize skills and values development and are evaluated by incremental practice exercises and written work.

DePaul’s formal certificate programs require students to complete both cornerstone and capstone classes. Students who successfully complete the program requirements receive a certificate noting that accomplishment. Certificate programs are organized and administered by faculty members. Program heads, with the approval of the law school’s curriculum committee, determine the number of credit hours and the particular course offerings, including cornerstone and capstone courses, that students must complete in order to receive the certificate upon graduation.

---


19 Id. at 256–257.


At the inception of DePaul’s first certificate program, the legal writing course was not part of the certificate landscape. Soon thereafter, Professor Roberta Rosenthal Kwall suggested to Professor Maureen Collins, Director of Legal Writing, that DePaul create a legal writing section that consisted entirely of students interested in studying intellectual property law. Working together, the two professors conceived a course that would follow the traditional legal writing curriculum but that would focus its assignments on topics integral to intellectual property law. They styled the section “Intellectual Property/Legal Writing” or “IPLW.” Professor Collins, a copyright attorney, taught the class.

After only a couple of years, the number of applicants for IPLW had increased sufficiently to warrant multiple sections of the course. In response, DePaul hired a legal writing professor with an undergraduate degree in engineering and practice experience in patent law. She taught the students who had engineering or hard science backgrounds, and Professor Collins taught the artists. Participation in IPLW was not a prerequisite for earning a certificate in intellectual property; correspondingly, students who enrolled in IPLW and later decided to abandon the study of intellectual property law were not obligated to pursue a certificate.

The IPLW sections were roundly considered a success by both faculty and students, and others quickly followed. DePaul now has specialized legal writing courses in family law, health law, and public interest law, in addition to the groundbreaking offerings in intellectual property law. Writing faculty with experience in the relevant legal fields teach these specialized sections, which have been a big boost to the certificate programs’ recruiting efforts.

The certificate programs appeal to prospective students because of their reasonable expectation that certificate programs will lead to employment in areas of the specialized interest. The intellectual property program, in particular, has been quite successful in working with the Chicago bar to place the IPLW students in intellectual property-related jobs during their first summers.

23 Roberta Rosenthal Kwall is the Raymond P. Niro Professor of Intellectual Property Law at DePaul University College of Law.

24 Maureen B. Collins is an Instructor of Lawyering Skills at John Marshall Law School in Chicago, Illinois.

25 Cf. Matasar, supra n. 9, at 479–482 (discussing the prestige sought by students during the law school application process, including specialty and certificate programs).
family law certificate program has an employment component as well.

D. Acceptance to a Specialty

DePaul has seen an impressive increase in the number of students who seek acceptance to a specialty LARC section. The DePaul law school admissions application includes an itemized box that students may check to indicate that they want to apply to a specialized LARC section in intellectual property law, family law, health law, or public interest law. For the first few years after the adoption of this admissions procedure, applicants could check only one box. Some of the certificate programs later required an essay through which the applicants elaborated on their interest in a specialized section.

Once DePaul admits an applicant, admissions administrators review his application for interest in a specialized section. If that admitted student has checked a specialty box, DePaul sends the student brochures describing the certificate program. In addition, in a personalized recruiting effort, an admissions officer or faculty member contacts the student to describe the program and the specialized LARC section. Simultaneously, admissions administrators forward information on all interested applicants' LSATs, GPAs, and prior work experience to the certificate program heads, who determine which applicants to accept into a specialized section. Once the program heads have admitted particular students to a specialized section, recruitment efforts continue in those cases in which the admitted students have not yet committed to DePaul. The program heads have systems in place to alert an admitted student that he has been accepted not only to DePaul but also to the specialized LARC section. They use this acceptance to the spe-

26 For the 2006 entering class, DePaul received approximately 5,000 applications; 70% of those applicants requested acceptance into one or more specialized sections. For that class, the admissions office had changed the application to permit applicants to check as many specialty areas as they wished. Admissions administrators and certificate program heads initially thought that this change would lead to a better yield, as students might not be accepted into their first choice for a specialty section but might still choose to attend DePaul if they were accepted to one of their choices. The 2006 application also dispensed with the essay requirement. Both decisions led to an undesired super-abundance of applicants to specialty sections, leaving administrators no clear way to determine authentic applicant interest in one area of law over another. For the 2007 entering class, the admissions application re-instituted the one-box option, and some of the certificate programs have re-instituted the essay requirement.
cialty class as a recruitment tool to encourage the admitted students to select DePaul for their legal education. For exceptional candidates, scholarship inducements are available.

The intellectual property certificate program was the first at DePaul to capitalize on the recruitment incentives inherent in the specialized LARC section. Its success in attracting well-qualified candidates to DePaul quickly led the three other certificate programs to recruit students in a comparable manner.

E. The LARC Curriculum

1. First-Year Course

DePaul's LARC curriculum is a unified curriculum in which faculty teach skills on the same schedule, following departmental requirements and guidelines. Accordingly, faculty who teach specialized sections coordinate their instruction, with the program director's help, to achieve important programmatic and pedagogic goals. Teachers of specialized sections also integrate ideas and inspiration from doctrinal faculty and sometimes collaborate with doctrinal faculty when preparing and executing their LARC assignments.

In the specialized LARC sections, students do not study intellectual property law or family law or any other type of law in the same substantive manner that they would study it in a copyright or adoption law course; rather, they focus on learning the skills and doctrine of legal writing: synthesis of multiple authorities, legal analysis, research, and legal citation. The difference between the specialized sections and the general legal writing sections is that the specialized students learn legal writing doctrine through assignments, class exercises, and hypotheticals that focus on their specialty areas. The substantive law that students learn is an adjunct to their research and writing, which are the primary programmatic goals of learning legal method and legal writing.

Specialized writing faculty ground as many exercises and assignments as possible in the specialty field. Because DePaul's LARC program is a unified one, assignments of writing faculty must meet certain requirements so that students—no matter their specialty designation—get a firm grounding in the basics. To this end, each faculty member incorporates assignments over the course of the year that cover state law and federal law, common law and statutory law, and civil law and criminal law. In supply-
The Journal of the Legal Writing Institute

ing the legal writing doctrine, some assignments, class exercises, and hypotheticals focus on the core principles of legal analysis and may take the specialized students to non-specialized content areas to ensure that programmatic requirements are met. To illustrate, the field of intellectual property is entirely statutory. Under departmental requirements, however, the IPLW professors must create an assignment using common law and, thus, cannot use intellectual property as the legal basis for at least one assignment. The benefits to students who learn the tools of common law analysis are indisputable and far outweigh the countervailing content concern to cast each assignment as one in intellectual property.

2. Upper-Level Elective Courses

In addition to specializing some of its first-year LARC classes, DePaul now also specializes its upper-level elective courses. DePaul has, in a long tradition, offered a rich menu of upper-level elective courses in writing. For many semesters, the law school offered courses in advanced legal writing, general transactional drafting, appellate brief writing, and judicial and scholarly writing. With the success of the specialized first-year LARC classes, the school added drafting courses in patents, copyright and trademark, health law, and family law. By 2004, the certificate programs were drawing a considerable number of applicants who were serious about pursuing a particular field of study. To better support these students in their pursuits, DePaul multiplied its offerings of the existing drafting courses and added sections of drafting in civil litigation and criminal law.

Many factors warranted these changes, including high student demand for more practice in writing and high student interest in learning how to draft legal documents by focusing on a particular subject matter. The changes, in turn, benefit both the students and the school. Students in a first-year specialty class can continue the specialization they begin as first-year students. Students who were not accepted into one of the specialized first-year sections may elect to take a drafting course in the specialty area of their choice; moreover, the upper-level courses dovetail with the certificate programs, giving DePaul another recruiting tool focused on its goal of comprehensively educating its students.

27 Upper-level courses are capped at twelve students.
3. The Required Third Semester of LARC

Two years after improvements to its upper-level curriculum, DePaul was ready for an even bigger innovation: its faculty voted to require a third semester of LARC. This addition resulted in a tripling of the number of assignments, giving students a much deeper experience with the core skills of writing and analysis. Correspondingly, the new LARC III course absorbed the advanced legal writing and appellate brief writing courses. After several years of evolution, DePaul now has a writing curriculum in which a student must take three semesters of writing and analysis courses and may take up to three additional semesters of writing electives, some of which are specialized. If a student takes a writing course in all six semesters, that student may enroll in as many as five specialized writing courses—deep study in a specific area of law, even before the serious student’s doctrinal elective courses are taken into consideration.

III. THE THEORETICAL BASIS FOR SPECIALIZATION

DePaul’s move toward offering specialization in a field of study roughly tracked two events in legal education: the publication of the American Bar Association’s MacCrate Report and the growing call among many educators for a greater incorporation of skills training—particularly writing—into all courses offered by law schools. The MacCrate Report was the American Bar Association’s 1992 review of legal education and included its recommendations for the legal profession. It identified “fourteen fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter.”

28 The MacCrate Report has been widely perceived as a call for law schools to increase their skills course offerings and to better integrate the teaching of theory and skills training in the classroom.29 Prior to

29 See id. at 128 (stating law schools could “use [the MacCrate Report] as a focus for examining proposals to modify their curricula to teach skills and values more extensively or differently [and that] such modifications might include . . . revisions of conventional courses and teaching methods to more systematically integrate the study of skills and values with the study of substantive law and theory . . . ”); see e.g. Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report, 33 Gonz. L. Rev. 1 (1997–1998); Alice M. Noble-Allgire, Desegregating the
the publication of the *MacCrate Report*, a movement had been making its way across American secondary education to incorporate writing into all aspects of instruction; this movement is known as “writing across the curriculum.” A major impetus for law schools to adopt writing-across-the-curriculum approaches was, largely, an underground impetus embraced by legal writing faculty, clinical faculty, and a few others. The *MacCrate Report* provided these groups with the support they needed to take their argument public, and the movement became a viable and enduring force in legal education.\(^{30}\)

**A. The Assumption behind Writing across the Curriculum**

Scholars and educators posit many justifications for a *MacCrate*-style integration of law school through the writing-across-the-curriculum model, but one assumption underlies all of those calls: that doctrinal, or casebook, faculty should import legal writing skills into their classrooms by incorporating writing assignments into their courses.\(^{31}\) For example, in explaining the differences between “instrumental writing” and “critical writing,” Professor Kissam explained the writing-across-the-curriculum movement as an expansion of clinical instruction methods and suggested three ways that faculty could incorporate more writing into their classrooms: take-home exams, short writing exercises, and

---


ungraded first drafts. Likewise, Professor Beazley encouraged casebook faculty to incorporate legal writing pedagogy—if not actual writing assignments—into their courses. Professor Vinson encouraged the legal academy and the legal profession to unite to provide a “life-long learning process.”

B. Implementation of Writing across the Curriculum

Responding to this assumption, a rich scholarship has developed describing ways that law school faculty members have incorporated skills pedagogy into their classes and ways that they have imported writing assignments into their coursework. Some of this literature predates the MacCrate Report, revealing that at least individual professors—if not law schools—recognized the vital importance of blending practice skills and doctrine. Before the publication of the MacCrate Report, Professor Abrams canvassed law school efforts to integrate practical skills components into “traditional” courses. He identified three ways that a civil procedure professor could integrate writing into a doctrinal classroom. Two ways involved the civil procedure professor deploying writing assignments in class. The third was to have doctrinal and legal writing professors collaborate to develop a topical problem for the legal writing course. Professors Busharis and Rowe have described their combination of doctrinal courses in employment discrimination and taxation with concurrent one-hour practicum courses. A quartet of professors at Seattle University's law school have described a similar curriculum involving one-hour, live-client components and “labs” in conjunction with upper-level substantive courses.

36 See id. at 819.
37 Id. at 819–827.
38 Id. at 819, 827–828.
40 See John B. Mitchell et al., And Then Suddenly Seattle University Was on Its Way to
These professors described their vision and their efforts, and they demonstrated both the willingness and relative ease with which faculty have integrated substance and skills and the success that comes from doing so. Examples from other law schools abound. One school’s Integrated Transactional Practice course combined instruction in estate planning, professional responsibility, interviewing, counseling, negotiating, and drafting. Another offered an integrated course in environmental law with a goal of introducing students to advanced legal research tools, leading its students to “realize the connections between research skills and substantive law.” At least one law professor has asserted publicly that law schools can help students become better legal writers through clinics that focus on teaching more sophisticated legal writing techniques, ones that ensure that the finished product can be used in representing a real client, rather than the fictional ones often used in legal writing courses.

Envisioning a full integration of legal research and writing into substantive first-year courses, Professor Greenshaw suggested a wholesale return to the “Iowa approach,” named for the University of Iowa College of Law. Prevalent until the early- to mid-1990s, the Iowa approach fully integrated legal writing and doctrine by using casebook faculty to teach legal writing through their courses. To support her thesis, Greenshaw quite accurately argued

---

44 Leigh Hunt Greenshaw, “To Say What the Law Is”: Learning the Practice of Legal Rhetoric, 29 Val. U. L. Rev. 861, 865–867 (1995). Interestingly, after more than twenty years of integrating legal writing with doctrinal courses, the faculty of the University of Iowa College of Law voted to create a separate legal writing program for first-year students. E-mail from Caroline Sheerin, Prof., U. Iowa College L., to Leg. Writing Inst. Discussion List, Eliminating Legal Writing (Sept. 27, 2007) (copy on file with Author).
45 See also James D. Gordon III, An Integrated First-Year Legal Writing Program, 39 J. Leg. Educ. 609 (1989) (describing the then-used method at Brigham Young University’s J. Reuben Clark Law School of conjoining legal writing instruction to a substantive law course); Michelle S. Simon, Teaching Writing through Substance: The Integration of Legal Writing with All Deliberate Speed, 42 DePaul L. Rev. 619, 620 (1992) (describing Pace Law School’s integration of criminal law, legislative process, and legal analysis and writing; “[t]he students do not take any other course in legal writing or criminal law”).
that students improve their legal writing when they understand the law about which they are writing. Of course, understanding the underlying substance of their writing is not the only need that students have in order to become competent legal analysts and legal writers. The article offered no evidence or argument that the Iowa model satisfies the many other needs that students have in their acquisition of competent legal writing skills—as the MacCrate Report envisioned. Indeed, the fact that a majority of schools have turned away from the Iowa model, some in order to satisfy the demands of the MacCrate Report, suggests that the Iowa model is not effective at communicating the essential core skills and concepts underlying legal writing doctrine. While some law schools do formally couple legal writing instruction with another first-year course, only a few still use the Iowa model.46 Still, Greenshaw had it right when she argued that “[l]egal composition and legal subject matter interact in ongoing rhetorical activity and are . . . best understood and best studied together.”47

Five years after the published suggestion that civil procedure and legal writing professors collaborate,48 four professors described their successful experiment doing just that.49 Their experiment represented a step forward in the evolution of the writing-across-the-curriculum movement: they reached beyond the assumed vision of importing writing into the doctrine classroom and exported doctrine to the legal writing classroom. Their classroom initiatives and publication of their ideas foreshadowed more recent scholarly and classroom efforts to promote the integration of skills and substance. Whatever led them to combine skills and doctrinal instruction—intuition, reliance on trial-and-error, or insistence on disproving the falsity of the “dichotomy between skills and substance”50—these educators and their efforts had sound grounding in learning theory, based as they were on sound theoretical justifications for uniting writing and substance.

47 Greenshaw, supra n. 44, at 867.
48 Abrams, supra n. 35.
49 See Glannon et al., supra n. 46.
In their recent, comprehensive article analyzing the theoretical and curricular justifications for writing across the curriculum, Professors Lysaght and Lockwood identify two approaches to the movement: writing to learn, through which students use writing to discover and refine what they think, and learning to write in the discipline, through which students use “the features of written communication in a specific discipline to enter that discipline’s discourse community.” Both approaches ultimately derive from the three major branches of learning theory: behaviorism, cognitivism, and constructivism.

1. The Three Major Learning Theories

a. Behaviorism

Behaviorism is the theory that students can be taught to alter their behavior through exposure to various stimuli. Behaviorists believe that learning is a behavior that can be accomplished independently of the internal workings of the brain. The behaviorist learning process is the repetition of desired behavior by the student, accompanied by positive and negative stimuli from the teacher. Behaviorism incorporates the sub-theory of “mastery learning.” As a teaching theory, mastery learning assumes that a student enters the classroom with an already existing base of knowledge and that the student’s success in the classroom is partly dependent on that knowledge base. To help him succeed, the teacher gives the student the individualized time and attention

---

51 See Lysaght & Lockwood, supra n. 30, at 74 nn. 8–9 (highlighting Janet Emig’s work in composition theory).
52 Id. at 74–75.
53 A full explication of the various learning theories and their historical development is beyond the scope of this Article. For an excellent synthesis of learning theories and their development, see Beazley, supra n. 33, at 47–53; Lysaght & Lockwood, supra n. 30, at 76–92; Terrill Pollman, Building a Tower of Babel or Building a Discipline? Talking about Legal Writing, 85 Marq. L. Rev. 887, 896–905 (2002).
54 Lysaght & Lockwood, supra n. 30, at 78–83.
55 Id.
56 Id.
57 Id. at 81–83.
58 Id.
that he needs and, in so doing, employs a variety of teaching techniques, sequenced exercises, and timely feedback.\textsuperscript{59}

b. Cognitivism

In time, behaviorism gave way to cognitivism, the theory that students learn by interpreting new information and placing it within existing information structures stored in the brain. Like behaviorism before it, cognitivism values a student’s pre-existing knowledge but places greater emphasis on the cognitive processes through which a student interprets and fits the new information with the old.\textsuperscript{60} Adherents of cognitivism identified several sub-theories to explain the ways in which the human brain performs this process of interpreting and fitting: “information processing approach,” schema theory, and metacognition are three.\textsuperscript{61} Cognitivists agree with behaviorists that consistent feedback is key to a student’s success, and they encourage active student participation in the learning process.\textsuperscript{62}

c. Constructivism

Constructivism is the most recent of the three major learning theories.\textsuperscript{63} Constructivists share the cognitivist belief that the cognitive process is the seat of learning, but constructivists assert that students do not “assimilate instruction intact.”\textsuperscript{64} They find, instead, that students actually create new knowledge, interpreting instruction in the context of their own experiences and their social relationships.\textsuperscript{65}

Four characteristics mark constructivism.\textsuperscript{66} The first two are closely connected: that a student’s new learning depends on an earlier knowledge base\textsuperscript{67} and that students create—or construct—their own understanding, rather than passively receiving new in-
formation in already constructed forms.\textsuperscript{68} Constructivists encourage teachers to teach in ways that legal writing professors traditionally teach: through a recursive process by which the professor visits and revisits material over the course of the year, packaging and repackaging it in different forms while employing different tools.\textsuperscript{69} In short, the constructivist legal writing professor uses a variety of teaching techniques, over several instruction periods, sometimes using a technique in isolation and sometimes blending teaching strategies. The process of approaching skills instruction from a variety of angles and approaches, say the constructivists, helps students to process new information and connect it to their pre-existing knowledge.\textsuperscript{70}

The third characteristic of constructivism is that social interaction among students creates an environment in which students can test and modify their ideas in light of their classmates’ viewpoints.\textsuperscript{71} The scholarly literature on cooperative and collaborative learning explores this characteristic.\textsuperscript{72}

Under cooperative learning, the teacher establishes the goal and often the particular responsibilities of the students; the students share ideas about the work, modifying it as they progress, and each student submits an individual product—shaped and revised in the process, but an individual work product nonetheless.\textsuperscript{73} Collaborative learning is dominantly student-driven: students identify and divide responsibilities, and all students work toward a final product, which is, at least in part, group-graded.\textsuperscript{74}

Professor Inglehart and her colleagues identify multiple benefits to both students and teachers of these two learning approaches: increased judgment, learning, analysis, class participation, and interest; decreased fear and anxiety; and creation of “genuine, lifelong, subject matter interest.”\textsuperscript{75} They posit that the confluence of these two disciplines is the constructivist learning theory.\textsuperscript{76} Collaboration permits students to achieve insights into their ideas,
2007] A Reconception of Writing across the Curriculum

Theories, theses, and analyses that they would not glean from independent and isolated work because the social interaction acts as a testing ground for the ideas.\(^77\)

The constructivist theory bears a fourth hallmark: the use of authentic tasks to promote learning.\(^78\) Authentic learning tasks are those that use real-world problems as assignments.\(^79\) Students respond best to assignments that they perceive to be grounded in reality, having some sense of reality and possible importance.\(^80\)

2. Approaches to Writing across the Curriculum

These four characteristics of constructivism are not mutually exclusive, nor do they belong solely to the constructivist camp; indeed, tones of both behaviorism and cognitivism echo through them. All three of the theories share many characteristics.\(^81\) Indeed, four themes are common to the three major learning theories:

1. instructors should begin instruction with basics already within the students’ grasp and proceed from there to more complex material;

2. instructors should instruct through a variety of teaching methods;

3. instructors should increase and deepen student learning by having students apply new skills and by giving feedback on that application; and

\(^77\) See Lysaght & Lockwood, supra n. 30, at 91.


\(^79\) Lysaght & Lockwood, supra n. 30, at 92.

\(^80\) Id.

\(^81\) New learning depends on the student’s prior knowledge base (behaviorism, cognitivism, and constructivism); teachers should begin with general, familiar material and progress to more complex ideas (behaviorism and cognitivism); teachers should divide and sequence tasks (behaviorism); teachers should move students toward autonomous learning (behaviorism/mastery learning, cognitivism); teachers should use a variety of teaching techniques (behaviorism/mastery learning, constructivism); teachers should provide feedback and should permit social interaction among students to create more feedback opportunities (behaviorism, cognitivism, and constructivism).
(4) instructors should teach students how to become autonomous learners.\textsuperscript{82}

Professors Lysaght and Lockwood argue that these four themes well support the merits of the \textit{learning to write in the discipline} approach to writing across the curriculum.\textsuperscript{83} The work of other scholars supports their thesis.\textsuperscript{84} These scholars posit that learning to write within a discipline is the approach to writing that a student must take in order to learn how to work as a particular professional.\textsuperscript{85} This is because learning to write in the discipline requires students to identify and master techniques and forms that are particular to that discipline, thereby making the students worthy of entering a restricted community made up only of people who know the particular forms—something that is known as a “discourse community.”\textsuperscript{86} A law student needs to learn how to write in the discipline of lawyers, as opposed to learning how to write in some other discipline—some other profession. Specifically, students need to learn the proper purposes of and audiences for legal work, the tones and formats of certain documents, and the forms of reasoning particular to lawyers.

Professors Lysaght and Lockwood differentiate \textit{learning to write in the discipline} from \textit{writing to learn}. When students engage in the latter, they are writing to discover what they think and to develop and refine those ideas.\textsuperscript{87} The difference between the two approaches is the difference between rejecting old forms of thought—writing to learn—and accepting and adopting new forms—writing in the discipline.\textsuperscript{88} They argue that learning to write in the discipline should be the primary focus of writing-across-the-curriculum programs because the approach satisfies the four themes common to the three major theories of learning.\textsuperscript{89} This approach also finds support in the three primary theories of composition.

\textsuperscript{82} Lysaght & Lockwood, \textit{supra} n. 30, at 75–76.
\textsuperscript{83} \textit{Id.} at 75.
\textsuperscript{84} \textit{E.g.} Busharis & Rowe, \textit{supra} n. 39, at 315.
\textsuperscript{85} Lysaght & Lockwood, \textit{supra} n. 30, at 75.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 74.
\textsuperscript{88} \textit{Id.} at 75.
\textsuperscript{89} \textit{Id.} at 75 n. 13.
3. The Three Composition Theories

The three major learning theories and their common themes are not the only ways to think about teaching and learning. Devising from the three major learning theories90 are the three primary composition theories, all of which have greatly influenced the instruction of legal writing.91 Those three composition theories emphasize (1) the finished product,92 (2) the process,93 and (3) the social discourse community.94 Although the theories differ among themselves, they are united by a considerable body of common principles.

Under the product approach, teachers do not provide regular feedback to students while they are writing. Instead, all or most feedback is reserved for the grading process. This approach experienced a fall from grace with the shift in focus to process,95 but it has lately enjoyed something of a renaissance96 and can be a successful component of a curriculum that incorporates all three theories.

The process theory brings the timing of the feedback forward from the end of the writing process to the middle. Teachers guide students through the writing task by commenting on both the writing and the likely product and by having the students revise their work after considering the teacher’s comments. In her thoughtful article about process, Professor Grearson synthesized seven assumptions that she thinks writing teachers make about the writing process.97 These assumptions are that (1) “teachers should take individual students’ writing backgrounds, histories,
and abilities into account when teaching writing”; (2) “writing is a way of thinking and learning, not just a means of recording thought or testing students’ [abilities]”; (3) “writers use writing at different times for different purposes and move from writer-based prose (writing used to explore and explain ideas to the self) to reader-based prose (writing used to communicate ideas to the reader)”; (4) teachers should teach writing “with some attention to the process [in which] writers engage[ ], not just to the documents that [students produce]”; (5) “students’ best writing comes from topics” in which they are “interested”; (6) “students’ best writing contains a strong sense of individual voice”; and (7) “writing is [a] collaborative—not a competitive—act.”

Dovetailing with several of these assumptions, the social discourse strain of composition theory is driven by the social context within which the writing does and must occur. Emphasis here is on the “community of knowledge,” and the teacher functions as master to the student’s novice. These three composition theories, different though they are, are united by Professor Grearson’s assumptions number four, five, and seven. These three assumptions resonate not just through the composition theories but also through the three primary learning theories. Furthermore, they form the foundation for the learning to write in the discipline approach to writing across the curriculum.

It is against this backdrop that the writing-across-the-curriculum movement has gained momentum, force, and support as an effective way to satisfy the MacCrate Report concerns and to integrate law school curricula. Instruction of legal writing through subject-matter specialties incorporates many of the characteristics and criteria of modern learning theory and is a subset of learning to write in the discipline.

---

98 Grearson, supra n. 97, at 62.

99 Lysaght & Lockwood, supra n. 30, at 98–99; see Beazley, supra n. 33, at 50–51. For comprehensive treatments of the various learning and composition theories, see generally Pollman, supra n. 53, at 906–909, and Rideout & Ramsfield, supra n. 31, at 49–61.


101 Lysaght & Lockwood, supra n. 30, at 98; Rideout & Ramsfield, supra n. 31, at 57–59.
IV. THEORETICAL JUSTIFICATIONS FOR SPECIALIZED SECTIONS

The constructivist theory of learning supports DePaul’s use of specialty sections. The wisdom of grouping students with similar interests into the same legal writing classroom is demonstrated by the process, product, and social discourse brands of composition theory. Finally, specialized instruction is a category of the learning to write in the discipline approach to writing across the curriculum because it teaches each class of specialized students a discipline-specific discourse.

A. The Justification Based on Constructivist Theory

1. Specialized Students Create New Knowledge More Quickly

Constructivism is the theory that students do not receive information from their teachers and then passively take ownership of that information; rather, they create new knowledge by interpreting their instruction through the lens of what they already know and have experienced. Four hallmarks identify the theory: (1) new learning depends on prior knowledge; (2) students create their own, individual understanding; (3) social interaction leads to thesis modification; and (4) learning tasks are authentic. The first two constructivist hallmarks are not unique to specialized instruction at DePaul; indeed, all of DePaul’s LARC professors use these two approaches to help students learn. That new learning depends on prior learning is the bedrock of DePaul’s first semester curriculum, which follows a stepped-progression syllabus. Under this curriculum, students work on discrete skills and receive feedback on their work before rewriting the work and incorporating it into a larger project; the new learning depends on the prior learning. In so instructing their students, DePaul’s LARC faculty

102 See Inglehart et al., supra n. 63, at 189; Lysaght & Lockwood, supra n. 30, at 90.
103 This hallmark is another way of articulating the first theme common to all three major learning theories: teachers should start with familiar material and proceed to unfamiliar, more complex material.
104 The social interaction is accomplished through (1) collaborative learning and (2) cooperative learning.
105 Lysaght & Lockwood, supra n. 30, at 92.
106 Id. at 90–91.
fulfill both the hallmarks of constructivism and the third theme common to the three primary learning theories: effective teaching includes giving students feedback on their application of new skills.\textsuperscript{107}

The second hallmark of constructivism—that the students create their own understanding\textsuperscript{108}—is a natural gradient in the process of learning the law at any school. Legal writing professors can give a student only so much help in reading and digesting the rules and reasoning of a judicial opinion; ultimately, the student must process the information and reconfigure it for himself, thereby coming up with his own synthesis of the law and prediction of how a court might rule in a similar fact situation. There being, usually, no correct answer to these questions, all of the student’s answers are his own creations, quite different from questions that have objectively right and wrong answers, such as historical dates and mathematical equations.

Where specialized students benefit over students in general sections is that many of them come with some prior knowledge of the specialized area. This prior base of knowledge or interest supports their learning, resulting in the quicker creation of new understanding. The specialized LARC professors have noted that even an interest in a legal area can function as a pre-existing knowledge base when it comes to how quickly students can absorb new material.

2. \textit{Casual and Planned Social Interaction Quickens Learning}

The specialized sections also well satisfy the third hallmark of constructivism: social interaction while learning causes students to test their assumptions and weigh their conclusions against the assumptions and conclusions of their classmates, which generally produces better conclusions, better learning, and better writing.\textsuperscript{109} This hallmark of learning at DePaul has two aspects: the casual, or unsupervised, interaction and the formal, planned interaction.

The known efficacy of casual social interaction underlies DePaul’s decision to permit all of its LARC students to discuss their work with each other throughout all stages of an assignment peri-

\textsuperscript{107} Id. at 91, 93.
\textsuperscript{108} Id. at 91.
\textsuperscript{109} Id.
od; they may not, however, show their written work to anyone other than their LARC professor and teaching assistant. This permitted collaboration opens the students to an almost constant conversation with each other while they work on their assignments. By explaining their ideas to a classmate, articulating how the rule works, defending their position in the face of opposition, and demanding similar justification from classmates with different ideas, students actually teach themselves. This is constructivism’s third hallmark in its finest hour.

Its efficacy, though, is even greater in the specialized sections: the normal trial-and-error process, when placed against the backdrop of the ideas of similarly situated students, produces better ideas and greater learning. The ideas and challenges that come from a classmate with a shared interest in public interest law or intellectual property law resonate to a higher degree than do the ideas and challenges of a “general” LARC classmate. Difficult to identify is whether this higher resonance exists because the student on the receiving end simply respects the ideas of his specialized classmates more than he would those of other students, or because most of the specialized students feel a heightened sense of relevance and are trying harder, or because, to use the biblical phrase, “iron sharpens iron.” While the reason may be hard to identify, the result is demonstrable: DePaul LARC professors have seen quicker learning and better work product in their specialized classrooms.

DePaul does not rely on casual social interaction alone to accomplish constructivist hallmark number three. The mix of assignments in DePaul’s curriculum requiring both cooperative and collaborative learning leads to planned social interaction between LARC students. Students accomplish some assignments individually, but they work on the majority—at least in the early to mid-stages—cooperatively. One written assignment is a fully collaborative one, and group student-teacher conferences mix cooperative and collaborative learning styles.

The mix of assignments complements the variety of teaching techniques that all LARC faculty employ in and out of the classroom—techniques that reach visual, aural, and kinetic learners. LARC faculty teach by using handouts, chalkboards, write-on-wipe-off overhead transparencies, PowerPoints, document readers,

\footnote{110} Id.\footnote{111} Proverbs 27:17 (New Intl.).
computerized databases, lectures, class-wide exercises, in-class and out-of-class small-group exercises, pair-and-share exercises, peer critiques, student reports, one-on-one conferences, group conferences, reports to the “supervising attorney,” role-playing, hands-on exercises, and flipbooks. DePaul’s LARC faculty richly fulfill the second theme common to the three primary learning theories: use of a variety of teaching techniques. The core learning—which occurs in all LARC students through the curriculum and the teaching techniques—is enhanced in the specialized students by their particular social interaction: when they are surrounded by and working with classmates who share similar interests, they have a far higher incentive to work cooperatively and collaboratively than do the general students, who sometimes resent having to work with others and having to share their ideas with classmates for fear of having their “good ideas” stolen.

3. **Higher Authenticity**

DePaul’s LARC instruction has its foundation in the fourth constructivist hallmark: LARC faculty all use real-world legal problems to create “authentic learning tasks” because these real-world problems better prepare students to work as lawyers than do fanciful assignments. The difference between the specialized students and the general students is that although all are receiving “real-type” assignments, the specialized students perceive their assignments to be more relevant to them as individuals—and, therefore, more real—than do many of the general students. They do so simply because they believe that they are about to enter the practice of that particular area of law. DePaul's method of LARC instruction is a classically constructivist model, satisfying all four of the theory’s characteristics.

---

112 Lysaght & Lockwood, supra n. 30, at 92; Schwartz, supra n. 78, at 380.

113 “Fanciful” is different from fictional. Many assignments are fictional, in that no real, live client supports them, but they nonetheless are real-world assignments because they involve true-to-life facts and significant legal problems. Fanciful assignments often involve neither and are more often focused on student entertainment than on learning. See Rideout & Ramsfield, supra n. 31, at 72 (indicating that “students will benefit most when . . . writing assignments are put into clear contexts and emerge from well-developed rhetorical situations, rather than being ‘canned’”).

114 The connection between the higher level of relevance and higher level of student learning is documented infra Section V(A).
B. The Justification Based on Composition Theory

DePaul's model also satisfies the requirements of composition theory. While the three composition theories are not mutually exclusive, the distinct branches are easily identifiable in DePaul's curriculum.

1. Process Learning

The first semester of DePaul's unified three-semester curriculum is a fully process-oriented one. All students learn legal analysis in a stepped-progression approach with the focus on the process of analysis, rather than the finished product of a legal document. Under the product-oriented approach, professors give students an assignment to prepare a legal document, with the finished project due in its entirety without any intervening steps and feedback. Under the process approach, students work their way through short assignments that teach each step of analysis: case briefing, rule outlining, synthesis, analogy and distinction, factual inferential reasoning, multiple-issue organization, questions presented, brief answers, and objective statement of facts. Only in the last assignment of DePaul's first semester do students put all of those pieces together, in a rewrite assignment, and submit the final product. By doing this, DePaul permits all of its first-semester students to focus on one discrete skill at a time, to receive feedback on it, and then to bring that knowledge base to the next skill to be learned.115 The curriculum also rests on the linchpin of process-oriented learning: teachers should teach writing “with some attention to the process [that] writers engage in, not just to the documents that [students produce].”116 This DePaul does. All of DePaul's first-semester students, whether specialized or general, receive the benefit of the process approach to learning. With respect to some of the other assumptions underlying the process approach, the general and specialized students have different experiences.

Teaching legal writing through specialized sections connects with these assumptions: that students' best writing—and, concomitantly, their best learning—comes when they write about topics in

115 This then unites the process-composition theory with the first hallmark of constructivism and satisfies them both.
116 Grearson, supra n. 97, at 62.
which they are interested.\textsuperscript{117} A corollary tenet on which DePaul's program rests is that "writing is [a] collaborative—not a competitive—act."\textsuperscript{118} All DePaul students engage in collaborative learning,\textsuperscript{119} and many of them serendipitously enjoy the topics on which they write. Only the students in specialized sections, though, escape the vagaries of serendipity and have a very high chance of being interested in all of their assignments. It is this high interest level that sustains them through the difficulties inherent in learning a new skill in a foreign environment. DePaul's method of instruction bears out the assumptions about the process approach to learning. This first-semester process approach to composition theory at DePaul largely gives way to a modified product approach in the second semester. The product approach, though not as favored as the process approach, still satisfies critical goals.

2. Product Learning

The second and third semesters of DePaul's LARC curriculum move the students from a stepped-progression, process-oriented approach to a spiraled, product-oriented approach. As they enter this product approach to learning in the second semester, the specialized students' projects continue to be mostly subject-matter specific.\textsuperscript{120} After spending fifteen weeks intensively learning how to create legal analysis by working on small, discrete tasks and receiving copious feedback, students are ready to assume more of the responsibility for their own learning by acquiring the skill of self-evaluation. They do not forego all personalized, written feedback, but they do receive less of it before each succeeding project is due. The students must practice already-learned skills on increasingly more complex legal issues to achieve learning mastery,\textsuperscript{121} so having them rely on more generalized, oral feedback from their teachers and on their own developing professional judgment is both proper and pedagogically sound. In short, they are on their way to becoming autonomous learners.\textsuperscript{122}

\textsuperscript{117} Id.
\textsuperscript{118} Id.; Lysaght & Lockwood, supra n. 30, at 97.
\textsuperscript{119} See supra sec. IV(A)(2).
\textsuperscript{120} To date, DePaul has no plans to offer any of the LARC III sections in a specialized form, though this would certainly be the next logical step in its program.
\textsuperscript{121} See Lysaght & Lockwood, supra n. 30, at 81–83.
\textsuperscript{122} Id. at 94. By putting students on the road to autonomous learning through the use of the product approach to composition theory, DePaul's curriculum fulfills the fourth theme
The social discourse theory of composition also undergirds DePaul’s LARC curriculum. This theory recognizes the vital importance of social context to a writer’s maturation within a specific discipline and the different ways that different social contexts impact both the process and the product of the writing. Mastery learning is a key to the behaviorism theory of learning. Mastery learning in the legal discourse community involves different methods and different goals than does mastery learning in many other education and professional communities. To help students enter and master the legal discourse community, legal writing professors incorporate social discourse theory into their courses by providing social context for the work that students perform.

Common methods among legal writing faculty for creating social context are grouping students into “law firms” within the class, creating realistic assignments for students to work on, and requiring simulated conferences with the “senior partner.” DePaul’s curriculum employs all of these teaching techniques for all of its LARC students, but the students in specialized sections receive an even more intense dose of social context because their entire section is contextualized for them. By permitting them to enter a pre-existing social context of like-interested students, DePaul creates micro-social discourse communities of public interest lawyers, health law lawyers, and so on within the larger discourse community of the law, thereby maximizing the benefits of the curricular design choices that employ the process, product, and social discourse theories.

C. A Reconception of Writing across the Curriculum

Teaching legal writing through specialized sections is a non-classic, but equally effective, version of writing across the curriculum. It is a subset of the learning to write in the discipline ap-
proach to writing across the curriculum.\textsuperscript{126} Not only do DePaul’s specialized students learn to write in the legal discourse community, but they also learn the particular language, customs, and “forms of life”\textsuperscript{127} of intellectual property law, of family law, of health law, or of public interest law. Each of these discipline-specific areas has its own dialects, forms, and shoals that students, and lawyers, must learn and navigate. DePaul’s specialized students begin the process of that navigation at the earliest possible moment, apprenticed to an expert in both the specific discipline and in learning theory, in an apprenticeship that can continue and deepen—if they choose to take specialized elective writing courses—for the three years of law school.

1. An Extension of Learning Theory

DePaul has actively incorporated these learning theories into its mandatory first-year legal writing curriculum. Beyond the first year, Professors Lysaght and Lockwood advocate deploying these learning theories into a writing-across-the-curriculum program that covers not just first-year doctrinal courses but also upper-level courses,\textsuperscript{128} and DePaul does this. These theories inform its upper-level writing courses: DePaul specializes its upper-level writing electives, just as it does its first-year mandatory course.

[Professor should go beyond having students write memorandum on a subject within the doctrinal class. Instead, students should draft documents unique to that subject area. Legislation, jury instructions, divorce settlement agreements, condominium documents, deeds, and administrative regulations are just a few of numerous possible examples. . . . By drafting discipline-specific documents, students acquire more skills and knowledge[ ] and have a better understanding of the legal discourse community.\textsuperscript{129}]

These writers envision this writing occurring in upper-level doctrinal courses, but the efficacy of the teaching and the writing assignments is surely not limited to the upper-level or the doctrin-

\textsuperscript{126} See supra secs. III(C)(1)(b)–(C)(3).
\textsuperscript{127} James Marshall, Presentation, Writing across the Curriculum: Two or Three Things We Know for Sure 3 (AALS Annual Meeting, Washington, D.C., Jan. 8, 2000) (quoted in Lysaght & Lockwood, supra n. 30, at 75).
\textsuperscript{128} Lysaght & Lockwood, supra n. 30, at 100–102.
\textsuperscript{129} Id. at 102.
nal classroom; rather, the impact of the teaching and assignments is augmented when the teaching is delivered early—in the first year—and by professional writing faculty who are immersed in the various learning theories and who can intentionally select which tools and techniques to deploy throughout the semester.130 These “discipline-specific assignments” are exactly what is waiting for DePaul’s students when they take an upper-level writing course. Second- and third-year students are able to take their “prior knowledge base” and “progress into additional discipline-specific knowledge.”131

Instruction of legal writing through subject-matter specialties, then, incorporates many of the characteristics and criteria of modern learning theory. Beyond this pedigree to recommend it as a curricular tool, the approach finds support in both practice among other law schools and in legal writing scholarship. With respect to instructional practice, at least a few law schools offer students the opportunity to take mandatory legal writing through a specialized section.132 One school offers students a choice among drafting courses that focus on specific subject matters. Unlike DePaul, where the subject-matter specific drafting courses are entirely elective, this school’s drafting courses satisfy its third-semester legal writing requirement.133 One school’s legal writing classes follow three “tracks”: transactional/general practice, advocacy/litigation, and intellectual property.134 Like DePaul’s program, not all assignments are track-specific, and the professors have

131 Lysaght & Lockwood, supra n. 30, at 101–102.
133 E-mails from Rebecca Scharf, supra n. 132.
134 E-mail from Maria Crist, supra n. 132.
practice experience in the areas, which enhances student learning.\textsuperscript{135} As at DePaul, students at this school choose a track at the beginning of school but—unlike DePaul—may change their decision later if they desire. All students also take a substantive course in the first year within the track.\textsuperscript{136} One school is revamping its legal writing program to follow a modified Iowa approach, with all students taking legal writing through torts classes taught by professors with experience teaching legal writing.\textsuperscript{137}

As for supportive scholarship, three articles are noteworthy. One highlights Loyola University Chicago School of Law’s specialized three-year course of study in children’s legal needs; the Loyola Childlaw Clinic required students to take a specialized legal writing course in the first year.\textsuperscript{138} Another explained the way that Temple’s law school satisfied the \textit{MacCrate Report} concerns with its instruction of an Advanced Legal Writing Course through the lens of consumer bankruptcy.\textsuperscript{139} A third encouraged first-year doctrinal professors to incorporate international law into their classes and posited that a first-year legal writing program provides “an excellent and easily adaptable venue for doing so.”\textsuperscript{140}

These articles detail methods of exporting particularized doctrinal instruction into the legal writing classroom holistically. Other scholars have suggested increasing other considerations into the legal writing classroom in slightly more targeted ways. One author suggested that writing faculty could focus on areas of specialized research, such as tax, labor, and environmental law.\textsuperscript{141} Another argued for an integration of ethical considerations into legal writing instruction.\textsuperscript{142} Most recently, Professors Millemann and Schwinn advocated bringing clinical education into the first-year legal writing curriculum by having students work on real cli-

\textsuperscript{135} \textit{Sourcebook}, supra n. 130, at 81.
\textsuperscript{136} E-mail from Maria Crist, \textit{supra} n. 132.
\textsuperscript{137} E-mail from Eric Easton, \textit{supra} n. 132.
\textsuperscript{141} Cordon, \textit{supra} n. 21, at 31–32.
ents’ actual legal problems for their assignments. Whatever form it takes, whatever subject matter is chosen, teaching legal writing with a purposeful doctrinal focus is congruent with, and extends, current educational theory and practice.

Legal writing instruction through some specialized sections is justified by all four themes common to the three major learning theories; by all four characteristics of the constructivist learning theory; by three of the seven assumptions underlying writing process; and by the writing in the discipline approach to writing across the curriculum. A legitimate question to ask of DePaul, then, is why not specialize all of the LARC sections? The answer is simple and in tune with the first characteristic of constructivism: not all students have self-identified with a particular area of law upon their application to law school. A significant number of students have no pre-existing knowledge of, or affinity for, a specific field of study, and they would not benefit from taking a subject-matter specific class before they are ready. On the contrary, instructors should consider students’ prior knowledge base and take their teaching from there because any new learning depends on it.

The affinity for a field of study functions as a prior knowledge base; forcing students without such an affinity could violate the first rule of constructivist learning. Accordingly, a good reason will likely always exist for maintaining at least some non-specialized LARC sections.

2. The Focusing Lens of Context

Specialized legal writing instruction is a success in the classroom: it draws on the best, and most accessible, aspects of the writing-across-the-curriculum movement, cooperative and collaborative learning, and use of capstone courses to maximize student learning of writing and analysis. It acts not just as a viewfinder for students seeking a familiar picture in a new and confusing vista but also as a lens: something that “facilitates and influences” students’ “perception, comprehension, [and] evaluation.”

143 Michael A. Millemann & Steven D. Schwinn, Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year, 12 Clin. L. Rev. 441 (2006).
144 Lysaght & Lockwood, supra n. 30, at 91.
which emphasizes both that context is king\textsuperscript{146} and the importance of integrating the instruction of all core skills.\textsuperscript{147}

The vital importance of context is the undercurrent of many suggestions for improvement of teaching and learning. For example, one article urges an end to the separation of research instruction from writing instruction, persuasively arguing that learning either skill in isolation deprives students of the full lawyering picture.\textsuperscript{148} Another describes an idea for better integrating the delivery of research instruction with research practice.\textsuperscript{149} This particular vein of learning theory is not the focus of DePaul’s writing program,\textsuperscript{150} but it is a useful tangent plane here because its argument highlights the wisdom of uniting writing instruction with a single doctrinal focus. When students understand the context for what they are doing—whether it is research, writing, or anything else—their overall learning quickens and steepens. That writing faculty must use some legal issue through which to teach the skills of analysis and writing is a truism: legal writing instruction cannot take place in a complete vacuum, but when students have a pre-existing affinity for a particular area of law, or some—even remote—idea of what the field involves, they immediately have a context for the ideas about which they will be writing. Furthermore, they feel connected to their subject matter in a way that general legal writing students either never feel or feel only through the serendipity of the teacher’s choice of subject. Purposeful writing instruction through particular doctrinal viewfinders satisfies the \textit{MacCrate Report} mandates by taking all of the learning theory about integration of skills instruction and doing exactly the overse of the writing-across-the-curriculum vision: exporting doctrinal instruction to the legal writing classroom.


\textsuperscript{147} See supra sec. III(B).

\textsuperscript{148} Margolis & DeJarnatt, supra n. 146, at 110–111.


\textsuperscript{150} The theory of integrated research instruction is not a focus of DePaul’s program nor of this Article because DePaul long ago decided to integrate the instruction of research and writing.
3. Exporting Doctrine to the Legal Writing Classroom

Although the prevailing wisdom among legal educators is that writing-across-the-curriculum programs must take writing into the doctrinal classrooms,\(^{151}\) the same goals are just as achievable by exporting discipline-specific work to the legal writing classes. Purposely teaching analysis through specialized sections is the next affirmative step in the academy’s rejection of the false dichotomy between skills and substance.\(^{152}\) DePaul’s legal writing program falls well within the prediction that “[t]he trend is clearly toward incorporation of [comprehensive skills training] into the legal curriculum through efforts like ‘Writing Across the Curriculum’ and specialized legal clinics that focus on substantive law areas while building skills.”\(^{153}\) The exportation of doctrine to legal writing even brushes the Iowa model argument that the actual doctrinal and legal writing classes should be merged.\(^{154}\) Focus on substantive law areas is the norm in many law school clinics; moving this model into the legal writing classroom is the next logical step in the evolution of legal skills training.

Why turn the tables? Why not just provide some writing instruction in the doctrinal classroom, rather than export it to the legal writing classroom? Reasons abound. The most pedagogically sound of those reasons is that career legal writing professors are most steeped in the knowledge of learning theory, especially as it relates to writing, conferencing, and critiquing.\(^{155}\) They tend to be in the best position to teach students how to write.\(^{156}\) When a teacher couples this quality with several years, or more, of practice experience in a particular area of law, he becomes a powerful tool in the delivery of writing instruction in that specific field.\(^{157}\) Other reasons relate to the well-catalogued difficulty of incorporating writing across the curriculum: lack of class units in which to incorporate writing practice into the doctrinal classroom;\(^{158}\) lack of

\(^{151}\) Lysaght & Lockwood, supra n. 30, at 104.
\(^{152}\) See Brand, supra n. 50.
\(^{154}\) Greenshaw, supra n. 44.
\(^{155}\) See Busharis & Rowe, supra n. 39, at 346; Schwartz, supra n. 78, at 355–356.
\(^{156}\) See id.
\(^{157}\) See Sourcebook, supra n. 130, at 81; see also Busharis & Rowe, supra n. 39, at 342, 346–347.
\(^{158}\) Cooper, supra n. 20, at 61; Schwartz, supra n. 78, at 357–358.
universal interest by the faculty;\textsuperscript{159} lack of understanding about how to successfully incorporate writing into a doctrinal course;\textsuperscript{160} and lack of time and knowledge to effectively critique writing assignments.\textsuperscript{161} All of these obstacles dissipate when a school turns the tables and sends doctrine to legal writing.

V. BENEFITS AND DRAWBACKS TO SPECIALIZED INSTRUCTION

Learning theory, DePaul’s practical experience, and scholarship all support the teaching of legal writing through specialized sections. Over the course of seven years, students, professors, and administrators have found the system to be successful. The benefits overshadow the few inevitable drawbacks.

A. Student Benefits

1. Higher Engagement and Better Learning

The most immediate and visible benefit of teaching legal writing through specialized sections is that first-year students learn from it and enjoy it. They come to law school excited to learn new things; specialized sections, as their first taste of working with the law, maximize that excitement.\textsuperscript{162} The students who work on specialized assignments have a high interest level in most of the assignments and are excited to be learning some substantive law in their field of choice.

The ancillary nature of the substance of the law does not detract from the learning. On the contrary, learning a skill through an area of law to which a student feels devoted creates a synergistic effect, permitting the LARC professor to deploy increasingly more difficult assignments as the year progresses. Scholarship in this area bears out this synergistic effect. One author reported her experience that as students’ understanding of the substantive law increases, so too does their ability to tackle more difficult issues in

\textsuperscript{159} Fine, supra n. 31, at 68–69; Rideout & Ramsfield, supra n. 31, at 42–47.
\textsuperscript{160} Fine, supra n. 31, at 68–69.
\textsuperscript{161} Busharis & Rowe, supra n. 39, at 346.
\textsuperscript{162} See also Weresh, supra n. 142, at 440 (discussing the way in which legal writing professors can marshal new-student enthusiasm to teach ethics); id. at 461–462 (discussing concrete ways to introduce ethics lessons into the legal writing curriculum).
a legal writing assignment.\textsuperscript{163} Other writers have promoted the benefits that flow to students when doctrinal and legal writing teachers coordinate their courses. They wrote that students benefit from “seeing clearly the link between analysis and its application and communication” and from covering more material more deeply.\textsuperscript{164} Another scholar agreed, saying that she initially incorporated writing assignments into her doctrinal classes on the basis of her “untutored intuition that students would learn material more effectively if they did so in the process of acting like a lawyer and engaging in lawyer activity.”\textsuperscript{165} This is the power of context, fully documented and authenticated by the constructivist and social discourse theories.\textsuperscript{166}

It is the power of context that specialized students demonstrate so well: they see themselves as lawyers, even at the beginning of the year, because they are working on assignments that they find relevant to their interests and their anticipated future. “A more richly textured course increases students’ interest, because it seems more relevant and more real to them.”\textsuperscript{167} When they feel like lawyers—rather than just students—they invest more of themselves in their work.\textsuperscript{168}

Specialized sections take all of the heuristic strategies already in place in the legal writing classroom, including the “cognitive apprenticeship,”\textsuperscript{169} and make students apprentices of the expert

\textsuperscript{163}DeJarnatt, supra n. 139, at 56.
\textsuperscript{165}Vaaler, supra n. 31, at 152.
\textsuperscript{166}See supra secs. III(C)(2)–(3), IV(A)(2).
\textsuperscript{167}Liemer, supra n. 164, at 287; see also Rebecca A. Cochran, Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service, 8 B.U. Pub. Int. L.J. 429, 445 (1999) (commenting on the importance of a realistic setting for LRW assignments); Grearson, supra n. 97, at 62 (synthesizing the significance to learning of using authentic tasks); Lysaght & Lockwood, supra n. 30, at 92 (explaining that legal writing exercises that require drafting documents to solve simulated real-world problems provide a realistic learning situation).
\textsuperscript{168}See Liemer, supra n. 164, at 287 (“Students who are interested in the subjects they are studying will throw themselves more willingly into the hard work needed to acquire their fundamental legal skills. They will be more satisfied with the course generally and with their work in it. Many students talk to friends in other sections or other law schools, and students who work on multidimensional LRW assignments often come to appreciate the extra education they are receiving.”).
\textsuperscript{169}Beazley, supra n. 33, at 44–47; see also Brook K. Baker, Learning to Fish, Fishing to
legal writing professor/practitioner. The students embrace the role of apprentice in a way that general legal writing students often do not because they perceive themselves to be in a “constructive learning process[ ] that is embedded in [a] context[ ] that [is] rich in resources and learning materials, that offer[s] opportunities for social interaction, and that [is] representative of the kinds of tasks and problems to which [they] will have to apply their knowledge and skill in future.” The apprenticeship model corresponds to Professors Rideout and Ramsfield’s vision of the legal writing classroom as a laboratory or workshop in which teachers employ a variety of methodologies, including collaborative learning, to teach students to write and analyze. Of the many methodologies that DePaul’s LARC professors use in their “labs,” the doctrinal viewfinder of the specialized sections provides the quickest, sharpest focus for teaching these skills.

The creation of the deeper and more stimulating learning environment finds support in other scholars’ experiences of teaching legal writing through a specialty focus. Professors using subjects related to civil procedure to teach legal writing also found that the approach created a more stimulating learning environment. Students gained an understanding of how procedure arises in practice; they became actively involved in analyzing the issues and applying the law; and they “simply learn[ed] more” about civil procedure. Many of the students in specialty classes become much more engaged in the learning process because they really like the topic. They then can continue their learning after the first year, when they can select from among a healthy number of upper-level writing courses to deepen their specialization. Because these upper-level courses fall under the jurisdiction of DePaul’s LARC department, the LARC director hires the professors and guides the

---

Learn: Guided Participation in the Interpersonal Ecology of Practice, 6 Clin. L. Rev. 1, 27 n. 96 (1999). The cognitive apprenticeship is a theory of learning that stresses the importance of authentic activity that makes use of social and physical contexts. Baker, supra n. 169, at 27 n. 96.

170 Id. (quoting Erik De Corte, Fostering the Acquisition and Transfer of Intellectual Skills, in Learning across the Lifespan: Theories, Research, Policies 95, 96–97 (Albert Tuijnman & Max Van der Kamp eds., Pergamon 1992)).

171 Rideout & Ramsfield, supra n. 31, at 70–72.

172 Glannon et al., supra n. 46, at 248.

173 “The analysis of the motion in Civil Procedure and its use in the LRW assignment operated symbiotically to provide a much richer appreciation for this procedural device.” Id. at 255; DeJarnatt, supra n. 139, at 56 (describing the “richer opportunity to develop [students’] analytical and other skills while learning the fine points of a specific area of law”).

174 All upper-level writing faculty at DePaul have multiple years of practice experience.
curricula in those courses, thereby achieving a consistent delivery of instruction across all three years of a law student’s education. This continuity comports with what Professors Busharis and Rowe see as one of the benefits to upper-level practicum courses:

[B]y using legal writing faculty to teach the practicum, the school takes advantage of their understanding of the analysis and writing [that] students have already learned in the first year, enabling the practicum to draw directly from that experience. Practica reinforce the standards set out in the first-year legal writing and research program and help convey the message that those standards are not artificially created for the legal writing course[ ] but are essential for the skillful practice of law.175

2. Increase in “Value” to Students

Specialized students also have the sense that they are receiving value for their hard work. This feeling produces several collateral benefits. All legal writing students think that they are working far more than the “payment” they receive in credit hours, but students in specialty sections complain about the workload less than those in non-specialty sections. Because the workloads are identical, this perception must be based on the students’ feelings that they are getting something extra for all their work. The “extra” differs among students: for some, it is the knowledge they have acquired in a certain area of law; for others, it is the more general sense that they are immersing themselves in an area of law that they love. Even if they do not end up loving the substance of the particular area of law, they have a far higher appreciation for the work that they are doing when they can see its application in an area of law that is meaningful to them. The experience of the four professors who taught legal writing through civil procedure subjects comports with DePaul’s experience on this point.176

in the specialty subject that they teach.

175 Busharis & Rowe, supra n. 39, at 346–347.

176 See Glannon et al., supra n. 46, at 248 (“[P]roviding students more context for their LRW assignments . . . help[s] them appreciate the practical benefits of the course and encourage[s] them to engage in the work more enthusiastically.”). For the report of comments by enthusiastic students, see id. at 253.
3. Networking

One benefit to students that flows from DePaul’s program is the networking that naturally occurs.\textsuperscript{177} For example, students begin to make contacts with practicing lawyers in Chicago when they are introduced to guest speakers and mock judges in LARC class.\textsuperscript{178} Further, writing faculty who teach specialized sections often put students in contact with their former colleagues from practice if the students want to explore certain legal questions more closely than class time permits, or if the former colleagues are seeking law clerks for the year. With or without these particular contacts, once the competitive Chicago interviewing season begins, specialized students have a head start on students from other area schools\textsuperscript{179} because they can market themselves as having a specialization. The specialty class gives them something to discuss in job interviews, especially when they do not yet have legal experience as a credential.\textsuperscript{180}

4. Other Benefits

Students experience the specialized sections as a benefit for reasons other than learning and interest-fulfillment. Even though their acceptance into one of DePaul’s specialty sections is not entirely within their control, students do have the sense that the class is the one elective in a sea of first-year mandates. This gives them the empowering feeling that results from having a say in their destiny in an otherwise mandated curriculum.\textsuperscript{181}

Another benefit to some of the specialized students is both visible and lasting: the job. Even without any of the other benefits, the summer jobs component of two of DePaul’s certificate programs gives many students the only incentive they need to be in, and work hard in, LARC class. Although jobs are no longer guar-

\textsuperscript{177} For a brief account of practitioners’ mixed reviews of their interactions with students who have specialized in an area of law, see Griffin, supra n. 11.

\textsuperscript{178} For the benefits of having practicing attorneys and judges speak to a group of students in a practicum course, see Busharis & Rowe, supra n. 39, at 347, and for the double-edged sword that guest speakers can pose, see Cooper, supra n. 20, at 61.

\textsuperscript{179} They also have a head start on their DePaul classmates from general LARC sections.

\textsuperscript{180} But see Griffin, supra n. 11 (discussing perceived perils of specialization).

\textsuperscript{181} See Edelman, supra n. 140, at 416–417 (A specialized moot court program “offers variety” to students, who “relish taking control of their academic program” in “what may be their only chance to elect a course in an otherwise prescribed curriculum.”).
anteed, the direct connection between being in a specialized section and securing a paying job after the first year is potent and undeniable.

B. Student Drawbacks: Disappointed Expectations

For their many benefits, the specialized sections do come with some drawbacks for students. If a certificate program does not accept a student to a specialty section, the student must still take LARC, usually in a general section. Every now and then, to stabilize numbers across sections, the school has assigned a student to another specialized section. Either of these situations can produce resistance in the student. Perhaps the student is angry because he is not in his class of choice. Perhaps the student hates the specialty to which he has been assigned and does not want to work on assignments involving that topic. Of course, any student bears the risk of having to work on an assignment that he does not like. Indeed, most students find themselves in this position at least once during the year in whatever LARC section they are in—even those in a specialty section. Students who are not in their specialty of choice often do not see their situations that way, though, coveting the “good” assignments of the specialized students. Correspondingly, students who are in their chosen specialty but who end up disliking it—or, more often, who discover that the area of law is simply not what they thought it would be—have no recourse: they are in that specialized LARC class until the school year ends in April.

Beyond the personal dramas of like and dislike, the limited subject-matter exposure can have a restricting effect on the students’ educations. Many students already tend to think that they know exactly what they will be doing once they leave school: what type of law they will practice and what type of assignments they will work on at their jobs. Of course, almost none of those assumptions bear out fully. Students who specialize too quickly or too narrowly sometimes wish that they had exposed themselves to a

182 Jobs are no longer guaranteed because the IPLW acceptance pool exceeds the number of jobs that the certificate program can line up; see supra Section II(C).

183 For example, one of the family law LARC students from the 2005–2006 academic year was quite unhappy to be working on an assignment involving the Federal Parental Kidnapping Statute. Unaccountably, she thought that the entire field of family law is state-based and that family law involves only spouses, not parents and children. Such is the assumption level of brand new law students. Her professor reported that she was quite sullen throughout the eight weeks of the assignment.
broader range of ideas and fields of study while they had the chance.\textsuperscript{184}

Akin to this potential regret is another form of disappointed student expectation. Specialized students’ ability to choose their legal writing class often leads to expectations about the class, the teacher, the assignments—even their classmates—that might not be reasonable and might not be met. For example, usually not every single assignment can be in the legal specialty. Assignments in some specialties might need to be off-topic in order to serve programmatic and pedagogic goals of comprehensive skills instruction.\textsuperscript{185} For students who have their hearts set on deep, all-specialty assignments all the time, these pedagogic choices inevitably produce disappointment.

\textbf{C. Faculty Benefits}

Students are not the only ones on the receiving end of the joys and sorrows of specialized sections. Teaching LARC through specialties presents benefits and difficulties for writing faculty, as well. At DePaul, the benefits far outweigh the burdens.

\textbf{1. Reduced Labor, Higher Interest}

The most apparent benefit to teachers is that they can teach what they know and like; this, then, makes specialized instruction pedagogically sound from the teacher’s perspective. Having practiced in the specialty field prior to joining the academy, professors of specialized sections bring their practical experience to the classroom in a way that is even more pointed than the experience that a professor brings to a general legal writing section. This practical experience almost always leads to reduced labor on, and a higher interest level in, assignment preparation.\textsuperscript{186} The ability of a professor to teach in an area in which he has practiced also often leads to greater excitement in teaching individual classes and conducting conferences on work-in-progress.\textsuperscript{187} In turn, these benefits lead to lower levels of burnout.

\textsuperscript{184} See Griffin, supra n. 11.
\textsuperscript{185} See supra sec. II(E)(1).
\textsuperscript{186} See Liemer, supra n. 164, at 290 (commenting on the way that legal writing assignments are particularly workable when the professor creates them from a well-known field).
\textsuperscript{187} See id. at 288–289 (teaching in a familiar and loved subject matter is intellectually
2. Job Fulfillment

Professors who teach specialized sections are pleased with the greater student interest in, and enjoyment of, the legal writing course. The professors enjoy watching their students immerse themselves in the work and enjoy the progress the students make because of that interest.\footnote{See id. at 287.} Greater on-the-job fulfillment couples with the reduced labor that comes from practical experience to further decrease rates of burnout. Students who are happier with their legal writing course will assess it more positively, and positive student evaluations can enhance a professor’s career.\footnote{Id. at 288.}

3. Career Development

Outside the classroom, the benefits of specialized instruction continue to accrue to legal writing professors. The specialized sections provide writing faculty with a unique opportunity to mentor students, to counsel them as to what the field is like on a day-to-day basis, and to provide them with contacts in the working world.\footnote{See Liemer, supra n. 164, at 290 (students will recognize the writing professor as an expert in the field and the proper person in the law school to serve as an employment reference).} DePaul’s specialized LARC faculty have enjoyed an increased profile in the law school—among both students and faculty—as they have emerged as great teachers and experts in their particular fields. Other schools have witnessed this event: “word of how great the [doctrinally focused] LRW course(s) and the LRW faculty are will inevitably filter through the school.”\footnote{Id. at 288.} As a result, students and faculty see these members of the writing faculty as experts in the law and experts in teaching legal writing.

The ability of the law school’s constituencies to view writing faculty through a broader lens has opened other opportunities for them; increased participation in activities of certificate programs is only one. At the same time as the advent of the specialized sec-
tions, DePaul’s writing faculty started to consistently teach upper-
level doctrinal classes;\textsuperscript{192} prior to the success of the specialty sec-
tions, LARC faculty had taught doctrinal courses only occasionally.
In addition, faculty members and student groups have requested
that writing faculty take part in symposia, conferences, and panel
discussions. These parties recognized the considerable expertise
that writing faculty could bring to those events.\textsuperscript{193} All of these ben-
efits can help writing professors feel more connected to their law
schools and more like the professionals they are.

Opportunities for overseas instruction have also developed. In
2006, for the first time in DePaul’s history, the dean selected the
family law LARC professor to serve as the annual visiting faculty
member to University College Dublin in Ireland, a highly coveted
assignment at DePaul.\textsuperscript{194} Advantages outside the law school’s am-
bit have also come: after she returned from the Dublin visit in
2006, the family law LARC professor received an invitation from a
neighboring law school to work on a project in Tanzania. There she
conducted comparative research on substitute care systems for
orphaned children. That research led to her creation of an inter-
national children’s rights class, and she has returned to Tanzania to
teach it.\textsuperscript{195} The weight that these invitations gave to her specialty
class instruction cannot be underestimated. Most of her students
rightly perceived her to be a professor of substance with the cre-
dentials and experience to back up what she said in class—not just
about family law, but also about writing and analysis.\textsuperscript{196}

These invitations did not come ten years ago, before writing
faculty started teaching specialized sections and doctrinal ele-
vatives; happily, they have not been limited to the faculty who teach
specialized sections. The specialty LARC sections have benefitted
all members of DePaul’s writing faculty. By highlighting some pro-
fessors as experts in a field, the specialized sections shine a spot-
light on the talents of all writing faculty, rightly showcasing them as far more than language specialists.\textsuperscript{197}

Increased visibility within the school and increased credibility among the student body also come to writing faculty who teach upper-level doctrinal students. Teaching fifty to 100 upper-level students, rather than only thirty first-year students, creates a fan base for the professor. When a first-year LARC student complains about a professor to an upper-class student who has had the professor for a prior course, that upper-level student can easily correct the first-year’s impression with an encouraging and credible, “I know she seems tough, but I’ve never learned more than when I was in her class.” The accumulation of students who are able to give this type of encouragement functions as a sort of pressroom for the teacher, and the trickle-down effect is to improve the tone of LARC class immeasurably. This cannot help but make the professors better teachers and more satisfied with their work.

\textit{D. Faculty Drawbacks}

The system of specialized instruction is not burden-free. DePaul’s professors have experienced a variety of challenges from teaching specialty classes.

\textbf{1. Human Resources}

With the increased student demand for specialized LARC sections and the increased interest of doctrinal faculty in creating certificate programs, more writing faculty have to teach specialized sections than in the past. Until 2006, DePaul had writing faculty who were eager to teach a specialty class, but the need for a third IPLW class in 2006 compelled the director to ask a professor to teach a section that he had not volunteered to teach.\textsuperscript{198} As more of the sections become specialized, the director may have to press more writing faculty into service to teach classes.

\textsuperscript{197} See Liemer, supra n. 164, at 294.
\textsuperscript{198} That professor graciously agreed to teach the class.
2. **Coping with Student Dissatisfaction**

Managing student expectations and handling dissatisfied students go with the legal writing territory, but when those expectations grow beyond the teacher’s ability to meet them, everyone becomes unhappy. Specialized legal writing sections create more opportunities for student dissatisfaction than tend to exist in general legal writing sections. Student unhappiness comes from a variety of sources: students may not have been accepted to the discipline of their choice and sometimes exhort the specialized LARC teacher to advocate on their behalves.\(^{199}\) Because the certificate program heads are responsible for selecting students for the specialized LARC classes, the LARC professors cannot help the students in their quest.

Some dissatisfaction grows from the very fact that DePaul recruited the students, and their expectations are high. Many come in incorrectly thinking that every assignment they work on will be in that particular field of law. They are not.\(^{200}\) Likewise, the IPLW professors do not teach students how to prosecute a patent or file a copyright claim; the family law LARC professor does not teach students how to accomplish an adoption; and the health law LARC professor does not teach students how to prevent trafficking in human organs. All LARC professors teach plain old legal writing skills, and this can be bitterly disappointing to a student who has made incorrect assumptions about the certificate program.

\(E.\) **Special Challenges for Directors**

A system of teaching legal writing through specialized sections presents special challenges for directors of legal writing programs. All of the challenges relate to issues of personnel and fairness.

1. **Staffing the Program**

Hiring is the first challenge a director encounters. Practical experience in the relevant field is desirable in a candidate, but so

\(^{199}\) See supra sec. V(B).
\(^{200}\) See supra secs. II(E)(1), V(B).
is teaching experience.\textsuperscript{201} The first-year legal writing professors do not engage in the mission of teaching highly technical aspects of substantive law, for which practice experience in the field might be paramount. Accordingly, a director may lean on the side of preferring teaching experience, if a candidate possesses only one of the two qualities. At DePaul, the certificate program heads are not formally involved in LARC hiring decisions, but trying to incorporate their wishes into hiring decisions is the right thing for a director to do from an institutional perspective.

2. \textit{Fairness in Workloads}

The next challenge for a director is to maintain consistent LARC class sizes; from a fairness standpoint, this is a priority. Because certificate program heads use criteria to accept students into specialized sections, the numbers of accepted students are inconsistent from year to year, and they are not always congruent with the anticipated and necessary class sizes of the LARC sections.

The number of students accepted into a specialty class or program may be greater or fewer than the target number for a section. These in-between numbers inevitably lead the director to have to even out a professor’s full load or to overload another professor, hence, invoking fairness issues for both professors and students. Developing good working relationships with the certificate program heads—who understandably have goals that differ from the director’s—can go a long way toward helping a legal writing director work through some of these issues.

3. \textit{Keeping the Students Happy}

Student backlash: it is a theme that every director must evaluate before beginning a program of specialized sections. It runs through every consideration of the specialized model. Directors of legal writing programs across the country daily cope with student dissatisfaction. This unhappiness almost always takes the form of students believing that they know better than the director what the goals of the legal writing department should be, but universally failing to provide any solutions for the perceived problems. That

\textsuperscript{201} Sourcebook, supra n. 130, at 81.
situation is only exacerbated when specialized sections are the focus of the complaints.

As all legal writing directors can attest, students can complain about a seemingly inexhaustible supply of topics. They may think they know what the specialized section is supposed to be and not be.\textsuperscript{202} This perception of knowledge can come from impressions formed through recruiting efforts, through information from their acquaintances, through assumptions that they make based on what other law schools might be doing, or through their own wish lists. They may fallaciously think that they should be getting a substantially “better” experience than students in other specialized sections, or students in general sections, are getting. They may think that their particular professor should be doing things differently. If the class does not rise to their expectations—whatever those expectations are, and however the students may have come by them—the students complain.

Students usually take complaints first to their particular professor, but they inevitably seek a resolution from the director.\textsuperscript{203} Sometimes, the director can solve the problem. More often, the student wants something that the director cannot or will not do: switch the student to a different section,\textsuperscript{204} make the professor behave differently, or alter the entire curriculum to suit the student. This is a golden opportunity for the director to help the student—as a developing lawyer—understand that the way to solve a problem is not to go over the head of the person with whom he has the problem but, instead, to go directly to the source of the problem and try there first.\textsuperscript{205} Very often, the student wants something that has larger, certificate-wide or school-wide implications, and the director cannot satisfy the student without involving others. Sometimes, the director cannot satisfy the student at all. Whatever the combination of factors giving rise to student dissatisfaction in a legal writing program, some complaining simply goes with the territory because the school has wooed the students, and the wooing creates a sense of expectation and entitlement.

\textsuperscript{202} See supra sec. V(B).
\textsuperscript{203} Sourcebook, supra n. 130, at 166–167.
\textsuperscript{204} DePaul’s policy is not to switch students from one section to another once the school year has started.
\textsuperscript{205} Sourcebook, supra n. 130, at 166.
4. Fairness in Grading

One complaint to the director that does have the ring of authenticity is related to curving the grades of students in specialized sections. DePaul mandates a curve for all first-year classes.206 Professors with multiple sections—a full load is two sections of approximately thirty total students—curve all students together. Admissions personnel use a variety of factors to distribute students among all sections of the class, to achieve balance. The specialized sections, of necessity, are partially exempt from this balancing. The certificate program heads select the students who will be in the specialized LARC sections based on LSAT, GPA, an essay explaining why the student is interested in the specialized section, and other factors particular to the certificate program.

Accordingly, when the specialized LARC program began, the students in specialized sections had, as a group, higher LSATs and GPAs than did students in general LARC sections. Imposing a curve on those students was possibly unfair because the groups were statistically unrepresentative. As DePaul has experienced a narrowing of the LSAT and GPA range in the accepted student pools, the argument over whether the curve should apply to students in specialized sections is becoming moot. Still, students advance the argument. To date, DePaul’s faculty has declined to change the curve for first-year students, regardless of their assignment to specialized LARC sections.

VI. CONCLUSION

Whatever the difficulties, specializing the first year and upper-level LARC courses is the right thing to do for student learning and engagement. The daily and yearly challenges are manageable, and their resolution is part of what is taking DePaul’s legal writing instruction in the right direction. Purposely teaching legal writing through specialized instruction is a system that is firmly rooted in modern learning theory and that enjoys support in practice—albeit in modified forms—in several law schools. It is one answer to the MacCrate Report’s call for greater skills instruction.

206 DePaul’s law school uses a range curve. Ten to fifteen percent of the students taught by a professor must get As; twenty to twenty-five percent must get B+s; twenty-five to thirty percent must get Bs; twenty to twenty-five percent must get C+s; and fifteen to twenty percent must get Cs. DePaul’s law school does not use “minus” grades.
and broader integration of law school curricula. It is a part of the writing-across-the-curriculum movement, specifically, a subset of the learning to write in the discipline approach. Scholars and educators almost universally assume that a writing-across-the-curriculum program looks like an importation and distribution of writing assignments by an upper-level doctrinal professor. The purposes of the movement are equally well-served—if not better served—by exporting doctrine into all levels of the legal writing curricula and having the writing professors distribute, monitor, and critique the writing assignments.

Exporting doctrine, rather than importing writing, is pedagogically sound for students and is beneficial for professors. It is not a perfect or easy path to move students from novice to law clerk/summer associate, but it can be a successful and rewarding path for everyone involved. The difficulties in offering a program of specialized instruction are resolvable and well worth the effort for the benefits that the instruction produces.

Teachers who are interested in creating a certificate program or a formal program of writing instruction through the doctrinal lens can launch their idea by preparing a proposal and sending it through the appropriate school channels for review. As with all proposals that may engender vigorous discussion, these interested teachers would be prudent to get prior approval from the deans and the support of key members of the voting faculty. Legal writing professors who teach at schools where uniform assignments are not the norm can easily create a de facto specialized section simply by creating assignments that draw from one discipline.

Unless they are planning to accomplish the placement of particular students into the specialty section by themselves, teachers will need the input and help of their school’s admissions personnel. Some professors have chosen to do this labor-intensive work themselves, but seeking the help of personnel who have access to admissions data and computer sorting programs can dramatically reduce the time spent on this task. Anyone considering the institution of a specialized program should consider many factors, including the logistics of specializing the first-year class; admissions methods; the creation of new classes; the achievement of speciali-

---

207 Nancy A. Costello, Associate Clinical Professor of Law at Michigan State University College of Law, created her own specialty section by selecting students interested in intellectual property from the admitted student pool. Presentation, Killing Three Birds with One Stone: Teaching Legal Writing from a Specialty Law Perspective (Atlanta, Ga., June 10, 2006).
zation across the upper-level; consistency across different sections; and consistency with any non-specialized sections in the program.

Once the teachers have organized the program, the one thing they can do to pave the way for a smoothly functioning one is to meet with the heads of the certificate programs, if those programs exist, and discuss possible pitfalls, such as conflicting goals. Deciding ahead of time on a division of responsibility and a seat of decision for particular hiring and pedagogic choices can help avoid conflict. Similarly, an open conversation about topics such as grading, curving, and general support for colleagues can go a long way toward averting problems before they erupt.

Non-specialized legal writing sections will always have a place in the law school curriculum. The specialized sections, though, for the students who want them, help students become and stay excited about learning the skills of writing and analysis. Teaching writing and analysis through a particular legal subject matter turns the doctrinal subject from a viewfinder that shows students a two-dimensional picture into a lens that actually focuses their attention and facilitates and influences their comprehension. The purposeful instruction of specialized legal writing is a significant, if untraditional-looking, step forward in the development of law school pedagogy.

Laurie C. Kadoch

I. INTRODUCTION

The paradox that ensnared “legal writing” courses from the moment they began to appear in law school curricula a little over two decades ago has become a topic of mainstream discussion, namely the paradox of a perceived chasm between theory and

---


[t]he most pervasive and useful changes always seem to be the ones that develop out of an alternative framework or viewpoint. These usually grow out of some dissatisfaction with the status quo or a major stumbling block of some sort. This is true for philosophies, theologies, sciences, societies, organizations... But the mere thought of alternative realities is confusing for most people. When people get confused, they get scared. When they get scared, they get angry. And when they get angry in numbers, they often choose up sides for a fight: polarization, the idea that “it” has got to be “either this or that.” The funny part is that “this or that” is seldom the issue. More often it is in the “either-or.” How about “both,” “neither,” or a combination of the two?

Anthropologist Desmond Morris once wrote that the “... human animal is remarkably good at blinding itself to the obvious if it happens to be particularly unappealing, and it is this self-blinding process that has caused so many of the present difficulties.”

There seems to be an unfortunate circular truth there: Belief systems die hard, sometimes only with the believer (or not even then). When what is necessary is a new belief system, we often get stuck. And it isn’t always the new system that is scary. Sometimes it is the change itself, or even just the thought of change. How do we make it so damned hard?

Jacobson, supra n. 1, at 5–6 (footnotes omitted).

* © 2007, Laurie C. Kadoch. All rights reserved. Professor of Law, Vermont Law School. The Author wishes to thank Evelyn Marcus for her support in the timely completion of this Article.
practice. In professional education, this paradox is unique to law and stems from three related fallacies. First, that there really is and should be a schism between the teaching of legal theory and the practice of the law, not just one unintentionally caused by the current educational model. Second, that “writing” curricula fall squarely on the practice side of the schism. Third, that the teaching of the practice of law and, therefore, legal writing, is devoid of intellectual heft. Current discussion about models of legal education that incorporate accepted theoretical underpinnings of law, legal studies, learning theory, and the cognitive sciences has begun to debunk the core belief supporting the imposed schism that only pure doctrinal courses have the intellectual heft necessary for inclusion in mainstream law school curricula. Perhaps unwittingly, the discussion necessitates questions about the continued validity of the marginalized position of so-called “legal writing” courses. Legal writing curricula have evolved despite imposed handicaps, and are now poised for recognition as curricula that offer not only intellectual weight but also a bridge between theory and practice. The discussion reveals possible benefits of a shift from the current paradigm. It offers the potential for those of us “trapped on the practice side” to bring the discussion to the attention of those who can orchestrate critical change.

Legal writing scholars have been illuminating the fallacy of the split paradigm by writing for years about the intellectual heft of the courses they teach and the connections between doctrinal and “writing” curricula, but, unfortunately, because we write from within the box, the audience we need to reach has received the insights through the lens of the fallacy. The volumes of excellent scholarship written by the legal writing academy have garnered recognition of the significance of scholarship about legal writing. See Francis J. Ranney, Aristotle’s Ethics and Legal Rhetoric 28 (Ashgate Publg. Co. 2005) (providing insight into the source of the split paradigm of theory and practice); Steven L. Winter, A Clearing in the Forest: Law, Life, and Mind 41 (U. Chi. Press 2001) (providing insight into the fallacy of a linear segregated approach to legal education and the knowledge gained from contemporary cognitive science); Peggy A. Ertmer & Timothy J. Newby, Behaviorism, Cognitivism, Constructivism: Comparing Critical Features from an Instructional Design Perspective, 6 Performance Improvement Q. 50 (1993); Terrill Pollman, Building a Tower of Babel or Building a Discipline? Talking about Legal Writing, 85 Marq. L. Rev. 887 (2002) (providing a history of the introduction of writing curricula); Michael Hunter Schwartz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 S.D. L. Rev. 347 (2001); see also Selected Bibliography: Scholarship by Legal Writing Professors, 11 Leg. Writing 3, 59 (2005).

Conflict theory illuminates the need for shifted paradigms to change rather than manage the clash of realities (the conflict). See generally Joseph P. Folger et al., Working through Conflict 274 (Addision Wesley Longman, Inc. 2001). Conflict theory illuminates the need for shifted paradigms to change rather than manage the clash of realities (the conflict). See also Richard Bandler & John Grinder, Reframing (Real People Press 1982).
institutions, students, and the practice of law itself. Naming the paradox and recognizing its hold on the design of legal education is an essential preliminary step to any re-framing.5

The paradox, and in turn, the split paradigm in whose breach legal writing abides, results from ancient debate over the essence of classical rhetoric.6 The term rhetoric was eternally tainted by the ancient Sophists, courtroom advocates, some of whom “were known for trying spurious lawsuits,” who unfortunately were also among the teachers of rhetoric.7 The disfavor that philosophers such as Plato attached to the term rhetoric, following the courtroom antics of the Sophists, also severed the once intimate association between law and rhetoric, “where to practice law meant to employ rhetoric.”8 In opposing the Sophists, Plato and other philosophers disregarded the multifaceted nature and “intellectual heft”9 that the study of classical rhetoric had brought to legal thought. Because of this history, legal rhetoric came to be seen by many as merely a manipulative use of language, a tool of persuasion devoid of either ethical or intellectual activity. From that time forth a prejudiced eye was often cast upon the term.10

On the other side of the debate, Aristotle continued to perceive the study of rhetoric as a deeper activity. Aristotle called it “a habit of the mind.”11 The schism between law and rhetoric, which has

5 Id.
7 Robbins, Philosophy v. Rhetoric, supra n. 6, at 112. Robbins distills the ancient argument over rhetoric in a way that mirrors the debate over the efficacy of teaching legal writing. She points out, “As early as the fifth century B.C., the Sophists, who were courtroom advocates as well as teachers of rhetoric, had already damaged rhetoric’s reputation. Some of the Sophists were known for trying spurious lawsuits, and thus ‘sophistry’ soon became associated with clever but false arguments.” Id.
8 Ranney, supra n. 2, at 2.
9 Robbins, Philosophy v. Rhetoric, supra n. 6, at 112.
11 Ranney, supra n. 2, at 2. Ranney draws from Aristotle in explaining the conjunction of law and rhetoric that “both practice and theory[] are knowledge-making activities that are valuable for what they can contribute to our understanding of legal and ethical problems.” Id. at 1. She includes a paragraph from Aristotle’s Nicomachean Ethics, Book VII, which illustrates the use of rhetoric in the study of law as a meaning-making activity, as a “habit of the mind.” Id. Ranney includes an explanation by Aristotle of his approach:

Our proper course with this subject as with others will be to present the various views about it, after first reviewing the difficulties they involve, finally to estab-
continued in various incarnations to the present time, has led to a loss “of a [once] coherent and all-encompassing approach to legal discourse,”\[^{12}\] which connected the intellectual study of law with the intellectual practice of law.

Christopher Langdell, of the Harvard Law School, shared Plato’s narrow view of rhetoric, as well as the schism between the study of law and rhetoric, and made it a mainstay of American legal education.\[^{13}\] In 1870, Langdell reshaped the essence of the study of law, which had previously relied upon apprenticeships,\[^{14}\] when he declared that law was a science and thus should be taught scientifically.\[^{15}\] He maintained that the purpose of law school was “not to teach law students to churn out legal products” but rather “to teach a process, a method of inquiry, and a way of thinking, ‘like a lawyer.”\[^{16}\] With these sentiments, Langdell severed theory from practice in legal education.\[^{17}\]

\[^{12}\] Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* 6 (Asch- gate Publg. Co. 2005); see also Kadoch, *supra* n. 10 (discussing the absence of oral narrative from the early English trial, perhaps as fallout from the schism between rhetoric and law begun by Plato and other philosophers).


\[^{14}\] Kadoch, *supra* n. 10; Robbins, *Philosophy v. Rhetoric*, *supra* n. 6, at 121.

\[^{15}\] Robbins, *Paradigm Lost*, *supra* n. 6, at 483.

\[^{16}\] Ranney, *supra* n. 2, at 3.

\[^{17}\] Feldman, *supra* n. 13, at 475–479. Thereafter, law schools neglected a vital aspect of legal education, the engagement of law students (future lawyers) in intellectual thought and discussion of the competent and ethical use of language. Given that the American trial is a seminal speech event (despite the longstanding distrust of rhetoric) and that everything the lawyer does both within and outside of the courtroom is in one form or another communication; and given that the lawyers’ communication not only impacts the resolution for the
Langdell’s approach shaped legal education well into the future and limited the role of clinical, writing, and other skills courses that encompassed “practice” components, as well as those within the legal academy who were brave (or naive) enough to bear the risks of teaching them. The ancient schism continues to have profound effects on the shape and substance of modern legal education.\(^1\)

The all-encompassing changes that Langdell imposed on legal education obscured until recent times the significant interrelationship between the study of law, the practice of law, and the very forming of law.\(^1\) Where Plato viewed rhetoric as a mere manipulative skill, Langdell’s modern law school created a paradigm in which the activities of the practice of law—its essential function of communication—were divorced from the intellectual workings of the law.

Despite the long-lasting nature of the extraordinary power wielded by Langdell over the shape of legal education, during the past twenty years, hairline fractures were uncovered in his paradigm. Pedagogic understanding of the three fallacies by clinical and writing faculty and resultant scholarship,\(^2\) recognition by the MacCrate Report,\(^3\) and reminders and pleas from the bench and bar,\(^4\) as well as from law students themselves,\(^5\) eventually began to open minds to shifting perspectives and incremental movement forward. Clinical programs made progress toward repairing the

---

1. Feldman, supra n. 13, at 475–479; Robbins, Philosophy v. Rhetoric, supra n. 6, at 122; Winter, supra n. 2, at 41.
2. Ranney, supra n. 2, at 2. “If rhetoric has had a long and troubled history—and it has—its relationship with law has been even more troubled. From their early intimate association, where to practice law meant to employ rhetoric, law and rhetoric are now barely on speaking terms.” Id.
schism by equalizing the status of their courses and faculty. Legal writing courses and faculty have now experienced at least two paradigm shifts, and are on the cusp of an all important third shift that has the potential not only to unmask the fallacies but also to heal the schism between practice and theory, law and rhetoric.

This Article is an attempt to name and begin to give voice to the possibilities and dimensions of an emerging new paradigm that has both the practical and intellectual weight to burst the Langdellian box and enter the reality of those in the mainstream. Its goal is to connect this third paradigm with past paradigms in the context of recent scholarship about cognitive science, learning.

24 The first paradigm shift was from the non-existence of writing courses to the product-producing teaching mode. The second paradigm shift is that described by Terry Phelps from the then-current traditional approach to the process model of the new rhetoric. These early classes were no-credit courses taught by librarians, third-year law students, adjuncts, or capped teachers. The shift to the process model was wrought by changed approaches to legal writing pedagogy by legal writing instructors. The changes affected those within the box. This is not to say that the shifts were not influenced by ideas from without, but that the perception of those outside the box was not altered with respect to the split paradigm. The paradigm shift that I suggest might now occur involves a changed perception of the place and significance of legal writing by those outside the box.

As noted in the keynote address given by Richard Gale, Senior Scholar, The Carnegie Foundation for the Advancement of Teaching:

Legal writing faculties are specially situated to advance pedagogy within legal education. They have more regular interaction with students than do many law faculties, and their teaching is more likely to be informed by educational theory and discussion of pedagogy among colleagues. Increasingly, legal writing faculties are publishing about teaching. Yet, this growing body of scholarship has not had a significant impact on pedagogy outside of legal writing and often fails to meet academy standards for promotion and tenure.

The scholarship of teaching and learning offers legal writing faculty new ways of thinking and writing about teaching, with the potential that work in legal writing pedagogy can influence legal education generally and bring greater recognition to those who engage in such work.


25 The seeds for this Article were planted during the preparations for a presentation at the Twelfth Biennial Conference of The Legal Writing Institute in Atlanta, Georgia entitled “Legal Writing on the Move.” Through development of the presentation with two writing colleagues, which required exploration and analysis of the interactions of our second and third semesters, student evaluations, past and present literature on the teaching of legal writing, and, most importantly, nearly bi-weekly face-to-face discussions about what it is that we do, how we do it, and the results, hidden dimensions of both teaching and student learning began to reveal themselves, suggesting the possibility that we were on the cusp of a new paradigm. See Tracy Bach et al., Presentation, Bringing Legal Writing “Out of the Box” and into the Mainstream: A Marriage of Doctrinal Subject Matter & Legal Writing Doctrine (Atlanta, Ga., June 8, 2006) (copy of presentation notes on file with the Author). The characteristics of this next paradigm for legal writing challenged my awareness, and I spent my summer engaged in their exploration.
theory, and rhetoric in order to highlight the need for deeper integration of practice and theory in the study of law and the significant role that writing curricula fill, or can fill, in that regard.

II. PARADIGM SHIFTS WITHIN THE BOX OF “LEGAL WRITING”

Of all law school subjects, legal writing, despite its marginal status in law schools, has undergone the greatest shifts and taken the most evolutionary steps in the development of its substantive curriculum and pedagogy. The shifts have occurred in a relatively short twenty-year span, mostly under the radar, with the movement from the first to the second paradigm occurring at the ten-year mark. The chronology is significant as we are now at the second ten-year mark poised on the verge of the third paradigm.

The chronology begins when Langdell’s edict that law schools should not teach the practice of law because it would merely teach the “churning out” of a product ensured the absence of writing and so-called skills courses from the law school experience well beyond the first half of the twentieth century. When writing courses were finally added to the law school curriculum, Langdell’s edict defined and confined them.

In 1986 Terry Phelps, a legal writing pioneer and visionary, wrote “The New Legal Rhetoric,” in which she introduced the legal writing community to the characteristics of the first paradigm, termed the “current-traditional paradigm.” This first paradigm embraced the belief that the teaching of legal writing indeed was merely the teaching of product. In the article, Phelps compared this operative paradigm with a new emerging paradigm that would shift focus from product to process.

Phelps’s description of the then current-traditional approach illustrates how early legal writing teachers (whose workplace was

---

26 Phelps, supra n. 1, at 1089.
27 Id. at 1093.
28 Id. The method of hiring, the profile of those hired (recent graduates interested in teaching who would use the job as a stepping stone to “real” teaching), the pay scale, the capping of positions (signifying that no teaching experience was necessary to teach these light-weight, product-oriented courses) all created a self-fulfilling prophecy.
29 Phelps describes the then current-traditional model as follows:
Influenced, knowingly or not, by the current-traditional paradigm, teachers assign paper topics, students write the papers outside of class and turn them in, teachers grade and comment on the papers and return them to the students. This procedure is repeated for the duration of the course. Kinds of writing are fre-
defined within the pre-fabricated box) accepted and adopted Langdell’s paradigm that education in the practice of law (i.e., legal writing) would only focus on the product because it was different from the higher purpose of law schools “to teach a process, a method of inquiry, and a way of thinking, ‘like a lawyer.’” Given this narrow perception of the teaching of writing as altogether unrelated and inferior to the teaching and study of legal theory, combined with supportive pedagogical beliefs that the composing process cannot be taught anyway, so-called legal writing curricula started out enclosed “within the box,” segregated from the study of legal doctrine.

As Phelps pointed out, this early paradigm was rule-based. She suggested that the goal for many of these early teachers was to help students turn out products that were error-free according to the rules. Most of the “writing” rules were rules for revision that focused on such errors as surplus words and passive voice to produce a product characterized by accuracy, brevity, and clarity. As Phelps suggested, these rules were correct but they did not engage students and help them think about the writing process. Within subsequently divided into four modes: exposition, description, narration, and argument. Students are expected to write a given assignment in one or another of these modes. The stress on the modes of discourse results in a stress on the form of the writing. It neglects the role of the reader and the writer, seeing writing as form rather than as conversation.

The writer’s role in producing the text remains mysterious, and a tacit assumption of the current-traditional paradigm is vitalism, which stresses the natural powers of the mind and “leads to a repudiation of the possibility of teaching the composing process.” The composing process is a creative act not susceptible to conscious control by formal procedures. “[T]he writer is, in a sense, at the mercy of his thoughts. He does not direct them at this or that point; instead, he follows them with more thoughts, spontaneously, naturally. It is hard to say whether he has the thoughts or they have him.” The composing process is thus not teachable, and writing teachers have relied on the “frequent writing followed by careful criticism” method. “[T]he teaching of composition proceeds for both students and teachers as a metaphysical or, at best, a wholly intuitive endeavor.”

Id. (footnotes omitted). Phelps goes on to cite Maxine Hairston’s famous article, The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing, 33 College Composition & Commun. 76, 78 (1982): Hairston points out three other misconceptions of the current-traditional paradigm: (1) “writers know what they are going to say before they begin to write”; (2) the writing process is linear, proceeding systematically from prewriting to revising; and (3) teaching editing is really all a writing teacher can do.

Id. at 1093–1094; see also Kuhn, supra n. 1, at 64 (“[N]ovelty emerges only with difficulty, manifested by resistance, against a background provided by expectation.”).

30 Ranney, supra n. 2, at 3.
31 Id.
32 Phelps, supra n. 1, at 1098.
this paradigm the teachers of legal writing unwittingly perpetuated the view that the nature of their courses was remedial rather than substantive.\textsuperscript{33}

In 1987, when Phelps wrote her article about the new paradigm, which she called the “new legal rhetoric,” the shift from product to process was just beginning to be spoken about and practiced. This emerging perspective on legal rhetoric borrowed heavily from classical rhetoric.\textsuperscript{34} According to Phelps this new paradigm was designed around five principal features:

\begin{enumerate}
\item Writing is a process; the process is recursive rather than linear; pre-writing, writing, and revision are activities that overlap and intertwine;
\item Writing is rhetorically based; audience, purpose, and occasion (the components of the rhetorical situation) figure prominently in the assignment of writing tasks;
\item The written product is evaluated by how well it fulfills the writer’s intention and meets the audience’s needs;
\item Writing is a disciplined creative activity that can be analyzed and described; writing can be taught; [and]
\item The teaching of writing is fruitfully informed by linguistic research into the composing process.\textsuperscript{35}
\end{enumerate}

The academy took up Phelps’s call.\textsuperscript{36} During the years that followed, teachers of legal writing began to re-envision the goals of their courses. The process paradigm described by Phelps was nurtured by the experience and reality of legal writing teachers “with-

\textsuperscript{33}Id. at 1101; see also Dean G. Pruitt & Sung Hee Kim, Social Conflict: Escalation, Stalemate, and Settlement 154 (McGraw Hill 2004) (“One mechanism of self-reinforcement involves the self-fulfilling prophecy, a phenomenon in which Party’s beliefs and attitudes about Other make Party behave in ways that elicit behavior from Other that reinforces these beliefs.” (Emphasis in original)).

There exist law schools today whose pedagogical understanding continues to be backward-looking. These schools mistakenly equate remedial work done by academic support programs, which help at-risk students develop their abilities so that they can fully benefit from their courses, with legal writing curricula. As long as the term “writing” calls to mind “remedial” rather than “substantive,” law students at these schools will suffer. More forward-looking schools recognize that so-called legal writing courses are aimed at the higher levels of intellectual engagement to which the at-risk student aspires and that they are no more remedial in nature than any of the so-called doctrinal courses.

\textsuperscript{34}Phelps, supra n. 1, at 1094.

\textsuperscript{35}Id.

in” their classrooms and supported by the *MacCrate Report’s*\textsuperscript{37} “outside” recognition of the faults in the schism between practice and theory in legal education. Additional support for the emerging second paradigm came from growing bodies of research and scholarship, both from within and without the legal writing academy.\textsuperscript{38} The “outside” support proved critical to the triggering of pockets of mainstream support.

By 1997, the ten-year mark from Phelps’s initial publication and dissemination of the second paradigm’s forward-looking ideas on writing, the fruits of the movement were visible and, perhaps even more significant, at least one legal writing professional was already looking toward further advancement of the paradigm. An article published in 1997 by a cohort of teachers is illustrative of the secured foundation and broadening acceptance of the second paradigm.\textsuperscript{39} The stated purpose of the article was to “contribute to the collective knowledge on implementing process views of writing.”\textsuperscript{40} In the article the six full-time legal writing teachers in Villanova’s first-year writing program described how they “integrated a comprehensive process approach in a traditional writing program.”\textsuperscript{41} They explained the inspiration for their innovations,\textsuperscript{42} the structure of their traditional product-oriented program, and the techniques they chose to implement the process-oriented program. The year 1997 also marked the publication of the article introducing the seeds of the third paradigm. That was the year Carol Parker began writing about social context theories, and advocating “writing across the curriculum,”\textsuperscript{43} foreshadowing a continuing

\textsuperscript{37} *MacCrate Report*, supra n. 21.

\textsuperscript{38} See Smith, supra n. 36.


\textsuperscript{40} Id. at 719.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 723 (“We first decided to incorporate process techniques into Villanova’s Legal Writing Program during the 1994–1995 academic year. Our decision was sparked by our introduction to process-oriented techniques at the 1994 Legal Writing Institute Conference in Chicago.”). This is an example and recognition of how the writing academy changed the paradigm from within.

\textsuperscript{43} Carol McCrehan Parker, *Writing throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997). Parker suggested, “The social context approach is the most recent development in composition theory to influence law school writing programs. This approach seeks to “acknowledge the social contexts within which writing takes place and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts.” Under this approach, law students are viewed as entering a new
movement forward. Parker’s foreshadowing of a third paradigm, while the second secured its hold on legal education, further illustrates the point that writing professionals continue to explore possibilities, to plumb the cognitive depths of writing curricula, and as they do that, to move us inevitably out of the box. Over the next ten years the second paradigm firmly claimed its hold on law schools.

Now at the twenty-year mark since Phelps’s publication, ten since Parker’s article, process-oriented programs are dominant.\textsuperscript{44} And, significantly, we move steadily forward toward the possibility of a third paradigm.\textsuperscript{45} Emerging research on learning theory and the cognitive sciences is educating all teachers and reframing conceptions of the law school classroom. Momentum for the change comes from the classrooms of writing teachers,\textsuperscript{46} which have proven to be singularly fertile ground for the application of advanced thought about learning.\textsuperscript{47} Additional momentum comes from notice by senior members of the bench and bar\textsuperscript{48} of the unfortunate gap between the current “study of the law” and our expectations that graduating students will be ethical and intellectually competent. Thus, a movement has begun to examine the design of what it is that law schools teach and how they teach it.

\textsuperscript{44} Observing the ten-year passage of time between Phelps’s article about the process-oriented paradigm, the subsequent proliferation of scholarly articles on the topic, the dissemination of the MacCrate Report, its acceptance in the mainstream legal community, and finally the adoption of the paradigm by the majority of law schools, the future is promising.


\textsuperscript{46} See Mary S. Lawrence, \textit{The Legal Writing Institute: The Beginning: Extraordinary Vision, Extraordinary Accomplishment}, 11 Leg. Writing 213 (2006) (offering a narrative history of the Legal Writing Institute, which helped professionalize the careers of legal writing teachers).


\textsuperscript{48} See generally Edwards, supra n. 22.
The movement includes scholarly examination of current and possible future models of pedagogy and the factors implicated by the gap between theory and practice in legal education. As a result, interest in learning theory is increasingly becoming a main topic at conferences, and law schools are offering workshops in the cognitive sciences and learning theory for their faculties.49 This flurry of activity suggests that law school pedagogy is undergoing a paradigm shift generally.50 In turn, this attentiveness to the cognitive science of learning and related approaches to teaching is reframing the environment surrounding the significance and status of legal writing curricula.51 Of special interest here is the growing body of scholarly writing about the meaning-making depths of writing. Such articles set the foundation for examination of the ways that writing curricula can incorporate into the marriage of theory and practice with the goal of deepening the analytic abilities of law students and, thus, practicing lawyers. It follows that such attention to both writing as a meaning-making activity and the related benefits from the marriage of theory and practice will also reframe the perception of who we are, what we do, and how we fit into the classification “law professor” for those who find themselves outside of our box as well as for those of us on the inside.52 It is, thus, incumbent upon us, the designers of writing cur-

49 In August 2007, my institution, Vermont Law School offered a day-long workshop for faculty by G. Christian Jernstedt from the Department of Psychological and Brain Sciences at Dartmouth College. Dr. Jernstedt spoke about Perspectives on Learning, Teaching, and the Brain (S. Royalton, Vt., Aug. 16, 2007).


52 See Bandler & Grinder, supra n. 4, at 5–43, (discussing representational systems and the need to create change within existing systems by altering the representational system); see also Kadock, supra n. 10 (citing Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf 32 (John B. Carroll ed., M.I.T. Press 1956) [hereinafter Lan-
ricula, to continue to think outside of the box, to explore the ways in which theory and practice could, should, or do meet in our classrooms.

III. THE THIRD PARADIGM: OUTSIDE THE BOX

As current cognitive science and learning theory explain, Langdell’s linear view was mistaken. The proliferation of experiential programs at law schools is one indication of the broad acceptance of the need to directly introduce law students to the marriage of theory and practice. A growing understanding of the need to marry theory and practice in the law school classroom in addition to experiential opportunities is beginning to take shape. The third paradigm of legal writing curricula provides a significant vehicle through which law schools can introduce the marriage of theory and practice in the first year of law school. Informing students of the critical role that case synthesis and nuanced analysis play in the real-life problem solving in which lawyers engage is crucial. Since some law schools devote at least two semesters and a minimum of six credit hours to legal writing, curriculum and space in first-year schedules already exist within which to form the pedagogical bridge between theory and practice from the start of the students’ legal careers, well before students leave campus for experiential programs. Repairing the schism between writing and doctrine opens the box to limitless institutional, pedagogical, and cognitive possibilities. This is further incentive for law school administrators to rethink old paradigms.

*guage, Thought, and Reality*) (describing how language shapes the way humans conceive of and structure reality). Whorf suggests two hypotheses about the relationship between language and thought. The second is that “the structure of the language one habitually uses influences the manner in which one understands his environment. The picture . . . shifts . . . tongue to tongue.” Stuart Chase, Foreword, in *Language, Thought, and Reality*, supra n. 52, at vi. It may be that to fully change the paradigm of “legal writing” courses we must use different language to name ourselves and what we do. Perhaps “legal writing” must morph into a broader, more accurate term. “Legal writing” might have been an appropriate name in the earliest paradigm of these courses when the debate was over whether legal writing could even be taught. The name began to lose its precision as the paradigm shifted to recognize that writing courses taught not a mere skill but a thinking process. As we move forward to a new paradigm, it might carry not only the taint of its connection to negative aspects of rhetoric, but, unfortunately, a taint created by the term “legal writing” itself.
A. The Marriage of Doctrinal Subject Matter and Legal Writing Doctrine at Vermont Law School

The marriage of doctrine and writing derives from a basic premise about law school teaching that is germane to legal writing and doctrinal curricula alike. In all law school courses, the analytic challenge for the student and the pedagogical goal for the professor are the same: the need to find a framework that fosters increasingly more complex thought processes about a given substantive topic. This goal creates a paradox for our students because it requires them to engage in sophisticated, flexible thought about complex issues, but to break that complexity into clear components and to show the interconnections clearly. They must also learn to articulate and communicate those thoughts to an audience with a clarity that illuminates both the forest and the trees and delineates the connections in between. Thus, the learning that takes place in our classrooms is (or should be) as complex as that which occurs in the doctrinal classroom.

The workings of the Magic Eye\textsuperscript{53} is an apt metaphor for explaining that what we do in “writing courses” can and should be as intellectually challenging as what is done in “doctrinal” courses. For those readers unfamiliar with the Magic Eye books, they contain a series of pictures with hidden dimensions. The readily visible pictures include graphic designs and traditional photographic depictions. A diverging of the eyes, a letting go of automatic seeing, is necessary for the viewer to see the hidden image. Sometimes, the process of diverging the eyes can be easy, and at other times nearly impossible to achieve. Critical to the ability is a threshold knowledge that there is a deeper image.

The metaphor of the Magic Eye makes tangible the recursive nature of the critical thinking we expect our students to achieve. The required intellectual movement between the simple and the complex thought processes can be experienced before it is fully achieved by likening it to the process of refocusing the eyes to see the three-dimensional picture behind the flat picture on the pages of the Magic Eye. The student is like the person who is unfamiliar with the context of the Magic Eye book; who, without instruction and guidance, is able to see only the flat representation. Once introduced to the existence of a deeper vision, the student attempts to understand the process necessary to see the deeper depiction.

\textsuperscript{53} Magic Eye: A New Way of Looking at the World (N.E. Thing Enters. 1993).
This endeavor is at once both simple and complex. Like the person viewing the *Magic Eye* image, for the law students too, the simple and complex can fade back and forth into perception; one moment a glimpse of the deeper vision is possible; the next it disappears. Sometimes the person can intentionally bring the focus back, but at other times only the simple is visible. For the law student, as well as for the viewer of the *Magic Eye*, the goal is the attainment of the ability to move back and forth between the two intentionally: to see the broader and the narrower perspectives, and to understand the psychological and intellectual impediments to clear vision. For the law student, that broader perspective includes understanding of and respect for the significance of multiple perceptions both intellectually and morally.

The *Magic Eye* metaphor illuminates the fallacy of Langdell’s schism because mastery of the process described above is critical to both the intellectual pursuit of legal theory and the intellectual pursuit of legal practice. This ability to engage in the recursive nature of critical thinking is key to success as a law student, as a practitioner of law, and as a member of the legal community whose choices and communications help form and reform the law. It is particularly true for those of us who are their educators. Thus we need to explore and underscore the cognitive depths of the third paradigm of writing pedagogy, and the ways in which we guide our students through a selected doctrinal eye to experience the three-dimensional aspects of both legal writing and the substantive law about which they write. The doctrine-writing marriage model provides a fertile environment for engaging students in thinking critically about substantive legal topics in a cohesive and comprehensive manner. This model engages them in sophisticated, flexible intellectual thought about complex issues. The writing aspect requires students to develop sufficient understanding of the complex so that they can communicate the resolution clearly. It requires that they learn to communicate to an audience with a clarity that illuminates both the forest and the trees and delineates the connections in between. In this paradigm, writing becomes the vehicle through which students explore the doctrine; doctrine frames and determines the audience, purpose, and format of both written and oral communication.

---

54 We can neither “simply” educate our students in the law nor “simply” educate them in the practice of law, because how they learn, what they learn, and who they become will form and reform the law as they use what we have taught them. Law schools must view what we are about through the “magic eye.”
We currently do this at Vermont Law School in the second and third semesters of a three-semester writing program. The first-semester course, Legal Writing I, introduces students to electronic and hard copy research, and to beginning the analysis of what they have found. This two-credit course moves from discrete exercises to closed-, and then open-, universe predictive memos. It is taught by third-year law students called Dean’s Fellows. The course is graded Pass/Fail. The design and pedagogy of this course fit a traditional model. While the assignments in the next two semesters fit the traditional model, the substantive content and pedagogical designs illustrate a third-paradigm approach that marries theory and practice. Legal Writing II begins with a final predictive memo project before moving on to persuasive writing. Each section of this three-credit course is set in a distinct area of the law, which permits students to choose an area of doctrinal interest and learn about substance while honing their research, analysis, and writing skills. Our third course in the sequence, Appellate Advocacy, utilizes the complex legal issues presented by pending United States Supreme Court cases. This three-credit course is another example of a mixed-focus course aimed at developing critical thinking utilizing a theory-practice marriage model.55

Three course descriptions detailing different and exciting ways of combining theory and practice help to illustrate the enhanced learning and educational possibilities available to our students. First is the description of my Legal Writing II course, Alternative Dispute Resolution. Using Critical Thinking and Mindfulness to Learn Related Aspects of Process in LRW and Alternative Dispute Resolution in Real World Situations:

The marriage of writing and alternative dispute resolution creates a fertile environment for students to experience the significance of process in client representation, dispute resolution, and legal communication. The course is first and foremost a course that introduces the critical need for clarity, accuracy, relevance, and depth along with other characteristics of critical thinking in

55 Five factors set the stage for innovation in our program: First, the faculty undertook a curriculum review. Second, there was a desire to offer students a doctrinal elective by the second semester of their first year. Third, Tracy Bach, one of the writing professors, surveyed best national practices and reported to the curriculum committee. Fourth, Vermont Law School had eliminated caps, and all writing professors were now on long-term contracts after going through a second national search and a thorough tenure-like vetting process. Finally, we were all experienced teachers and had developed doctrinal specialties and areas of scholarship.
both written and oral communication. At the same time that students learn the importance of critical reading and critical writing in the practice of law, the course introduces students to the law governing various methods of ADR; to the examination of the relationship between the courts and methods of ADR in the forming of law; [and] to the critical role of the lawyer as it pertains to the strategy of the selection of the vehicle for resolution. Students are expected to critique not only their work product but [also] the process through which the product evolves. The students work with two case files. The first introduces the strategic differences between ADR methodologies and litigation within the context of an easement dispute between neighbors. Students write research memos [and] client letters, and then use their written products to engage in negotiation. Students then respond to the lawyer’s Motion for Summary Judgment. They take a field trip to the property to get the real-world perception of the problem. The second case expands on the use of ADR methodologies to resolve disputes and then introduces the role of the courts in the enforcement of arbitration clauses within a Divorce Settlement Agreement. This is an issue of first impression [that] requires sophisticated case synthesis and policy analysis. Students write an appellate brief and give oral argument.56

Second is Professor Anthony Renzo’s description of his Legal Writing II course, Civil Rights Law. Using Legal Process Immersion to Teach Students the Indivisibility of Legal Analysis and Legal Writing:

It is not enough to intellectually grasp the concept that legal writing and legal analysis are inextricably linked. Students must discover and experience for themselves that legal writing is an indispensable and creative component of understanding and analyzing legal doctrine. While legal writing ultimately serves to communicate the clarity of legal analysis and comprehension, the writing process itself adds a holistic logic and [a] depth to the analysis that could not otherwise be achieved. In short, writing is a mode of thinking that both communicates and generates knowledge.

To implement this “writing as process” methodology, I have developed a course that uses case simulations constructed around a particular doctrinal area; in this case, civil rights law. By having the student work through the various stages of spe-

56 A copy of this course description is on file with the Author.
specific legal disputes involving civil rights law, the student is required to write about those disputes and the law governing them from various perspectives; e.g., client correspondence, internal office memos, pleadings, trial motion briefs, and judicial opinions. By immersing students in a multi-stage legal writing process that cannot be managed without an in-depth understanding of legal doctrine, students come to understand legal writing as indispensable to the analysis itself. This, of course, requires the teacher to engage in a critical dialogue with each student that shows the student how the process of writing and rewriting is necessary both to construct and to communicate clear and logical ideas about what the law is and how it should be applied. With this approach, students learn that legal analysis is more than the search for a single, correct interpretation of legal rules and principles. Instead, the student is faced with a multifaceted process of thinking and writing about the legal dispute at different times for different purposes. Legal process immersion forces students to find new connections and to refine their analysis as they tackle the various demands that must be met in order to competently represent the client or to resolve the dispute as a neutral decision-maker.57

Finally, I include Professor Tracy Bach’s description of her Legal Writing II course, Environmental Health Law. Using Problem-Based Service Learning (PBSL) to Hone LRW Skills While Solving Real World Problems:

Problem-based service learning (PBSL) makes an explicit connection between law school and legal practice while requiring students to fuse substantive knowledge and legal skills to solve a client’s problem. This teaching method takes a piece (or more) of a planned curriculum and teaches it through a service project. A PBSL project is structured by the professor to meet both curricular goals and the needs of a non-profit organization. Thus at the same time students learn the content and skills at the heart of a given course, they also learn the subject’s impact on the world outside the classroom, especially as it serves those most in need of assistance. PBSL has been well-integrated into high school and college curricula. It is now making its way slowly into professional education, notably in medicine and business. This teaching strategy has a natural hook in the law school curriculum, given our problem-based approach to learning. To date, the legal clinic has been the locus for learning in the service of others. Yet law school classrooms could bring real-
life legal problem solving into the curriculum, most easily in classes like Legal Research and Writing (LRW). Two years ago, as I planned a new 1L writing course set in environmental health law, it occurred to me that my work with a local nonprofit public health advocacy group dovetailed well with my developing curriculum. Rather than develop a simulation based on my real-life experience with this group, why not hand part of this project over to my first-year students, under my supervision? In so doing, students can achieve some balance in the content-rich but service-poor law school curriculum by placing more of their learning in the context of service to others. Doing so meets a basic human need to connect ideas with their impact on others. It also enables lawyers in training to experience the satisfaction derived from pro bono work.58

B. Observations: Marriage of Doctrine and Writing

Over the years as I have endeavored to inspire my students to be expert learners, I have learned to be a better teacher from the exercise of self-awareness of my teaching. However, the enhanced learning that I have witnessed in my Legal Writing II: Alternative Dispute Resolution course, at least initially, was as much a product of serendipity as it was of any new approach to teaching. In the beginning I thought I was using the same pedagogy as I had before, a combination of the process and social-contextual approaches to composition theory. It was in retrospect that I realized that unnamed dynamics were at work that enhanced the learning of both alternative dispute resolution and legal analysis and writing topics. I discovered that for the doctrinal combination of alternative dispute resolution and writing, the enhancement derived from a substantive focus and critical engagement with process. Alternative Dispute Resolution is all about the significance of choice of process. Thus, the focus on process, combined with communication and substance, forced my students to experience three aspects of writing. And because the process of writing was the vehicle for learning both the law and the practical aspects of alternative dispute resolution, the learning was enhanced.

The kind of enhanced learning a student experiences often varies with the relationship between the doctrinal topic and writing. While the ability provided by ADR opened a unique perspec-
tive on the complexities of process to trigger enhanced learning for my students, one of my colleagues whose doctrinal topic is Environmental Health Law is able to use related service-based writing to engage her students. Because the writing faculty has been able to draw upon their areas of doctrinal expertise to design their courses, they are able to identify a unique window through which to engage students in the particular doctrinal topic, which connects to the teaching of effective communication about that topic. Thus interactions between various subjects and writing projects open the door to unlimited curriculum design opportunities and new ways of incorporating doctrine and skills.

A presentation by Steven Schwinn,\textsuperscript{59} entitled \textit{Theory and Models of Actual Legal Work in the First Year}, illustrates yet another way to move toward a third paradigm. Schwinn described a six-credit course that he designed and implemented for first-year students in civil procedure that integrated writing and other skills. He discussed how the design of his course tapped into the moral as well as the cognitive development of his students. The written work allowed the students to see themselves as active agents in the development of law. Schwinn suggested that traditional doctrinal courses, like the traditional writing course (in the first paradigm), are rooted in a developmental pedagogy that is not applicable to the learning needs of most law students. He suggested further that an experience-based approach—marrying legal doctrine and writing—better addresses the needs of students.

Schwinn explained and applied the learning models of Lawrence Kohlberg, William Perry, Joseph Williams, and Jack Mazirow to illustrate how traditional course design and pedagogy failed to meet the needs of his students. He focused primarily on three of Perry’s stages of moral and cognitive development:\textsuperscript{60} dual-

\textsuperscript{59} Steven D. Schwinn, Presentation, \textit{Theory and Models of Actual Legal Work in the First Year} (Vancouver, B.C., June 12, 2006) (copy of presentation notes on file with the Author). Schwinn’s ideas are relevant to this Article through two related connectors. The first and most significant is the effect of his presentation on my thoughts. The second relates to the third paradigm. Schwinn prefaced his talk by discussing his movement from legal writing teacher to doctrinal teacher. His move had nothing to do with any dislike of teaching legal writing. In fact, as his talk explained, he continues to teach writing but in a different framework that, at the time, would not have been possible at his law school if he were “merely” a legal writing teacher. He also suggested that he believed his students took him more seriously as a doctrinal professor because of the stigma attached to the teaching of legal writing.

\textsuperscript{60} These stages are discussed in William G. Perry, Jr., \textit{Forms of Ethical and Intellectual Development in the College Years: A Scheme} (Holt, Rinehart & Winston 1970).
ism,61 relativism,62 and reflective thinking,63 which he found resonated most accurately with his observations. Schwinn explained that he had observed that students were not necessarily coming to law school as dualistic thinkers, but rather that the traditional curriculum was turning them into dualistic thinkers, creating the idea that there were definite right and wrong answers. He also found that many students felt alienated from law school. They were not quite getting it. Because they were not engaged in real legal work, they “checked moral commitments at the door.” They were unable to connect what had brought them to law school with what they were learning in law school.

Schwinn believed that many writing courses were complicit in putting students into the dualistic stage. He suggested that the hypothetical simulations resulted in students taking a scavenger-hunt approach to research, looking for specific answers and that this approach had the effect of causing students to work backwards into the thought process of the activity. He suggested that such traditional approaches were homogenizing students. He wanted to engage his students on multiple planes of thought and to help them advance to Perry’s reflective stage. Schwinn’s ideas suggest that the “hidden dimensions”64 of learning are connected to the re-engagement of students in both cognitive and moral development, and they are revealed when a course is designed around both doctrine and the reflective and meaning-making process of writing, particularly when placed in real-world experiences.

Study within the cognitive sciences and learning theory has brought mainstream attention to the significant place of legal writing in the law school curriculum. “There is a virtual revolution going on within the cognitive sciences.”65 Growing bodies of accepted knowledge about the workings of the mind make clear that the brain does not operate according to the schism, created by Lang-

61 Schwinn described the student in Perry’s dualistic stage as seeing in black and white, as not interested in nuanced arguments, and as believing that the professor has the right answer and wants it. Schwinn, supra n. 59.
62 Schwinn described the student in Perry’s relativism stage as able to understand the contextual nature of knowledge. In every aspect of law “it depends” on the context. Id.
63 Schwinn described the student in Perry’s reflective stage as able to recognize the complexity of relativism yet is still able to come to his or her own moral position. Id.
64 See generally Edward T. Hall, The Hidden Dimension (Doubleday 1966). I borrow the term from Hall. Hall was the first to refer to spatial implications as the “hidden dimensions” in man’s interactions. In this Article, I suggest that the integrated classroom creates an environment and interaction that tap into “hidden dimensions” of learning.
65 Winter, supra n. 2, at xi.
dell, between practice and theory. Recognition of the relationship between experience, memory, emotion, and learning is significant for those designing law school curricula.

The more we learn about the cognitive sciences, the more we understand that teaching is so much more than imparting knowledge. Teaching involves showing our students how to absorb and integrate new knowledge and how to apply that knowledge with critical thought. One could say that the marriage creates a double-layered, “magic eye” experience.

In order to fully integrate knowledge of learning theory and cognitive development into course design and pedagogy that will succeed, teachers must understand the goals we need to set for our students. Michael Hunter Schwartz recently published a timely book entitled Expert Learning for Law Students. Citing two leading authors in expert learning, Schwartz provides a concise description of expert learners. They are aware of the knowledge and skills they possess, or are lacking, and use appropriate strategies to actively implement or acquire them. This type of learner is self-directed and goal oriented, purposefully seeking out needed information, incorporating and applying a variety of strategic behaviors to optimize academic performance. . . . By using the knowledge they have gained of themselves as learners, of task requirements, and of specific strategy use, they can deliberately select, control, and monitor strategies to achieve desired goals and objectives. By being consciously aware of themselves as problem solvers and by monitoring and controlling their thought processes, these

---

67 I also have experienced these hidden dimensions in my Appellate Advocacy course, in which students learn the law related to a case currently pending before the United States Supreme Court, write appellate briefs, and present oral argument. Many students also take the opportunity to attend the actual arguments of the case at the Court. Our semester culminates in a panel discussion in which each of the professors who teach the course (each selecting a different case) invites an attorney who worked on the case and preferably argued or will argue the case before the Court. Students get to hear from the actual attorneys and to discuss the case, their briefs, as well as unknown background material. It is an engaging real-world experience for students, and most agree that it is their capstone law school experience.
68 Schwartz, supra n. 66.
learners are able to perform at a more expert level, regardless of the amount of specific domain knowledge possessed.70

IV. CONCLUSION

Ironically, noble things resulted from legal writing being segregated from the rest of the law school curriculum. Stuck within the box, we became expert teachers and, from our teaching, we became expert learners. We applied our learning about composition theory to spark the revolution from the product paradigm to the process paradigm, and we have constructed the foundations of the third paradigm. We were able to accomplish so much, perhaps, because we were sidelined and only viewed occasionally from the corner of the administration’s eye. It is time, however, to step forward into the mainstream. As Terry Phelps has said, we have spent long enough as Ginger Rogers, executing the same steps as Fred Astaire but doing it backwards in high heels. It is time we take authority and assume our rightful place in law schools. The law is language. We teach our students how to use the language of the law that is at the heart of the practice and forming—and reforming—of law.

70 Schwartz, supra n. 66, at 4 (citing Ertmer & Newby, supra n. 69, at 5–6).
DISMANTLING THE “OTHER”: UNDERSTANDING THE NATURE AND MALLEABILITY OF GROUPS IN THE LEGAL WRITING PROFESSORATE’S QUEST FOR EQUALITY

Mitchell Nathanson*

I. INTRODUCTION

Walk through a law school building, or anywhere else in the world for that matter, and take notice of the various groupings of people. Almost anywhere one looks can be seen evidence of the ways we as humans choose to group ourselves: flyers promoting an upcoming program sponsored by the Family Law Society, bulletin boards announcing the newest members of the Moot Court team, a collection of students huddled in front of a television in the student lounge watching the horrific images of their home town of New Orleans in the wake of Hurricane Katrina. Whether the association is formal or informal, we believe, on a rational, intellectual level, that we have chosen our compatriots wisely and intelligently. Likewise, we believe that we have excluded certain individuals from our groups for specific, identifiable reasons, and, without question, for good cause. Because we are secure in this understanding of how we relate socially with those we come in contact with, we are firm in our belief that our choices are not only defensible but correct. It is this security that allows us to sleep peacefully at night.

The groupings of individuals on any given law school faculty are no exception. In every law school in America, numerous groups among various members of the faculty exist: tenured professors, tenure-track professors, full professors, associate professors, clinical professors, legal writing professors, torts professors, contracts professors, male professors, female professors, Caucasian professors, African American professors, Asian professors, Jewish pro-

* © 2007, Mitchell Nathanson. All rights reserved. Associate Professor of Legal Writing, Villanova University School of Law. Special thanks to Dean Diane Edelman of Villanova and Kristen Robbins Triscione of Georgetown for their thoughtful comments on earlier drafts of this Article.
fessors, right-handed professors, left-handed professors, and so on. Some of these groups overlap (female professors and associate professors, for example); some do not (male professors and female professors); some we consider nonsensical (left-handed professors) and some we consider vitally important (tenured professors). Those we consider nonsensical become irrelevant to us and, as such, invisible. Although the differences continue to exist, we choose not to recognize them as defining characteristics.

Those differences we consider important, however, become easily apparent, and the implications of membership in that group or outside of it become vital, in some cases, to our financial, emotional, and personal well-being. The legal writing professorate knows these implications all too well: by being considered something other (or less) than tenured or tenure-track doctrinal professors in the overwhelming majority of American law schools, it receives significantly smaller salaries, less job security, and a muted voice in faculty governance. In short, the legal writing professorate has suffered greatly as a direct result of the importance placed upon the differences between the legal writing faculty and its doctrinal counterpart.

This Article contends that not only does this differentiation not have to be the case but that the very classification of professorial groupings is arbitrary, artificial and, surprisingly, incredibly malleable. As this Article will show, contrary to our assumptions, because groupings typically take place in our unconscious minds, there is no rational, intellectually defensible reason why legal writing professors are grouped together and apart from the rest of the law school faculty. Rather, the differences between these two groups are identified after the fact—after the classification has been made—and highlighted in our rational explanations of such groupings as a means of justifying why our unconscious minds separated them the way they did. By contrast, the differences that nevertheless exist among members of the tenured and tenure-track professorate (torts professors versus contracts professors, etc.) are ignored because our unconscious minds do not process these differences as significant.

This Article will first explore the relevant social and physical science behind the operation of our unconscious minds in order to better understand why we group individuals the way we do. Thereafter, drawing from this understanding of how groups are formed, this Article will discuss important symbolic alterations that inevitably alter the makeup of groups so as to transform the
members of an out-group into members of an in-group. Contrary to our rational beliefs, groups are not permanent, unalterable fixtures; rather, they are best understood as a description of the relationship between two sets of individuals. Change the relationship and one can change the groupings rather naturally and easily.

This Article will show that (1) the granting of voting rights to the legal writing professorate and (2) the integration of legal writing offices among all faculty offices are such symbolic alterations on law school faculties that are crucial first steps in dismantling the legal writing professorate’s perception as the “other”—the perception, on behalf of the doctrinal faculty, of the legal writing faculty as an undesirable out-group, unworthy of equal status, salary parity, and respect. Contrary to much of the scholarship on the subject of equality for the legal writing professorate, this Article will conclude that it is nigh impossible for a doctrinal faculty “group” to both recognize the legal writing “group” as such and then treat it equitably. Unfortunately, and as empirical psychological research on this subject has demonstrated, the denigration of out-group members is a natural, unavoidable, human tendency. As such, it is asking too much of anyone to attempt to overcome his or her unconscious inclination to do so in the name of fairness to the legal writing faculty.

This Article will demonstrate that the only way for the doctrinal professorate to treat its legal writing counterpart equally is to convince it that a difference does not exist; that there is no “other,” that we are all part of the same group. Although the ability to vote and the existence of integrated offices will certainly not change the status of the legal writing professorate overnight (indeed, as this Article will discuss, many legal writing departments have one or both of these yet still feel stigmatized as the “other”), such advances provide the foundation for greater change—change that cannot occur until the perception of the legal writing faculty as an out-group begins to dissipate. Once this divide has been breached, integration and equality on a more substantial level can begin to take place. Whether it does, however, depends on continued vigilance and foresight. Nevertheless, it will be the small but attainable steps discussed in this Article that provide the tools for more substantial change later on and which make the goal of a fully integrated legal writing faculty a realistic possibility in the future.
II. GROUPING AS AN UNCONSCIOUS ACTIVITY

Contrary to what our rational brains tell us, we very often group individuals unconsciously and then justify our groupings after the fact. Thus, in a very real sense, the determination of “us” versus “them” is a subconscious feeling rather than the result of a rationally deduced observation. Without our even being aware of it, our brains formulate mental codes that lead to emotional responses (again, outside of our control) based upon the meaning of the indicators. Although this loss of control over our actions, at first glance, may make us appear more like animals and less like the exalted human species we like to consider ourselves, it is uniquely human to group others in this way. Animals, by contrast, search for familiar smells, sounds, and sights—objective, measurable things—in order to determine who belongs to their group and who is an outsider. Humans, by contrast, look for signs and then process them unconsciously. What’s more, we do this constantly; testing each other to see if those who come in contact with us belong with us or are better left on the outside of our circle. Without our even knowing it, our brains never stop working, constantly adding up all of the cues and producing the feelings that ultimately guide our behaviors toward other people.

1 See Jennifer L. Eberhardt & Susan T. Fiske, Motivating Individuals to Change: What Is a Target to Do? in Stereotypes & Stereotyping 369, 387 (C. Neil Macrae et al. eds., Guilford Press 1996) (noting that, according to social identity theory, initial categorization is the “default option” in our brains. It is the first thing we do. Thereafter, once the categorization is made, we seek to justify it rationally.).
4 See id. at 214–215 (analyzing social activity of the chimpanzee).
5 See id.
6 See id.
7 This emerging view of how the human brain operates is at odds with hundreds of years of philosophical thought on the very nature of human existence. Philosophers as far back as Plato opined that it is rational thought that separates man from the animals that roam the jungles. See Jonathan Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 108 Psychol. Rev. 814, 815 (2001). From this perspective, humans act as rational judges, weighing the evidence on both sides of an issue before issuing their “rulings,” which then guide their actions. Id. Without a rational justification, no action could then be taken. Id. Stoic philosophers likewise frowned upon the
What emerges from this process is what is commonly referred to as “stereotype.” Although, when first used in this context, the term implied “rigidity, permanence, and lack of variability from application to application,” more recent science has determined that these generalizations are, for the most part, incorrect.

Instead, stereotypes are something much less sinister than what many researchers initially thought. Basically, they are simply the categories we create that bring coherence and order to our social environment. Without them, our brains would quickly become overloaded with all the stimuli careening toward them and would be unable to make sense of our environment.

Thus, although we may believe we “group” or “stereotype” based upon rational, objective criteria, psychological studies have shown that in fact, these groupings are made subconsciously, without our even realizing it. Later, once we have created the stereotype, we then seek to rationalize it through what we believe to be “objective,” solid information. In reality, we merely justify our unconscious feelings to our rational selves.

For the legal writing professorate, this information is important because it indicates that the historical means by which our unconscious mind, taking “an even dimmer view of the emotions, seeing them as conceptual errors.” Similarly, Medieval Christian philosophers likewise linked emotions to “desire and hence to sin.” David Hume attempted to rebut these approaches, arguing that people have a built-in moral sense and concluding that moral judgments are derived from sentiment, not reason, but he found his philosophy not well-received and forcefully rebutted by others such as Kant in his “rationalist ethical theory.” However, psychological and social scientists are now starting to line up behind Hume, to produce data and analysis that demonstrates that it is our unconscious emotions that rule our behaviors, operating stealthily, computing and analyzing information, and producing the feelings that we act upon for reasons unknown to us. Id.


10 See Henri Tajfel, Experiments in Intergroup Discrimination, 223 Sci. Am. 96, 98 (1970) (analyzing “the need to bring some kind of order into our ‘social construction of reality’”); see also Bargh & Chartrand, supra n. 2, at 465–466 (surveying an array of literature including studies that demonstrate “stereotypes of social groups become activated automatically on the mere perception of the distinguishing features of a group member”).

11 See Bargh & Chartrand, supra n. 2, at 465–466.

12 See David Berreby, All About Us & Them 5, http://www.davidberreby.com/files/Faq3-17.05.pdf (accessed Aug. 4, 2007). As Berreby observes, in many cases, our brains work the opposite of how we would expect. “First the category, second, the evidence.” Id.
has sought to achieve inclusion into the grouping of “real” professors in the legal academy is based upon a rational argumentation that does not explicitly focus on the psychological bases for how groups operate and how they open themselves up to some, while closing themselves off to others. In this regard, much scholarship has focused on data collection, together with a rational analysis and argument regarding the myriad reasons why the legal writing community deserves to sit “at the grown-up’s table” within the legal academy.\footnote{See e.g. Jo Anne Durako, Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal, 73 UMKC L. Rev. 253 (2004) [hereinafter Dismantling Hierarchies]; Jo Anne Durako, Second Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Leg. Educ. 562 (2000) [hereinafter Second Class Citizens]; Susan P. Liemer & Jan M. Levine, Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later), 9 Scribes J. Leg. Writing 113, 122 (2003–2004) (“Information about faculty voting privileges was obtained from 89% of the [selected] schools. At 61% of them, the director may vote on all matters or on all matters except promotion and tenure. At 37% of the schools reporting, all the legal-writing professors enjoy such broad voting privileges. But at almost half the schools, 49%, the professors cannot vote at all. Finally, at 21% of the schools reporting, neither the director nor the other legal-writing professors can vote. At these schools, faculty decision-making and self-governance occurs without a vote from any legal-writing professor. The situation hits bottom at [three] schools, where the full-time writing professors are not even permitted to attend faculty meetings. Presumably, at the thirty-five schools that rely primarily on adjuncts to teach legal writing, the adjuncts also do not attend faculty meetings.”); David T. Ritchie, Who Is on the Outside Looking in, and What Do They See?: Metaphors of Exclusion in Legal Education, 58 Mercer L. Rev. 991 (2007).}

This analysis, in large part, appeals to the conscious part of the brain, where the psychological research shows the significant activity that takes place with regard to groupings is the after-the-fact justification of them. As such, the arguments have inherent limitations, because the psychological research demonstrates that in order to change the grouping, one has to appeal to the part of the brain where groups are made—the unconscious part. Thus, while such data and rational arguments directed to doctrinal professors may lead to intellectual acceptance of the logic contained within the rational arguments, the legal writing professorate remains an out-group in those cases where the doctrinal faculty still unconsciously “feel” as if the legal writing professorate is somehow different from them.\footnote{See e.g. Berrey, supra n. 3. As Berrey observed, we create the stereotype and then search for the justification after the fact. Id. As the remainder of this Article discusses, oftentimes, we create the stereotype and then search for the justification after the fact.} The door will remain closed, and, what’s more, there is really nothing these doctrinal professors can do about it. They have no rational control over the grouping. Appealing to their rational minds may begin the process toward change,
but the feeling of inclusion will not necessarily be affected, unless their rational minds allow for environmental changes to the status quo.\textsuperscript{15}

More problematic, however, is the potential for the rational argument to not merely fail in its quest but to make matters worse by highlighting the presence of an out-group, identifying it as such, and opening the door for even greater ostracization by the in-group. Arguments that call upon the legal academy to recognize and respect the legal writing community are potentially dangerous because studies have shown that first recognizing and then treating an out-group fairly is an unnatural sequence of activities.\textsuperscript{16} Rather, it is the natural state of affairs for people, once identified with members of their group, to denigrate and discriminate against those in other groups.\textsuperscript{17} Because the formation of groups implies a competitive relationship between in-groups and out-groups, whenever we are in a situation in which some form of inter-group categorization appears relevant, we are likely to act in a manner that discriminates against the out-group and favors the in-group.\textsuperscript{18} As a result, by highlighting the presence of the legal

\textsuperscript{15}See Eberhardt & Fiske, supra n. 1, at 401. As Eberhardt & Fiske note, alerting people to their “should-would discrepancies” (what they \textit{are} doing as opposed to what they \textit{should} be doing) can be dangerous, because “[t]hose who think of themselves as egalitarian may feel quite betrayed and insulted by targets who directly address these discrepancies, particularly if the target has relatively little power.” \textit{Id}.

\textsuperscript{16}See Taijfel, \textit{supra} n. 10, at 96 (recognizing the “intricate interdependence of social and psychological causation” where “a dialectical relation [exists] between the objective and the subjective determinants of intergroup attitudes and behavior . . . reinforcing each other in a relentless spiral”).

\textsuperscript{17}Id.; \textit{see also} Bargh & Chartrand, \textit{supra} n. 2, at 470 (“One tactic that people often use to restore self-esteem is to denigrate others, especially groups of low power and status within society.”); Eberhardt & Fiske, \textit{supra} n. 1, at 383 (“[I]ntergroup discrimination is most likely in situations that accentuate group distinction and thus encourage social comparisons between groups.”).

\textsuperscript{18}Id.; \textit{see} Brian Lickel et al., \textit{Varieties of Groups and the Perception of Group Entitativity}, 78 J. Personality & Soc. Psychol. 223, 242 (2000) (observing “a competitive context, in which groups are in conflict with one another, may increase perceptions of entativity”). This observation is true even if a particular member of an in-group is not involved in any real or even imagined conflict with the out-group. As for why this response occurs, studies have shown that people have a tendency to evaluate themselves positively. Therefore, if they then define themselves in terms of a particular group membership, they are likely to evaluate the group positively as well. Because groups are evaluated in relation to other groups, this positive self-image \textit{requires} that other groups be evaluated negatively. See Eberhardt & Fiske, \textit{supra} n. 1, at 283–285 (surveying scholarly contributions to “Social Identity Theory”); Taijfel, \textit{supra} n. 10, at 98–102 (illustrating and analyzing data collected on ingroup and outgroup behavior). As Taijfel noted, “Whenever we are confronted with a situation to which some form of intergroup categorization appears directly relevant, we are likely to act in a manner that discriminates against the outgroup and favors the ingroup.” Taijfel, \textit{supra} n. 10, at 98–99; \textit{see also} Lickel et al., \textit{supra} n. 18, at 226 (outlining research goals, including
writing faculty as an out-group, the legal writing professorate is inviting discrimination. Therefore, it is at best irrelevant, and at worst damaging, to argue that doctrinal faculty members should not engage in behavior that is deleterious to the legal writing faculty. The fact that not only do they do so but that it is, of all things, a natural behavior should cause the members of the out-group to choose a different tactic if they seek inclusion within this group.¹⁹

Up to this point, much of the story of groups has been one of bad news: they are formed out of our control; they naturally discriminate against others; and rational arguments, regardless of their logic and appeal, are powerless to stop their discriminatory effects. However, there is good news as well. Due to the very nature of groups themselves, they are easily manipulated. As such, it is quite possible to make undesirable groupings disappear and replace them with other, more desirable ones. For the legal writing professorate, this insight is crucial if the goal of integration within the legal academy is to be achieved. The key is to understand how they are formed: how the unconscious brain goes about its business of coding and processing the information it is receiving, spitting out the groups that do not “belong.” The key is in understanding why we somehow “feel” whenever we see a collection of people, an irrational feeling that we then seek to rationalize after the fact. Once this process is better understood, the manipulation of this process becomes a rather straightforward, and surprisingly effective, affair.

With regard to the malleability of groups, in many instances groups remain the same for centuries: Catholics, Protestants, Americans, Germans, etc.²⁰ However, they can also change rather

¹⁹ This is not to suggest that members of an in-group will never feel the urge to act fairly toward outsiders. In fact, “fairness” is another powerful group norm and one that is acted upon frequently. However, “fairness” takes a backseat to “groupness” whenever the two come into conflict as the urge to conform to one’s group is more powerful than any other. By compelling the doctrinal professorate to first recognize their “groupness” and then to ask it to nevertheless act upon its “fairness” urge is to pit these two powerful urges against each other and to expect the impossible. Tajfel, supra n. 10, at 102. “Unfortunately, it is only too easy to think of examples in real life where fairness would go out the window, since groupness is often based on criteria more weighty. . . . Socialization into “groupness” is powerful and unavoidable . . . .” Id.; see also Lickel et al., supra n. 18, at 226.

²⁰ See Berreby, supra n. 3, at 167.
quickly as a result of experience. Groups change, merge, disappear, and materialize all the time. In the legal academy, this malleability can most easily be seen through the continual process of the resegregation of female faculty members. Because our unconscious “feelings” about gender are strong (as gender is an obvious and easily identifiable characteristic), our perceptions of groups can change when women enter what was previously a predominantly male group, causing new groups to emerge. For decades, because most doctrinal faculties were overwhelmingly male, every doctrinal course was considered equally prestigious. However, with the emergence of women into the legal academy (the decade of the 1990s saw a 45.6% increase in the overall population of female law professors), new groupings of courses emerged, with certain courses such as Contracts, Conflicts of Law, and Constitutional Law being seen as “male” courses and others, such as Family Law, Juvenile Law, Poverty Law, and, of course, Legal Writing, being seen as “female.” Some courses, such as Health Law, were once thought of as “male” but are increasingly being thought of as “female.” Consequently, given the larger numbers of women now teaching these “female” courses, they are perceived as less desirable than before. Family Law professors, once considered part of a desired in-group, with the differences between them and their Constitutional Law brethren once invisible and unnoticed, have since become identified and set apart from them. Suddenly, what was invisible has become apparent. Nothing objective about the course has changed over the years. What has changed is the composition of the unconscious groupings of courses due solely to the emergence of female faculty members. To many male faculty members, Family Law—once a course that “felt” part of them, now “feels” like something else entirely. Just as it naturally felt a part of their world beforehand, it now just as naturally feels like part of something else, something less desirable. The course catalog may remain the same for decades, but this does not mean that the

---

21 Schneider, supra n. 9, at 425 (noting that categories with strong visual cues such as race, gender, and age “seem more ‘natural’ as opposed to artifactual, and lead to ‘more potent categorization’”).

22 Marjorie Kornhauser, Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender among Law Professors, 73 UMKC L. Rev. 293, 308 (2004). This change reflects a move from 21.7% to 31.8% of overall faculties. Id. at 348 tbl. 5.

23 Id. at 309.

24 Id. at 317.
groupings of the courses contained within necessarily will remain similarly unchanged.

The above example shows that nothing about groups is inherently permanent. They are constantly shifting, changing, adapting to our perceptions of the nature of the people who comprise them. When people are arranged to seem similar, they satisfy the “mind’s syntax for a thing made of people.”25 This prompts us to see the group as a single being. However, if the people are arranged differently, or made to appear to align differently, our mind’s perception of the group changes accordingly.26 With regard to the legal writing community’s current status as a perceived out-group on most law faculties, it follows that this perception is very likely caused by the “feeling” that the legal writing faculty is likewise perceived as a distinct entity made of people. However, if this perception can be changed, the grouping will change as well.

Currently, on most faculties, the legal writing professors are perceived as somehow different from the greater faculty. Legal writing itself is considered different from doctrinal courses, from the way it is taught to the skills it teaches,27 and this perception affects how everything in conjunction with it is perceived on an unconscious level. Because of these perceived differences, the members of the legal writing faculty are seen as having a distinct, “common fate,” a fate different from that of the rest of the faculty. As a result, in the minds of these faculty members, an unconscious trigger is tripped, activating the human kind code mechanism where what is enclosed within (legal writing professors) is thereafter perceived as a distinct whole. This unconscious coding leads to what is referred to as “the looping effect” of human kinds where, once people are convinced that a category of people exists, they then begin to act on that belief, treating it as though it were real, giving teeth to this artificially created group.28 None of these observations are meant to suggest that the differences themselves between legal writing courses and doctrinal courses are artificial.

25 Berreby, supra n. 3, at 132; see also Schneider, supra n. 9, at 442 (“Perceived homogeneity of groups may encourage applications of stereotypes to group members.”).
26 See generally Berreby, supra n. 3.
27 Debra Moss Curtis, You’ve Got Rhythm: Curriculum Planning and Teaching Rhythm at Work in the Legal Writing Classroom, 21 Touro L. Rev. 465, 482–483 (2005) (discussing the various ways and reasons that teaching styles in legal writing classrooms differ from “substantive” courses).
28 See Berreby, supra n. 3, at 57–58. “Looping effects go on in perpetuity. Once a human kind is defined, the people in it even change how they think and act, to better fit the definition.” Id. at 58.
Rather, the differences are real.\textsuperscript{29} The point, however, is that differences exist between all types of courses taught within a given law school. It is just that once the human kind coding process is triggered, the differences are perceived and then acted upon.\textsuperscript{30} If it is not, then they are ignored. Hence, the inherent and very real differences that exist between a Torts class and a Contracts class go unnoticed.

Because of the looping effect, the artificiality of any group cannot be brushed aside simply because it is a figment of our unconscious imaginations. Once people start to act on their feelings of “otherness” towards an out-group, very real consequences emerge. The legal writing community knows such consequences all too well. Perhaps most obviously, classification as an out-group has hurt many legal writing professors in terms of salary parity, as deans in many schools seek to justify their discriminatory treatment of this out-group through lesser salaries than they would offer to other faculty members.\textsuperscript{31} Although many deans cite “supply and demand” as a justification for such lower salaries,\textsuperscript{32} they ignore the reality that these very same market factors would very well exist with available tenure-track positions as well, should all faculty positions be made available at equivalent salaries. In all likelihood, the grouping, not the market, drives these deans to treat their legal writing faculty members differently than the rest of their faculty. Accordingly, it is crucial for the legal writing professorate to appreciate the ramifications of unconscious, artificial grouping and make conscious efforts to change it. The

\textsuperscript{29} Berreby, \textit{supra} n. 12, at 5 (“Our beliefs about human kinds are not fantastical. If we didn’t see real, apparent, measurable differences among the categories, they would not convince us.”).

\textsuperscript{30} Id.; see also Miles Hewstone, \textit{Contact and Categorization: Social Psychological Interventions to Change Intergroup Relations}, in \textit{Stereotyping & Prejudice: Changing Conceptions}, \textit{supra} n. 8, at 323, 326. Hewstone notes that category based interaction occurs when “a given in-group member responds to out-group members as interchangeable representatives of a fairly homogeneous category.” Once this occurs, everyone within the out-group is seen as possessing the differences that mark the group as an out-group. In other words, at that point, differences are sought out and will, inevitably, be found. \textit{Id}.

\textsuperscript{31} See Richard K. Neumann, \textit{Women in Legal Education: What the Statistics Show}, 50 J. Leg. Educ. 313, 347–348 (2000). Neumann notes that in his experience as a director of legal writing programs for over a decade and at more than one school, he has been privy to numerous discussions on the topic by deans and faculty members. \textit{Id}. As he observes, “[w]hen challenged about the gender line separating teachers who are not conventionally tenured or tenure-tracked from those who are, some deans answer that they are only responding to a market that allows people to take the jobs for which they are qualified and determines through supply and demand what they will be paid.” \textit{Id}.

\textsuperscript{32} \textit{Id}. 
first step in this process is to understand what makes a group feel like a group in the first place.

III. GROUPS AS RELATIONSHIPS

When we group, we categorize. In fact, the word “category” was first used by Aristotle who defined it as “to accuse”; Aristotle’s definition demonstrates why “category” remains an apt term today, because we pigeonhole people based on certain feelings that register with us. Once we experience such a feeling, we then categorize the person based upon whether they’re with “us” or with “them.” An unavoidable byproduct of such categorization is stereotyping—a term familiar to anyone who has ever fought for equality for teachers of legal writing. In fact, much of the push to gain equality is rooted in the effort to eliminate the stereotypes that tag those who teach legal writing. For example, the mission statement of the Journal of the Association of Legal Writing Directors, the first journal devoted exclusively to the publication of scholarship on the substance of legal writing, states one of its main purposes is to help alleviate the stereotype that legal writing professors are not scholars. Because of this stereotype, the mission statement continues, the legal writing professorate suffers a lack of respect from the rest of the legal academy.

However, as stated earlier, our perceptions of stereotyping are largely inaccurate. Not only are stereotypes not inherently negative, they are not even “things” as we imagine them to be. As indicated by the ALWD Journal mission statement, when the legal writing community thinks of the stereotypes attached to legal writing professors, it conjures up images of things—and bad things at that (i.e., poor scholars, with inferior academic credentials, etc.): collections of tangible, inaccurate perceptions of things that need to be eliminated in order to improve the legal writing professorate’s standing within the legal academy. However, a stereotype

---

33 Berreby, supra n. 3, at 64.
35 Id. at 24. (“The third goal [of the Journal of the Association of Legal Writing Directors]... involves gaining more recognition for legal writing within the more general legal academy.... By producing [articles focusing on pedagogy rather than theory], the legal writing profession has allowed others to conclude that legal writing skills scholarship lacks the intellectual depth of other areas of legal study. If legal writing skills scholarship is to gain recognition and respect in the academy, it must embrace a more theoretical approach.”).
does not describe a thing but rather the relationship between two groups. As a result, the objective accuracy of any given stereotype is irrelevant because we do not categorize people based on facts about them but, instead, on how we relate to them. In short, “we imagine ourselves in a world of nouns, like ‘France,’ or ‘the Muslim world,’ or ‘old people.’” But the mind’s environment is a world of verbs—perceiving, feeling, and thinking. Categories are the adverbs that color experience” in that they join feelings to things. Consequently, the objective “facts” concerning the education or scholarly interests of members of the legal writing community are irrelevant in a vacuum. Rather, it is the relationship the members of this community have with the rest of the legal academy (and, more specifically in this case, the members of the doctrinal faculty in a given law school) that determines the stereotype.

In some respects, this renders the quest for equality exceedingly difficult for members of the legal writing professorate; there is no “magic bullet,” no easily identifiable “thing” the legal writing community can do to change how it is perceived within the legal academy. Because the facts do not matter, it is not as simple as altering scholarly interests, hiring more legal writing professors with impressive clerkships—tweaking the facts—in order to change the perception. Instead, in order to reach the unconscious minds of those doing the stereotyping, it is important to focus not on facts but on relationships.

This becomes evident when it comes time to attempt to change a given stereotype. As stated earlier, stereotypes are not inherently “good” or “bad,” they just are. They cannot be avoided. Because we stereotype subconsciously, they are merely an expression of our perceptions, not of some rationally deduced reality. They are the expression of how we as humans view the world. As such, it is pointless to argue for the removal of stereotypes because to do so is to argue for the elimination of that which makes us human. Rather, the key is to understand the stereotype and to work to change the categorization that led to it. Contrary to the popular understanding of stereotypes, they are not necessarily the polar

---

36 Berreby, supra n. 3, at 164.
37 Id. at 321.
38 Schneider, supra n. 9, at 421. According to the social cognition perspective, stereotypes “are beliefs we have about people in groups. They may or may not be false, negative, held rigidly. They need not be shared with other people, and the assumption that stereotypes bear a close relationship with prejudice and discrimination is not to be made lightly.” Id.
opposite of the “truth” about any particular individual or group.\textsuperscript{39} They are not “fantastic, arbitrary notions” that are inherently inaccurate.\textsuperscript{40} Nor are they “good facts about real people.”\textsuperscript{41} In fact, they are neither. So, if they are not inherently “right” and they are not inherently “wrong,” then what are they? They are—and this is the key that unlocks their secrets—the result of the perception of the stereotyper.\textsuperscript{42} By studying the relationship between the stereotyper and the individual or group being stereotyped, one can identify exactly where the stereotype itself comes from.\textsuperscript{43} And once the source of the stereotype becomes apparent, it is then possible to change the stereotype to a different one. Importantly, the goal should not be to eliminate the stereotype (as this goal is impossible and, in any event, objective facts are irrelevant to the process) but rather to change it to something with which the group being stereotyped is more comfortable.\textsuperscript{44} For the legal writing community to become a member of the larger legal academy in-group, it is imperative for it to understand its relationship with that group and then try to change it. And this awareness, once it is understood, turns out to be not all that difficult to develop after all.

A. “Kind Reading” versus “Mind Reading”

In any social situation, the first thing we do subconsciously is to break people up into categories—things made of people.\textsuperscript{45} Thereafter, this is how we will understand “them” and their relationship to “us.” We decide what “kind” of people they are in relation to how we perceive ourselves.\textsuperscript{46} How we feel about ourselves in relation to the collection of people we are categorizing determines the group. In this way, human kinds are made (in our subcon-

\textsuperscript{39} Id. at 438.
\textsuperscript{40} Berreby, \textit{supra} n. 3, at 105.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 165.
\textsuperscript{43} Id.
\textsuperscript{44} See Schneider, \textit{supra} n. 9, at 426 (“[T]he use of one category may diminish stereotypic thinking based on other categories.”). In this respect, it is not the presence of a stereotype that is the problem; rather, it is the presence of an unflattering or inappropriate one. Thus, the key is to create a new category—a new stereotype—which, in the process, causes the old one to disappear.
\textsuperscript{45} Berreby, \textit{supra} n. 3, at 132.
\textsuperscript{46} See Eberhardt & Fiske, \textit{supra} n. 1, at 387 (“[I]ntial categorization is the default option, and people only go beyond their categories when they have the capacity and the motivation. If people do go beyond initial categorization, they attend to the target’s other, potentially individuating attributes.”).
The objective facts regarding these people are irrelevant; rather it is our beliefs that determine our categorization of human kinds. In this regard, whenever we first see someone, we act as “kind” readers—we ask not who a particular person is in the objective sense but what he is in relation to us. Accordingly, we first know each other merely as types. Of course, “kind reading” is inherently superficial and often inaccurate. Our beliefs regarding a particular person may not in fact be an accurate reflection of who they are or even how they stack up against us based upon the objective facts. Regardless, we have already made the categorization and will then seek to rationalize it later. And, as discussed, because differences exist between any two groups or individuals, we will always be able to justify our categorizations. Through this mechanism of “kind reading,” stereotypes are created—stereotypes that are not inherently wrong or inherently accurate, but merely stereotypes that exist to make sense of the world in which we live.

“Kind reading,” however, is not the end of the story. If it was, then we would never understand each other on anything more than a superficial basis. Because we do in fact develop deeper, more personal, relationships with certain people, something else must be going on beyond this initial reading. And there is. Within certain kinds, we move on to “mind” reading—determining how the people within a particular group stand with us, what they think, or how they feel. If we believe we can predict such thoughts and feelings, we develop a kinship with them and consider them to be part of our group—the in-group as far as we are concerned. With people we know well, we believe we know what they think because of the feeling of community we share with them. This shared sense of understanding about the world and the comfort we find in being able to predict how they will react in certain

47 Berreby, supra n. 3, at 31.
48 Id. at 125.
49 See Eberhardt & Fiske, supra n. 1, at 387.
50 Id.
51 See Hewstone, supra n. 30, at 326. Hewstone refers to this phenomenon as “decategorization”: in which personalization occurs where “an in-group member responds to out-group individuals in terms of their relationship to self.” Id.
52 Schneider, supra n. 9, at 439. Schneider noted that stereotypes can change based upon interaction with out-group members. Negative perceptions change and are replaced by positive, individualized ones based upon shared beliefs. Id.
53 Berreby, supra n. 3, at 124.
situations leads to a deeper bond with the people in our group.\textsuperscript{54} Groups are not static, however. All one needs to do is change the relationship between the members such that the commonalities of fate line up differently and the kinds will change as well.\textsuperscript{55} In this way, groups are amazingly malleable.

An example of the malleability of kinds and, therefore, groups, comes from the various and shifting kinds that exist within the legal academy. On the one hand, most legal writing faculty consider the members of their institution’s doctrinal faculty to be a distinct kind with a common fate. It is likely that members of the doctrinal faculty see their legal writing counterparts much the same way: as single, cohesive units—a clearly distinct kind. However, when the relationships change, so do the groups. Within the doctrinal faculty, new kinds emerge based on the different relationships. Here, there are male and female faculty members, with each group seeing the other as a distinct and separate kind.\textsuperscript{56} Tenured and tenure-track professors are additional kinds when considered together. The list is endless. Most importantly, few of these groupings have much to do with the facts concerning them. Rather, it is to a large degree based upon the relationships between them. The “us” in one relationship (doctrinal professors) will be the “them” in another (female faculty members). With regard to the legal writing community, many think of themselves simply as the objective, unchanging “them” within the legal academy, but they may fail to realize that in many situations, when the relationship dictates it, they become a part of “us” with the doctrinal faculty. For instance, from the perspective of many within the practicing bar, all law teachers are part of the same kind: a distinct group sharing the common fate of educating future lawyers.\textsuperscript{57} Thus, when the perspective arising from the relationships shifts, so does the grouping.

To reach the goal of equality within the legal academy, achieving a state of “us-ness” in the eyes of their doctrinal colleagues, legal writing professors must contend with the insight that their relationship with this group ultimately determines their fate. Currently, the legal writing professorate is hampered by the fact that

\textsuperscript{54} Id.
\textsuperscript{55} See Eberhardt & Fiske, supra n. 1, at 387–388.
\textsuperscript{56} See generally Neumann, supra n. 31 and accompanying footnoted text.
when many among the doctrinal professorate look at legal writing professors, they see a thing made of people, a clearly defined out-group with a common fate. To change the stereotype, the legal writing professorate must assist its doctrinal colleagues in moving from a superficial stage of “kind reading” to the more intimate “mind reading” that will lead to a feeling of shared understanding. However, there are barriers, in the names of “essentialism” and “immoral stigmatization” of the out-group.

IV. ESSENTIALISM IN THE LEGAL ACADEMY AS A BARRIER TO “MIND READING”

Essentialism is the belief that contemporary human kinds have always existed and are never-changing. This observation is comforting in that it provides us with a solid (if untrue) foundation for our beliefs. Our perceptions are correct, we believe, because things have always been as we now perceive them. As such, those perceptions are infallible. Essentialism is an extremely powerful feeling in that it makes us feel good, giving credence to our beliefs, which are actually arbitrary and artificial. A natural extension of this belief is one that assumes that, because things have been a certain way in the past, they no doubt will remain unchanged in the future. This unchanging feeling we get with regard to our beliefs gives them a permanence that otherwise would be lacking, given that our beliefs really stem from our ever-changing relationships with others. Regardless, essentialism allows us to feel secure that our beliefs are “correct” when “correct” is a relative term.

The phenomenon of essentialism occurs with regularity in the legal academy. Of particular relevance to members of the legal writing community, essentialism occurs in the belief among many members of the legal academy that legal writing as a discipline and a course has “always” been inferior to those courses within the curriculum believed to be more theoretical and substantive. This feeling therefore justifies the feeling that it is “correct” to think of legal writing (along with the professors who teach it) as inferior today because it is just as likely to continue to be inferior well into the future. This essentialist belief in the inferiority of legal writing justifies its perpetual treatment as an out-group.

58 Berreby, supra n. 3, at 60.
59 Id.
60 Id.
However, like many essentialist beliefs, this one as well does not withstand closer examination. In fact, given that it is a relatively new addition to most law school curriculums, arguably the most recent major addition, legal writing has no longstanding tradition within the legal academy.\textsuperscript{61} If anything, rather than having a permanent, unbreakable link with the past, the only constant with regard to most legal writing programs has been their continual evolution. Many law schools did not even have formal legal writing programs until the 1980s.\textsuperscript{62} Since then, they have evolved from programs operated as addendums to certain first-year doctrinal courses (and taught by first-year doctrinal professors), to ones run by upper-level students, to ones run by adjunct instructors, to ones taught by full-time faculty members. And this transformation has occurred roughly within the past twenty-five years. Given the continual metamorphosis of legal writing programs across the country, it seems hard to believe that any essentialist feelings and beliefs could be attached to it. Nevertheless, the fact such feelings persist is testament to our strong, natural desire to believe in them. For without them, the foundations of our beliefs become untethered, causing us discomfort. By simply not thinking about the sources of our beliefs, it somehow “feels” natural to think of legal writing as a constant, unchanging thing even though, intellectually speaking, it has perhaps undergone more changes than any other discipline within the legal academy in recent memory.

By contrast, numerous courses and doctrines have emerged in other disciplines within the legal academy but because these courses and doctrines somehow “feel” different to doctrinal faculty members, the essentialist trappings surrounding them cause many faculty members to treat them as if they have always existed and consider those other disciplines, along with the professors who teach them, as part of their in-group. Law and Technology, Law and Economics, in fact, much of the “law and ____” catalog has de-

\textsuperscript{61} See Durako, \textit{Second Class Citizens, supra} n. 13, at 577 (noting that “legal writing is the newest big addition to the law school curriculum”); cf. David S. Romantz, \textit{The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum}, 52 U. Kan. L. Rev. 105, 107–108 (2003) (“[W]hile the pedagogy of legal writing and doctrinal courses may differ, both categories strive to inculcate students with the critical thinking skills required of lawyers and, thus, complement the other. As such, legal writing courses ought to enjoy the same significance and curricular importance as their doctrinal counterparts.”).

developed only within the last two decades or so; nevertheless, because of the power of essentialism, they somehow “feel” as if they have always existed. Consequently, those disciplines are treated as canon disciplines despite the fact that Christopher Columbus Langdell would hardly recognize the doctrinal course catalog of any twenty-first century law school.

The relevant focus of analysis here is not merely to recognize and call attention to the inherent similarities between, for example, law and economics and legal writing; as stated earlier, when it comes to groups, the facts are irrelevant. Rather, the point is to understand just why it is these two disciplines somehow “feel” different to members of the doctrinal academy such that they develop differing essentialist feelings for these otherwise similar emerging disciplines. When this analysis is undertaken, two factors emerge. Each will be discussed in turn.

A. Differing Approaches to Teaching the Relevant Subject Matter

In her study of the various approaches to teaching legal writing, Debra Moss Curtis addressed major categories of both teaching and course design and applied them to the law school context. Most doctrinal teachers, she found, focus on one approach—the “formal” approach—to the subject matter, stressing content and theory. In contrast, many legal writing teachers teach pursuant to the “demonstrator” model, which focuses on the “ability to do” rather than “knowing about,” or the “facilitator” model, which stresses the primary importance of skills over content. As a result of the choice of pedagogical method, the classroom role of the typical doctrinal teacher is quite different from that of the legal writing teacher. In many doctrinal classes, the teacher plays the role of the all-knowing sage, replete with a store of knowledge stu-

63 The four categories of course design are (1) the formal approach (focusing on content with the expectation that students will learn and organize these ideas in a particular order); (2) the demonstrator approach (focusing on performance of certain standards by students, with “clearly defined steps and through situations based on the practical field”); (3) the facilitator approach (focusing on skills rather than content with the goal being to teach the student how to learn a particular subject rather than teaching them the subject itself); and (4) the delegator approach (focusing on “the personal growth of students, rather than on specific content, procedures, or skills,” where the approach is to start students “on the process of working through problems and situations that model a desired end result”). Curtis, supra n. 27, at 475–476, 479.

64 Id. at 475–477; see also Romantz, supra n. 61, at 108.
B. Differing Approaches in the Makeup and Selection of Legal Writing Teachers

Of course, different teaching styles cannot account for everything. Depending on the nature of a law school’s review process, many doctrinal teachers will not have observed a legal writing class and would not know, at least first hand, of these pedagogical differences (although the “feeling” that legal writing classes are, in and of themselves, somehow “different” likely still attaches). So there must be more to it. And there is. Despite the radical metamorphosis in the composition of legal writing faculties over the past two-plus decades, the changes taking place within the legal writing professorate are, to a large degree, occurring outside the traditional faculty “feeder” schools—those elite schools most often tapped to provide the next generation of law teachers. As a result, because most doctrinal faculty members, even those more recently appointed, graduated from schools with antiquated legal writing programs, the perception persists that the teaching of, and status accorded to, professors of legal writing have somehow remained a constant when in reality they have been constantly evolving.

---

65 Id.
66 See generally Durako, Dismantling Hierarchies, supra n. 13; Durako, Second Class Citizens, supra n. 13.
67 See Neumann, supra n. 31, at 317 tbl. 4. The twelve schools identified as “feeder” schools in Neumann’s article are: Yale, Harvard, Chicago, NYU, Columbia, Stanford, Berkeley, Michigan, Duke, Georgetown, Virginia, and Pennsylvania.
Approximately 47% of all tenured and tenure-track teachers graduated from the twelve traditional “feeder” schools. Of these, ten (as of 2003) have legal writing programs that lag behind the current norms in the field. Given this reality, it is no wonder that legal writing “feels” as if it has always been different and inferior to the graduates of these law schools. In their experience going back to their days as law students, it always has been. Moreover, the treatment of women in these feeder schools is likewise relevant to the essentialist feelings of many current doctrinal faculty members.

Because we group quickly and unconsciously, and because gender is such a defining characteristic, it is easy to see how a doctrinal faculty member’s “kind reading” of any faculty segregates the doctrinal “us” from the legal writing professorate’s “them” and how graduates of feeder schools will have some basis to believe that, largely owing to their own experiences as students, things have always been this way and will just as naturally continue along the same path in the future. For in their experience as students, they have been exposed to two realities: relatively few women holding high status teaching positions and legal writing programs that truly are inferior to their doctrinal counterparts. It is no wonder that as teachers, when presented with legal writing programs dominated by women, they would similarly see them as inferior despite the reality that in the school in which they now teach, the makeup of the legal writing program may be quite different than that with which they were accustomed as students.

A further illustration of this phenomenon comes from the fact that newer law schools appear to experience much less essentialism with regard to legal writing than their more established coun-

---

68 Id. at 318.

69 See Susan P. Liemer & Jan M. Levine, Legal Research and Writing: What Schools Are Teaching, and Who Is Doing the Teaching (Three Years Later), 9 Scribes J. Leg. Writing 113, 135–161 (2003) (identifying Berkeley and Michigan as the two exceptions). Six of these schools (Yale, Columbia, Harvard, Georgetown, Virginia, and Pennsylvania) had programs still taught primarily by students; three others (Chicago, NYU, and Stanford) ran “capped” programs; and one (Duke) considers its legal writing faculty to be something less than full-time law teachers, classifying them at three-fourths time rather than full time, and does not permit them to attend faculty meetings. Id.

70 See Neumann, supra n. 31. Approximately 70% of all legal writing teachers are female; however, Harvard, the leading feeder school, regularly admits significantly fewer women to its law school than the national average (41% versus 45.2%). Id. at 319 tbl. 5. In addition, only 22% of female faculty members teaching at these schools are either tenured or on the tenure track (as opposed to the 61% who are on something other than the tenure track). See id. at 322 tbl. 7 (furthering the feeling that, due simply to the gender makeup of most legal writing faculties, they are something different and, therefore, something inferior).
terparts. Although there are several reasons why teachers of legal writing are considered part of the in-group at these schools, one of them is quite possibly because these newer schools hire from outside of the traditional feeder schools at a much greater rate.\textsuperscript{71} Because the doctrinal faculty members come from schools where the percentage of women in tenured or tenure-track positions is much higher, and where teachers of legal writing are accorded more job security and respect, they do not bring to the legal academy essentialist feelings of legal writing as a distinct out-group. With regard to these doctrinal faculty members, the fiction of essentialism is eroded, at least somewhat.

V. THE IMMORAL “OTHER”

Inexorably tied to the grouping of human kinds is our determination of the bounds of morality. We “feel” that people who are like us are moral and that people unlike us are not.\textsuperscript{72} In this sense, morality contributes to the groupings we make.\textsuperscript{73} Consequently, if an individual’s feelings regarding the morality of a group can be changed, it is very likely that he or she will come to see an out-group as an in-group and vice versa. In fact, we often sense similar kinds based on nothing more than our feelings of morality. As such, the power of morality is very strong, perhaps the strongest indicator of human kinds that exists.

Morality is, however, completely arbitrary. Studies show that morality is not based on objective factors but rather, on whether we “feel,” on a subconscious level, that the focus of our attention is part of “us” or “them.”\textsuperscript{74} In short, “what is not us is not normal.”\textsuperscript{75} As a consequence, many of our feelings regarding “right” or “wrong” are more accurately feelings regarding “us” or “them.”\textsuperscript{76} People who are with us are inherently moral; people who are not are inherently immoral. Although, on an intellectual level, this

\textsuperscript{71} See Mitchell Nathanson, \textit{Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor}, 11 Leg. Writing 329, 353 (2005). The article cites a study that found that less prestigious schools (defined as schools ranked below the national top 25) are six times as likely to hire doctrinal candidates from outside of these same top 25 schools as their top tier counterparts.

\textsuperscript{72} See Berreby, \textit{supra} n. 3, at 191–192.

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 200.

\textsuperscript{75} Id.; see also Hewstone, \textit{supra} n. 30, at 324 (noting that typically, stereotypical perceptions of out-groups are often negative).

\textsuperscript{76} See Berreby, \textit{supra} n. 3, at 200; Hewstone, \textit{supra} n. 30, at 324.
tautology should strike us as offensive, it nevertheless feels natural.\textsuperscript{77} In the end, human kinds line up not merely as “us” and “them” but as “good” and “bad” with “good” synonymous with “us” and “bad” synonymous with “them.”\textsuperscript{78}

Issues of morality come into play with regularity when the relationship between the legal writing and doctrinal professorates is analyzed. To each group, it is not merely that the other is somehow different but that it is actually immoral or “bad” in some way. These feelings, in turn, make the members of each group feel secure in their distance from the other, justifying their participation among their group as well as the ostracization of the other. Although these feelings of immorality may not be a problem when analyzed from the perspective of the doctrinal faculty (after all, they have no desire to join the legal writing professorate), such feelings are a tremendous obstacle for the legal writing professorate who, despite these feelings, desire inclusion in this larger faculty “group”; it is, after all, difficult to convince a group to let immoral or “bad” members join in. Naturally, there will be stiff resistance to this push. The legal writing community feels this resistance with regularity.

Evidence of the “badness” tagged to the legal writing community comes from many avenues. First, the term “legal writing” itself is a negative one in that, in many circles, is synonymous with bad writing.\textsuperscript{79} Legal thinking, on the other hand (and in the minds of many within the doctrinal community) is considered a good thing.\textsuperscript{80} Thinking like a lawyer is to be commended; writing like one is to be ridiculed. The teachers of each discipline similarly line up along these “good” versus “bad” lines. Moreover, the greater legal academy’s persistent association of legal writing with academic support is another unconscious recognition of how this group negatively perceives the out-group.\textsuperscript{81} In many law schools,

\textsuperscript{77} See Berreby, supra n. 3, at 200.
\textsuperscript{78} Id. at 199.
\textsuperscript{80} Id.; see also generally Romantz, supra n. 61.
\textsuperscript{81} Mitchell Nathanson, Integrated Office Survey (conducted Jan. 16–31, 2006, on the Legal Writing Institute listserv) (results on file with Author). In this survey, one respondent highlighted this presupposed relationship, noting that “it has . . . been suggested that I would naturally have a close working relationship with our academic support person, unlike the students’ other professors who never speak to her. I’m not sure I’ve ever understood why that relationship should be different, unless you think of legal writing as more like academic support, which I think some people probably do.” Id.
the natural pool from which to tap academic support administrators is the legal writing faculty. Although, at first glance, this connection might “feel” natural, upon examination, it might be asked just what the connection between these two fields is. Academic support is a remedial program, dealing with students who are struggling with many aspects of legal education, in writing as well as in their grasp of the legal doctrines discussed in their doctrinal classes. It makes just as much sense to tap a teacher of contracts, for example, for the job as someone who teaches legal writing who has no specialized skills in reaching struggling students. However, to the larger legal academy, the connection “feels” natural because, to them, both legal writing and academic support deal with students with problems (“bad” students).

This “good” versus “bad” paradigm plays out even more when one considers traditional ivory tower opinion of the practice of law. Historically, members of the legal academy demonized it, considering it to be immoral in many ways—ways that the study of the theory and concepts of it was not. 82 Today, this feeling may be less persistent, but still, it remains to a degree if one considers the scholarly topics of interest of many doctrinal faculty members (topics of practical concern are perennially at the bottom of the list). 83 This scholarly focus may impact the doctrinal faculty members’ perceptions of a segment of their faculty that has, as a whole, much greater practical experience and stronger ties to the practicing bar than they. 84

In addition, a survey conducted in conjunction with this Article on the legal writing professorate’s sense of belonging within the larger legal academy (hereinafter the “integrated office survey”) unearthed additional examples of the “immoral other” at work. 85 Some respondents stated they believed their doctrinal colleagues

---


83 This was shown to be true among the top quintile of law reviews, which are the ones in which it is considered most prestigious for law professors to publish. See Michael J. Saks et al., Is There a Growing Gap among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart, 30 Suffolk U. L. Rev. 353, 374 (1996).

84 See Nathanson, supra n. 82, at 336–341. A comparison of a random sample consisting of doctrinal and legal writing professors demonstrated that, on average, legal writing professors arrive at their first academic positions with more than twice as much practical experience (defined as law firm, in-house, governmental, or public interest employment) as their doctrinal counterparts.

85 Nathanson, supra n. 81.
blamed them whenever their students did poorly on their exams—believing that the cause of this underperformance was something the student picked up in their legal writing class. Others noted that they were blamed whenever student research assistants turned in work that demonstrated poor citation ability. Still others remarked that student complaints regarding classes were handled differently depending on whether the complaint was directed toward a doctrinal or legal writing class; if it was a doctrinal class at issue, the student would normally be told that there was nothing that could be done about it, but if it was a legal writing class at issue, the complaint was handled more seriously. The implication is that with regard to the doctrinal classes, the fault could not possibly lie with the inherently “good” professor; with the legal writing classes, however, the fault may very well rest with the “bad” professor.

Regardless of the sources for the allegations and assumptions, each has one thing in common: they have little or no factual basis. This is of little matter, however, as it is our natural tendency to demonize the “other,” to place morality tags on behaviors in order to justify our feelings towards ourselves and those around us.

VI. FROM “KIND READING” TO “MIND READING”: DISMANTLING THE “OTHER”

Because we see each other as kinds first, it is necessary to move beyond this superficial form of categorization if the makeup of any particular group is going to be altered. Thus, for the legal writing professorate to become fully integrated within the greater law faculty “group,” it must facilitate this more intimate form of perception. At that point, the myriad differences between the two groups, which currently are highlighted, will fade into the background and eventually become invisible, much like the myriad differences that currently exist among members of the doctrinal faculty. In short, the point is not that differences cannot exist, but

---

86 See Hewstone, supra n. 30, at 327. Pursuant to the “contact hypothesis,” contact between members of different groups will improve relations between them. Other theories (such as the social identity and interdependence-power theories) have challenged this simple hypothesis, however, and noted that some forms of contact succeed in merely further ingraining negative stereotypes. See Eberhardt & Fiske, supra n. 1, at 391. Pursuant to these theories, it is not merely contact but the right kind of contact that diminishes unwanted stereotypes. My view is that the contact engendered through integrated offices and, most particularly, voting rights, facilitates such forms of contact.

87 Id.
rather, to get to the point where these differences are no longer seen as important markers that differentiate the legal writing professorate from the rest of the faculty.

There is much legal scholarship that focuses on the existence of the legal writing and doctrinal groupings and that approaches the issue on a rational, intellectual level, advocating for the acceptance of the legal writing professorate into the greater legal academy group, contending that because it is the “right” thing to do, it should be done. These rationally-based arguments, however, require members of the desired group to overcome the impulses of their unconscious minds, to accept the legal writing professorate into their fold despite their feelings of difference at a level these people cannot verbalize or even recognize. Hence, this is asking the mind to do something it is not equipped to do. As such, it is asking the (nearly) impossible. Instead, as this Article has shown, the focus should be on the unconscious mind, with the goal being to invite “mind reading” so as to cause the differences between these groups to be ignored. Therefore, in order to achieve equality within the legal academy, the legal writing professorate cannot simply point out its virtues to its doctrinal brethren and wait for an invitation that will be a long time in coming, if it ever does. Rather, it must succeed in persuading the greater legal academy to not notice it at all, at least as a distinctive, separate group.

To the extent that lawyers and legal academics are, for the most part, not all that different from the general population,

---

88 See e.g. Durako, Second Class Citizens, supra n. 13. Durako concludes her article by stating that “[t]he collection of isolated examples of unequal treatment produces a subtle pattern of bias that reflects poorly on legal education. Improving the status and salary of women legal writing directors is but a first step. Eliminating the status and salary gaps will begin to elevate women directors in the academy and women in the profession.” Id. at 586. If only it were that simple.

89 Berreby, supra n. 3, at 191.

90 It may be the case that lawyers and, more particularly, law professors are something of an anomaly. For instance, much of the training of a lawyer is an attempt to overcome these natural tendencies to seek out similarities in that “thinking like a lawyer” stresses the importance of seeking out differences and distinctions. Throughout law school, students are taught to break things down and to be on the lookout for minute differences. Whether this sort of training has any effect on the unconscious mind’s grouping activity is something that requires further study. Moreover, at least some of the anecdotal information received in response to the integrated office survey, supra n. 81, indicates that academics, and more specifically, law professors, may likewise be more prone than the general population to search for differences than similarities when sizing up other individuals. More than a few respondents remarked that they did not believe that their fellow faculty members treated anyone as equals—as similar kinds—regardless. One replied that at her school, faculty members kept to themselves to such a degree that she wondered “whether any of them are truly integrated into the faculty or even society for that matter.” Another re-
their unconscious groupings can be altered based upon nothing more than changed feelings toward those currently categorized in their out-group. And this can be done, as discussed above, through the process of moving from kind to “mind reading.” If the barriers to this more intimate form of perception can be removed, than the roadblocks of essentialism and immorality of the other will likewise be less enduring.

The following two subsections of this Article will discuss two ways to go about such a change. Of course, this list is not exhaustive; there are myriad ways to foster “mind reading.” However, the two highlighted here (the granting of voting rights and the integration of office space) are effective initial steps in fostering the type of individual interaction between group members necessary to encourage, in this case, members of the doctrinal professorate, to perceive members of the legal writing community as individuals and not merely a collective “thing made of people” with a common fate that thereby signals the triggering of their unconscious feelings of “the other.”

Through this process, the “looping effect of human kinds” can be avoided wherein the doctrinal professorate becomes persuaded that the legal writing professorate is in fact a distinct kind and then acts upon this feeling in ways (by offering reduced salary and employment protection) that give this artificial difference “teeth.” Instead, these avenues discussed below encourage “mind reading” that, in turn, is more likely to result in feelings of ease and acceptance, feelings among members of the doctrinal faculty that they are among members of their group whenever interacting with their legal writing colleagues. These feelings will then, in turn, cause them to feel as if they are among good, moral people.

marked that she believed that her status as a non-tenure-track faculty member had very little to do with her feeling of belonging, noting that many on her faculty “think they’re better than almost anybody.” Perhaps people self-select the academic life (to the extent that they have the academic pedigrees to do so) and the status both attached to it externally as well as the rigid hierarchical nature of it from within, precisely because their internal desire for “us-ness” is much weaker than those from among the general population. Again, this is an issue for further study.

91 See Berreby, supra n. 3, at 132.
92 Berreby, supra n. 12, at 3.
93 See Hewstone, supra n. 30, at 329.
A. Voting Rights

An example of the continuous evolution of legal writing programs throughout the country (and contrary to the essentialist assumption) comes from examining the issue of voting rights. From something that was all but unheard of in the 1970s, today almost half of all legal writing faculties are permitted to vote, to some extent, during faculty meetings.\(^\text{94}\) Apart from being an obvious status indicator on a rational level, voting, and the activities that surround it, sends signals to the unconscious mind, encourages “mind reading,” and works to effect change in perception on a much deeper level (where such change, if it is to have a significant impact, must occur).

On a rational level, the status attached to voting is obvious. Voting, in an academic setting just as in the world at large, is power, and those who have it are perceived as superior in status to those who do not.\(^\text{95}\) Beyond these more objective observations, however, voting is much more significant on a subconscious level and it should be sought for these reasons rather than for power alone. For the determination of who votes is, at its core, a determination of who is considered competent to govern\(^\text{96}\) and those considered competent to govern will be those who are believed to be good, moral people. Conversely, those denied this opportunity are inherently considered something less. Thus, in those schools in which the members of the legal writing faculty are not permitted to vote, the “immorality of the other” is inherently demonstrated at each and every faculty meeting.

On another level, having the right to vote leads to additional interaction with members of the greater law faculty, which facilitates the “mind reading” necessary to overcome feelings of “otherness” toward this group. Voting invariably leads to back-room politicking on hot-button or close issues, which inherently necessitates more interaction between the two groups.\(^\text{97}\) And more interaction leads to more opportunities for these members of the faculty to see the commonalities between these two groups rather than the dis-


\(^{95}\) See Liemer, supra n. 82, at 385.

\(^{96}\) Id. at 363.

\(^{97}\) Id. at 372–373.
As such, it is necessary for the legal writing community to foster opportunities wherein the rest of their faculties have the ability to encounter them as teaching colleagues and not merely as legal writing professors—a distinct group with the dreaded common fate.

The integrated office survey confirms these conclusions to a degree, with the qualification highlighting a crucial point about the nature of the legal writing faculty's feelings of "otherness." Although the survey focused solely on the value and effects of integrated offices, several respondents volunteered information on voting rights as equally or even more relevant to feelings of inclusion on their faculties. One stated that, despite having integrated offices, she did not feel "truly integrated" with her doctrinal faculty because she is unable to vote. She also stated that she was not included in the discussion of law school topics for the same reason. Others voiced similar concerns. However, some respondents stated that even though they did have a vote, they still were not consulted as often as their doctrinal colleagues. One respondent wrote,

Lately there seem to be little cabals of faculty developing for and against various changes that have been proposed, whether it is to curriculum or a hiring decision or relocation of law review space. . . . No one from any of these little groups trying to garner support for their position has ever come to talk to me or the other writing instructor seeking our support or finding out where we stand, though we will be voting on these issues. . . . Two votes could make a difference; I just don't think we're on the radar screen.

As this respondent has indicated, the process of dismantling the "other" is more complex than a simple, rational case of cause and effect. Instead, because these feelings are hidden within the unconscious, most likely a combination of factors contributes to the feeling of "otherness." It is not as simple and straightforward as identifying a problem on a rational level, fixing it, and then assuming that the problem will be resolved.

---

98 See Hewstone, supra n. 30, at 329; see also Eberhardt & Fiske, supra n. 1, at 387. Eberhardt and Fiske note that, although under Social Identity Theory not all contact leads to a breakdown in stereotypes, certain types do. Primarily, contact that is outcome dependent, "that is, wanting resources controlled by another party," leads to "potential individuation." Voting is classically outcome dependent in that it is not possible for one to get what one wants without cooperation (favorable votes) from others. This form of required dependency is precisely what, under Social Identity Theory, would lead to a breakdown in stereotypic thinking.
Voting rights are at least an initial piece of the puzzle, however (and, given the increase in legal writing faculty voting rights through the decades, apparently one that can be reasonably achieved despite the essentialism and immorality of the other that currently exists). Activities at faculty meetings send both conscious as well as unconscious cues to those in attendance with regard to who is a member of “us” and who is a member of “them.” Two respondents to the survey noted the reality at some law schools that non-voting members are required to physically get up and leave in the middle of meetings to allow the voting members to conduct their vote outside of their presence. There is not a clearer visual cue identifying a collection of individuals as a distinct outsider group with a common fate than this one.

B. Integrated Offices

Historically, legal writing faculty offices in many schools have been lumped together and segregated from those of doctrinal faculty members while other first year faculty offices were not similarly situated together (i.e., torts professors next to torts professors and contracts professors next to contracts professors, etc.) and apart from the general faculty population. As for why this segregation might exist, several explanations lead to the unmistakable one: legal writing professors “feel” different so are therefore treated differently—the looping effect of human kinds in action. The fact that so many legal writing faculty offices are not merely segregated but actually grouped together further ingrains this feeling: that the legal writing faculty is a “thing made of people” and, as such, a distinct human kind. Although the traditional argument against such classification and segregation—the lessening of prestige and power among the legal writing professorate—certainly has merit on its own right, the subconscious effects of this form of segregation are of more relevant concern.

Initially, segregation, like the withholding of voting rights, leads to reduced opportunities for interaction with members of the doctrinal faculty; hence, it frustrates the “mind reading” required to alter the nature of the groups that presently exist. Here

---

99 Durako, Dismantling Hierarchies, supra n. 13, at 255–256.
100 See id. at 257–258.
101 See Liemer, supra n. 82, at 385. Here, however, the dependence considered so important under the Social Identity Theory is absent.
again, the integrated office survey confirmed these assumptions. Many respondents remarked how, regardless of the status of the people contained within the actual offices themselves, interaction among individuals in offices situated closely together was greater than among those situated further apart. In at least one school, the offices of the legal writing faculty were located on a separate floor from the rest of the faculty offices. This separation resulted in minimal interaction between these two groups. However, among those situated together, informal lunch groups and impromptu discussions on both law school and other issues was reported to be quite frequent. One respondent put it best when she said, “to reverse an old cliché, in sight, in mind.” This integration led more than one respondent to conclude that he or she felt “part of the team,” an indication that in these schools, perhaps, a new group was in the process of emerging. Another respondent stated,

Yes, I do regularly interact with other faculty members. I am always asked to join the “lunch group,” as are other members of the faculty who teach writing. . . . I discuss scholarship with anyone who wants to listen, and I often discuss non-work issues. Regarding visiting, I always visit other offices, and members of the doctrinal faculty often visit my office. I really do feel part of the “team.”

The use of the word “team” was not uncommon in the survey responses.

Other responses were similarly indicative of the dissipation of the legal writing “group” and the emergence of a new, more inclusive faculty “group” as a result of integrated offices. One respondent noted that he felt that his merit as a teacher and scholar was judged by the same criteria as the rest of the faculty—an indication that essentialism did not predominate in his school. Another provided a particularly illuminating response;

I think the biggest benefit to integration has been that the distinctions are largely made on more “objective” criteria (i.e., do I publish, how well-received is it, how am I perceived as a teacher, etc.), not on the fact that I teach legal writing instead of say, Torts.

Of course, the criteria described by this respondent are no more “objective” than any other. Instead, these are merely new classifications of visible differences among members of a particular hu-

---

102 See Schneider, supra n. 9, at 426.
man kind. What is significant about this respondent’s remark is that the old classification of differences (legal writing teacher versus doctrinal teacher) had dissolved. Because, in this particular school, legal writing teachers no longer “feel” different from members of the doctrinal faculty, the very real (and similarly “objective”) differences between these two groups are no longer seen because they are no longer being searched out. Within this school’s one human kind (law teachers), a new set of differences emerge and become visible in order to resegregate the group into subsets within the larger group. Because this set of differences is being applied to members of the legal writing faculty along with members of the doctrinal faculty, the new bases for resegregation “feel” objective. On closer scrutiny, of course, they are as arbitrary as any other.

Integrated offices, just like voting rights, are not a cure-all. Despite the increased interaction between groups, several respondents still felt as if they were members of the out-group in relation to their doctrinal colleagues. One respondent noted that he felt that he was perceived to be something less of an equal by the rest of the faculty because the legal writing faculty at his school did not engage in scholarship. Another remarked that different titles for members of the legal writing faculty likewise contributed to this feeling, branding these members of the faculty as somewhat lower in the academic hierarchy—a distinct thing made of people. Another noted that not being able to serve on committees was similarly relevant to his feeling as an outsider. There were several responses that touched on these sorts of differences as relevant to the issue of integration.

All of these responses are indicative of how the mind operates in classifying our interactions and creating order in our lives. We are constantly testing others to see what lines up with us and what does not. The more a person lines up with us initially, the easier it is for us to graduate from “kind reading” to “mind reading.” Thus, those who somehow “feel” different to us will be subject to greater scrutiny as additional differences will be sought to justify these feelings (differences in title, committee work and scholarship, for example). However, regardless of our initial reaction to a person, if daily interactions persist, the differences we initially perceive will become less visible as we move on to a more intimate

103 Id.
104 See Berreby, supra n. 3, at 214–215.
relationship with this person. Because voting rights and integrated offices foster this type of interaction, they are helpful first steps in altering the makeup of the groups that presently exist in many law schools. They will not, however (as the survey results indicated), solve the problem alone. They are means to an end, not the end themselves.

VII. CONCLUSION

The intent of this Article is to demonstrate a better way of righting the multitude of wrongs afflicted upon the legal writing academy. The traditional method of attack—based upon rational, conscious thought, that urges members of the greater legal academy to initially recognize and then treat members of the legal writing professorate more fairly—however noble in effort, is ultimately doomed to failure because of the unconscious reasons and causes underlying how we go about categorizing people. Once members of an in-group sense the presence of an out-group, they will, unconsciously and for reasons they themselves are not aware of, seek to justify their feelings of “otherness” toward this group and will, without fail, find them. The forces of essentialism and the immorality of the other, when combined with the reality that differences exist between any groupings of individuals make this response inevitable. Instead, it is more effective to convince the greater legal academy that the grouping of “legal writing professors” does not exist at all, or at least no more than the groupings of “contracts professors” or “property law professors.” And this change must take place on the subconscious level. It cannot take place anywhere else.

Thus, it is critical that, when considering reform in any legal writing program in any given law school, attention be paid to the order in which the steps to equality are taken. Demanding equality in salary at the first approach is a recipe for failure in those

---

105 This is true only to a degree, however, and it depends on which theory one chooses to believe. Under the Contact Theory, see Hewstone, supra n. 30, interaction is all that is required; under the Social Identity Theory, see Eberhardt & Fiske, supra n. 1, the contact must be of the proper kind. Regardless, the type of interaction discussed herein would seem to be satisfactory under either theory.

106 Of course, the process of negotiating for integrated offices and voting rights will very well call to attention to the differences among doctrinal and legal writing professors and may result in a further entrenchment of these distinct groups. However, any integration setbacks caused by these acts could be outweighed in the long run by the increased interaction between members of these two groups over time.
schools where doctrinal faculty members “feel” differently towards members of the legal writing faculty. As a result, those who “feel” a difference will always be able to justify the differences in salary based on perceived differences between the two groups. Instead, the better approach is to first seek those areas of reform that place the two groups in greater contact with each other. Voting rights and integrated offices are two such examples but there are many others. Once these initial steps are completed, the feelings of “otherness” will lessen, perhaps to the point where one day, doctrinal faculty members will wonder why it was that some of their colleagues were ever treated differently than anyone else.
PRACTICING CIVILITY IN THE LEGAL WRITING COURSE: HELPING LAW STUDENTS LEARN PROFESSIONALISM*

Sophie Sparrow**

INTRODUCTION

“The central message in both Best Practices and in the contemporaneous Carnegie report is that law schools should: . . . give much greater attention to instruction in professionalism.”1

“Civility is behaviour in public which demonstrates respect for others and which entails curtailing one’s own immediate self-interest when appropriate.”2

“Even though we can stop talking, we cannot stop sending signals (our tone of voice, our fleeting expressions) about what we feel. Even when people try to suppress all signs of their emotions, feelings have a way of leaking anyway. In this sense, when it comes to emotions, we cannot not communicate.”3

We all hear the complaints about “today’s students.” Today’s law students use their laptops in class to instant message and

---


3 Daniel Goleman, Social Intelligence: The New Science of Human Relationships 85 (Bantam Dell 2006). Goleman defines “social intelligence” as intelligence “not just about our relationships but also in them.” Id. at 11 (emphasis in original).

---
check eBay accounts. They chat with their neighbors; they eat food with noisy packaging; they are unprepared. Students are rude to professors, support staff, classmates, and teaching assistants. Whether it is Generation X, Y, or Millennials, these students are worse than previous classes. It is their lack of responsibility, work ethic, respect, and initiative that reduces their ability to learn in school and succeed in the workplace.

I have been skeptical that today’s students are really all that different. After all, I participated in 1980s-style disengagement in law school; my friends and I solved many problems by exchanging notes in the back of the classroom. Twenty years ago, I knew which situations demanded professional behavior. Listening to lectures that regurgitated the reading did not; being in the workplace did. I assumed that today’s law students made similar distinctions and choices. Reports from legal employers suggest that I am mistaken, at least regarding some students. Supervisors lament that many employees show up late, dress inappropriately, fail to follow-through on assignments, and treat co-workers with disdain. They miss obvious social cues conveyed through body language and facial expressions. They have no idea how their actions affect others. While these behaviors may be limited to a few students and graduates, for years the public, bar, and bench have voiced concerns with the lack of professionalism—including civility—in lawyers.

So what? Why should we care how our students or graduates behave, as long as they can master legal skills and doctrine? Their uncivil behaviors may be annoying, but it is not our job to teach them how to act respectfully; parents and elementary or high school teachers should have given them basic training in how to

---


5 E.g. Tim A. Baker, *A Survey of Professionalism and Civility*, 38 Ind. L. Rev. 1305, 1306 (2005); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1344 (1997) (noting the erosion of professionalism in lawyers over twenty-five years, Daicoff refers to the “decline in civility and courteous conduct between lawyers”). An online survey conducted by the Indiana Bar Association in 2004 showed that 43.1% of respondents had a negative impression of lawyers. Comments from respondents showed several themes, one of them being “lawyers do not return telephone calls or care about the client.” Baker, supra n. 5, at 1312. Similar comments were “start caring about the client” and “[l]awyers should remember that they are working for the client, not the other way around.” Id. at 1314.
2007] Practicing Civility in the Legal Writing Course 115

participate in a democracy. In fact, parents and teachers already do this. Most students know that it is important to treat others with respect, work hard, disagree with grace, and listen attentively. The problem is that some students do not seem to know how or when to use these skills. They do not always realize how their actions are perceived by, or influence, others. When stressed,\(^6\) students struggle to practice civility. They may not realize how important being civil is for them, for their clients, and for the legal profession. If we seek to prepare our students to meaningfully contribute to the profession, we should teach them civility.\(^7\)

Law schools and bar associations have been striving to increase law students' and lawyers' awareness of civility and professionalism for years; studies have been completed, symposiums held, task forces and commissions set up.\(^8\) This attention to professionalism is not unique to the legal profession; similar concerns

---


\(^7\) Stuckey et al., supra n. 1, at 11 (noting that although many best practices in teaching law students "seem obvious, most law schools do not employ [them] for educating lawyers"); Melissa H. Weresh, Fostering a Respect for Our Students, Our Specialty and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum, 21 Touro L. Rev. 427, 435 (2005) ("[F]ew would dispute that instruction in the areas of ethics, professionalism, legal analysis, and written communication [is] essential [to], if not the bare minimum, [sic] of a legal education."); see infra nn. 54–104 and accompanying text. Civility and professionalism are not absolutes, but spectrums. Within components of civility, we may have times when we are very civil, such as almost always using a respectful tone when we speak to others, and different times when we are less civil, such as pushing past others to enter an elevator or grab a table at a crowded function.

\(^8\) As of the time of this writing, nearly all states have some form of a professionalism code at the state, county, municipal, or bar section level. ABA, Ctr. for Prof. Resp., Professionalism Codes/Reports, http://www.abanet.org/cpr/professionalism/profcodes.html (accessed Sept. 6, 2007). Many of these have also created commissions or task forces to study and report on the professionalism of lawyers in their area. Id. State and federal courts and professional associations have similarly adopted professionalism creeds. Id. Illustrative of the references to the need for civility are the words from Arizona's code: “I will advise my client that civility and courtesy are not to be equated with weakness; . . . I will be courteous and civil, both in oral and in written communication . . . .” Bd. of Govs., St. B. of Ariz., A Lawyer’s Creed of Professionalism of the State Bar of Arizona, http://www.myazbar.org/Members/creed.cfm (2005). An excellent compilation of the many resources on professionalism is located at http://professalism.law.sc.edu/index.html, and http://law.gsu.edu/cunningham/Professionalism/Index.htm. For more information about professionalism in law schools, see Standing Committee on Professionalism of the American Bar Association, Report on a Survey of Law School Professionalism Programs, available at http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf.
have been voiced in the medical profession and in all levels of education. Educational institutions have been asked to address this perceived lack of professionalism. Physicians have responded, seeking to teach and assess professionalism. Meanwhile, neuroscientists and psychologists have been developing the study of emotional and social intelligence and have found that the way we interact with others has an enormous influence on our emotions, physical states, and mental health. Being civil, it turns out, is good for us. So how can we help our students develop as professionals who practice civility? How do we define “civility,” identify its attributes for our students, and then assess their learning? How do we respond to colleagues’ skepticism that professionalism and civility cannot be taught, cannot be learned and, above all, is not what law professors should teach? Finally, how do we teach and assess students’ civility in a way that treats them with dignity and respect?

9 “Ensuring that students of medicine at all levels not only acquire but consistently demonstrate the attributes of medical professionalism is arguably the most important task facing medical educators here at the beginning of the twenty-first century.” Jordan Cohen, Foreword, in Measuring Medical Professionalism vi (David Thomas Stern ed., Oxford U. Press 2006).


12 Ken Bain, What the Best College Teachers Do 89–92 (Harvard U. Press 2004) (describing a medical professor’s focus on teaching her students to develop their personal skills as well as learn neurology).

13 Stern, supra n. 11, at 4–12.

14 Goleman, supra n. 3, at 5.

15 Malcolm Gladwell, Blink: The Power of Thinking without Thinking 12–13 (Little, Brown & Co. 2005) (providing an example of the power and speed with which these emotions are processed; student ratings of a teacher’s effectiveness based on a two-second silent videotape were consistent with ratings at the end of a semester); id. at 11–12.

16 Goleman, supra n. 3, at 224.

17 In his Epilogue, Goleman notes, Surely much of what makes life worth living comes down to our feelings of well-being—our happiness and sense of fulfillment. And good-quality relationships are one of the strongest sources of such feelings. Emotional contagion means that a goodly number of our moods come to us via the interactions we have with other people. In a sense, resonant relationships are like emotional vitamins, sustaining us through tough times and nourishing us daily.

Id. at 312.
This Article suggests some concrete ways to teach civility—one component of professionalism—to law students.\textsuperscript{18} Professionalism certainly includes much more than civility, incorporating the concepts of ethics, morals, public service, life-long learning, personal integrity, professional identity, and a commitment to self-development.\textsuperscript{19} This Article begins with a brief overview of civility in Part I. Part II provides a few of the many arguments for why we should teach law students to be civil. Part III explores some concrete ways in which we can teach civility within individual classes, using the dynamics of student engagement in the classroom as an opportunity to identify goals, practice, and receive feedback.\textsuperscript{20}

\textbf{I. WHAT ARE “PROFESSIONALISM” AND “CIVILITY”?}

The legal profession has struggled to arrive at a definition of professionalism, with many yielding to Justice Potter Stewart’s

\textsuperscript{18} Additional ideas about how and why to teach this are in Melissa H. Weresh, \textit{Legal Writing: Ethical and Professional Considerations} (LexisNexis 2006); Donna C. Chin et al., \textit{One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing}, 51 Rutgers U. L. Rev. 889 (1999); Leah M. Christensen, \textit{Going Back to Kindergarten: Considering the Application of Waldorf Education Principles to Legal Education}, 40 Suffolk U. L. Rev. 315 (2007); and Weresh, \textit{supra} n. 7.

\textsuperscript{19} Patrick Emery Longan, \textit{Longan Application}, http://www.law.gsu.edu/ccunningham/Professionalism/Award05/Apps/Longan.htm. Professor Patrick Longan was the winner of the 2005 National Award for Innovation and Excellence in Teaching Professionalism, co-sponsored by the American Bar Association Standing Committee on Professionalism and the Conference of Chief Justices. Professor Longan presented his ideas for teaching professionalism at the AALS Annual Meeting, Section on Legal Writing, Reasoning, and Research, in Washington, D.C., on January 5, 2006.

\textsuperscript{20} This is not to suggest that teaching civility in individual law school classes will solve the problem. Law students and lawyers are more likely to practice civility under stress when civility permeates law schools and civility is incorporated into lawyers’ continuing professional development. This would provide the kind of comprehensive, ongoing, and systemic teaching and reinforcement that would be more likely to lead to success. Such a discussion, however, is beyond the scope of this Article.
definition of obscenity: “I know it when I see it.” Some academics, however, have put forward definitions. For example, in creating his course The Legal Profession at Mercer University School of Law, Professor Patrick E. Longan arrived at the following five-part definition of professionalism:

(1) that a lawyer have the expert knowledge and skill necessary to provide competent assistance to his or her client; (2) that a lawyer act as a fiduciary of his or her client and always act in the client’s best interest regardless of the financial or other interest of the lawyer; (3) that a lawyer contribute some of his or her services for the good of others without expectation of payment; (4) that a lawyer acting as an advocate place his or her duties as an officer of the Court before the lawyer's duties to a client or the lawyer’s own interests; (5) that a lawyer act with civility in his or her dealings with others.

Other definitions of professionalism include similar themes and concepts, such as promoting diversity, treating others with respect, providing service to the profession, practicing with knowledge and skills, engaging in life-long learning, and having good judgment. In contrast to the legal profession, the medical profession has reached a consensus: “Professionalism is demonstrated through a foundation of clinical competence, communication skills, and ethical and legal understanding, upon which is built the aspiration to and wise application of the principles of professionalism: excel-

---

21 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); see Daicoff, supra n. 5, at 1343.
22 Longan, supra n. 19.
23 Id.
24 For example, the New Jersey State Bar Association’s Preamble to its Principles of Professionalism states,

The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Both are indispensable ingredients in the practice of law, and in the orderly administration of justice by our courts.

The following Principles, which focus on the goals of professionalism and civility, are aspirational in nature and are designed to assist and encourage judges and lawyers to meet their professional obligations.

25 Perhaps because words are so critical to the practice of law, lawyers have more difficulty agreeing on a shared definition, but this should not prevent us moving forward. As physicians have noted, if professionalism is to be validly assessed, it must be defined in a way that is “clear, complete and concise.” Louise Arnold & David Thomas Stern, What Is Medical Professionalism? in Measuring Medical Professionalism, supra n. 9, at 16.
lence, humanism, accountability, and altruism.”26 This definition shares many of the concepts lawyers believe essential to professionalism. That which physicians call altruism, we call service. For physicians, humanism focuses on the client–patient and treating patients and others with respect and dignity.27 This is what lawyers commonly call civility.

Civility is defined as “[p]oliteness; consideration; an act or expression of politeness.”28 Being civil is about being respectful and considerate; “[c]ivility is behaviour in public which demonstrates respect for others and which entails curtailing one’s own immediate self-interest when appropriate.”29 Civility is often associated with the notion of manners, but it is more than that.30 It is one of the fundamental “tools for interacting with others.”31 Civility “begins with the assumption that humans matter, that we owe each other respect, and that treating each other well is a moral duty.”32 Civility means valuing the reactions, views, and cultures of others. It implies the ability to disagree without violence or insult. When we practice civility, we pay attention, acknowledge others, think the best, listen, are inclusive, and speak kindly.33 Following these and other guidelines is “fundamental to the making of a good, successful, and serene life.”34 If we want our students to have successful lives, we will teach them these skills.35

26 Id. at 19.
27 Id. at 21.
29 Billante & Saunders, supra n. 2, at 13.
30 Id. at 9; Stephen L. Carter, Civility: Manners, Morals, and the Etiquette of Democracy xii (Basic Bks. 1998).
31 Carter, supra n. 30, at xii.
33 P.M. Forni, Choosing Civility: The Twenty-Five Rules of Considerate Conduct vii (St Martin’s Press 2002) (naming the first six of twenty-five rules). Other rules are Don’t Speak Ill; Accept and Give Praise; Respect Even a Subtle “No”; Respect Others’ Opinions; Mind Your Body; Be Agreeable; Keep It Down (and Rediscover Silence); Respect Other People’s Time; Respect Other People’s Space; Apologize Earnestly and Thoughtfully; Assert Yourself; Avoid Personal Questions; Care for Your Guests; Be a Considerate Guest; Think Twice Before Asking for Favors; Refrain from Idle Complaints; Give Constructive Criticism; Respect the Environment and Be Gentle to Animals; and Don’t Shift Responsibility and Blame. Id. at vii–viii.
34 Id. at xi.
35 Id. at 7. A professor of Italian Literature, Forni realized while teaching his students
One scholar describes the rules of civility as a “code of decency to be applied in everyday life.” Some critics argue that “codes of decency” oppress, with those in power prescribing specific behaviors to those from a traditionally disempowered group. One response is that civility is “pre-political”—a character trait that applies regardless of our view on life. Civility itself does not stifle expression nor bolster the status quo. Instead, it is about the manner in which we criticize, disagree, resist, challenge, or advocate. Being civil means that we do all these things. In fact, being civil may require that we take these actions to fight injustice and oppression but that we do so while respecting others. Civility is not about repressing concerns or individualism, but encouraging those expressions in a constructive way.

Civility is implicated in a vast number of interactions; overall, civility means treating others with respect—with communicating the gesture of respect being most important. Furthermore, civility requires that we communicate these gestures of respect not just to those we care for, but also to complete strangers. It means that we engage in self-restraint when doing so would promote “harmonious relations with strangers.” Specific behaviors and actions—in conveying respect and exhibiting self-restraint—depend on the situation we are in and whom we are with. Being civil includes listening as well as talking. It includes being humble and open to

about Dante’s *Divine Comedy* that “I wanted them to be kind human beings more than I wanted them to know about Dante.” *Id.*

36 *Id.* at xi.

37 See e.g. Randal Kennedy, *The Case against “Civility”*, Am. Prospect 84 (Nov.–Dec. 1998) (suggesting that demanding a standard of civility is simply another means of maintaining control, perpetuating the status quo).

38 *Carter, supra n. 30*, at xi.

39 *Id.* at 242 (noting, “Civility values diversity, disagreement, and the possibility of resistance . . .”).

40 Carter also argues that “[c]ivility requires that we express ourselves in ways that demonstrate our respect for others.” *Id.* at 162. “Civility allows criticism of others, and sometimes even requires it, but the criticism should always be civil.” *Id.* at 217.

41 E. Grady Bogue, *An Agenda of Common Caring: The Call for Community in Higher Education*, in McDonald et al., *supra* n. 11, at 19 (noting that a learning community is one in which “a lively and often contentious argument over the nature of truth” exists).

42 Billante & Saunders, *supra* n. 2, at 10. Billante and Saunders note that during focus groups they conducted with a range of Australian citizens, small acts such as having a younger person offer up a seat on a bus to an older rider were “commonly seen as important precisely because it expresses and recognizes a norm of respect . . . . The importance, in other words, is in the symbolism of the gesture more than the outcome of the behaviour.” *Id.* at 10.

43 *Id.* at 11; *Carter, supra n. 30*, at 78.

44 Billante & Saunders, *supra* n. 2, at 11.
the possibility that “they are right and we are wrong.” It means that we seek to empathize, to understand the thoughts, motives, and actions of others, rather than jump to conclusions, accuse, or attack based on quick, thoughtless reactions. When we listen, it means more than hearing and comprehending words. It means that we seek to read the behavioral landscape, the body language, tone, and actions that convey much greater meaning than words alone. Being civil demands that we recognize that social norms are not uniform across cultures and settings. In this regard, we need to acknowledge that social norms change.

Acting with civility has significant emotional influence. Many of the same behaviors and skills attributed to those who act with civility are associated with effective leaders. These include emotional self-awareness—the ability for leaders to be “candid and authentic, able to speak openly about their emotions.” Emotionally intelligent and successful leaders also demonstrate the ability “to manage their disturbing emotions and impulses . . . stay[ing] calm and clear-headed under high stress or during a crisis.” These effective leaders also show empathy. They “listen attentively and can grasp the other person’s perspective . . . get[ting] along well with people of diverse backgrounds or from other cultures.” These behaviors and skills of civility are the practices

45 Carter, supra n. 30, at 139.
46 E.g. Goleman, supra n. 3, at 85; Joshua D. Rosenberg, Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance of Human Relationships in the Practice of Law 58 U. Miami L. Rev. 1225, 1239–1240 (2004) (noting that “researchers have shown that merely adopting certain postures or facial expressions has immediate impact on emotions, regardless of the reason the postures are adopted and regardless of whether the positions are physically comfortable, uncomfortable, stressful or relaxing”).
47 Billante & Saunders, supra n. 2, at 17 (noting that “once it was considered civil to let someone smoke in your home, now it is uncivil to smoke in a non-smoker’s home and in most public situations”).
48 Daniel Goleman et al., Primal Leadership: Realizing the Power of Emotional Intelligence 253–256, app. B. (Harvard Bus. Sch. Press 2002). The leadership competencies outlined include the self-awareness competencies of emotional self awareness; accurate self-assessment and self-confidence; the self-management competencies of self-control, transparency, adaptability, achievement, initiative, and optimism; the social awareness competencies of empathy, organizational awareness, and service; and the relationship management competencies of inspiration, influence, developing others, change catalyst, conflict management, and teamwork and collaboration. Id.
49 Id. at 253.
50 Id. at 254.
51 Gladwell, supra n. 15, at 42–43; Goleman, supra n. 3, at 254 (both noting that doctors who displayed a dominant tone of voice in their conversations with patients or who otherwise were poor communicators were more likely to be sued than their counterparts who sounded concerned).
52 Goleman et al., supra n. 48, at 255.
that allow people to engage in satisfying and productive relationships. “To learn how to be happy we must learn how to live well with others, and civility is a key to that. Through civility we develop thoughtfulness, foster effective self-expression and communication, and widen the range of our benign responses.”

Practicing civility means that we are doing more than outwardly manifesting politeness. Being civil is using and developing our emotional intelligence.

II. WHY SHOULD LAW SCHOOLS TEACH LAW STUDENTS TO BE CIVIL?

In addition to teaching students how to think like a lawyer, we should be teaching them civility because it will help them in practice, will enhance their learning, and may even improve the profession. On the larger scale, civility allows us to re-

---

53 Forni, supra n. 33, at 6.
54 Scholars have repeatedly noted the complexity involved in the short phrase “thinking like a lawyer” and how those three words are shorthand for a multitude of higher-order thinking skills. E.g. William M. Sullivan et al., Educating Lawyers: Preparation for the Professor of Law 71–72 (Jossey-Bass 2007); Nancy B. Rapoport, Is “Thinking Like a Lawyer” Really What We Want to Teach? 1 J. ALWD 91 (2002). Addressing the complexity of this notion and how to teach it is beyond the scope of this Article.
55 Chin et al., supra n. 18, at 895 (responding to the outcry about civility’s decline in the profession, the authors note that they can help by “instilling in our students a sense of civility, fair-dealing, good judgment, and competence”); see Rosenberg, supra n. 46, at 1229 (noting that “success in law . . . correlates significantly more with relationship skills than it does with intelligence, writing ability, or any other known factor”); Weresh, supra n. 7, at 435 (“[F]ew would dispute that instruction in the areas of ethics, professionalism, legal analysis, and written communication [is] essential [to], if not the bare minimum, of a legal education.”).
56 I am assuming that law schools have a duty to train students to enter the profession. See Stuckey et al., supra n. 1, at 16 (“There is general agreement today that one of the basic obligations of a law school is to prepare its students for the practice of law.”). As noted in that work, “it seems hypocritical for law schools to collect three years of tuition while failing to prepare most students for law practice . . . .” Id. While I recognize that the role of scholarship is important, I also believe that law schools have a duty to provide high-quality teaching and to focus on student learning in exchange for student tuition and state subsidies. See John O. Mudd, Academic Change in Law Schools, 29 Gonz. L. Rev. 29, 60–61 (1993) (identifying as a barrier to academic change in law schools the “predominant” reward system in place that “strongly favors writing law review articles over creating innovative courses or developing new teaching materials”); Alice M. Thomas, Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy, 6 Widener L. Symposium J. 49, 52–53 (2000) (To enjoy promotion and job security, law teachers must devote much of their time to publication, an emphasis that detracts from their teaching); see also Philip C. Kissam, Launching towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education, 60 Ohio St. L.J. 1965, 1974–1975 (1999) (noting that a research orientation like that of the traditional university, with publication standards for professors
solve disputes peacefully, helping us fully participate in a democracy,\(^ {57}\)

... in a liberal democracy, personal freedom is fundamental. But so is the sense of owing duties to others that leads us to impose limits on our freedom, not because it is required by law but because it is required by morality—the morality of trying to build a civil community together.\(^ {58}\)

For democracy to succeed, it “needs dialogue, and dialogue requires disagreement.”\(^ {59}\) But how much easier it is to disagree and resolve conflicts when all participants do so with respect and dignity.\(^ {60}\) Most of us would rather engage in conversation with those who speak politely, audibly, and calmly, who do not attack, accuse, or badger. We would rather read polite, instead of vicious e-mails. Interacting with others, we may have different comfort levels and cultural expectations, but we all perform better when we have positive emotional connections.\(^ {61}\)

The vast majority of law students already practice civility.\(^ {62}\) But even students who practice civility may, when encountering the high-stress environment of law school,\(^ {63}\) engage in uncivil behaviors.\(^ {64}\) These students need reminders and practice. And there

tied to tenure, salary, and chair positions, has left less time for and less interest in teaching in law schools).

\(^ {57}\) Describing political civility, authors Nicole Billante and Peter Saunders refer to the work of scholars Cheshire Calhoun, John Rawls, Edward Shils, and Michael Meyer, noting the importance of being civil towards strangers in a civilized society. Billante & Saunders, \textit{supra} n. 2, at 8–9, 11.

\(^ {58}\) Carter, \textit{supra} n. 30, at 84.

\(^ {59}\) \textit{Id.} at 109 (continuing to note that “sharp criticism . . . is not uncivil”).

\(^ {60}\) \textit{See id.} at 132 (“[Civility] requires us not to mask our differences but to resolve them respectfully.”).

\(^ {61}\) Goleman, \textit{supra} n. 3, at 270 (“When the mind runs with such internal harmony, ease, efficiency, rapidity, and power are at a maximum. Heightened prefrontal activity enhances mental abilities like creative thinking, cognitive flexibility, and the processing of information. Even physicians, those paragons of rationality, think more clearly when they are in good moods. Radiologists . . . work with greater speed and accuracy after getting a small mood-boosting gift—and their diagnostic notes include more helpful suggestions for further treatment, as well as more offers to do further consultation.”).

\(^ {62}\) \textit{But see} Amy S. Hirschy & John M. Braxton, \textit{Effects of Student Classroom Incivilities on Students}, 2004 New Directions for Teaching & Learning 67, 68 (Fall 2004) (noting that, at the undergraduate level, it is common for students to demonstrate incivilities in the classroom).

\(^ {63}\) \textit{See} Krieger, \textit{supra} n. 6, at 114 (citing studies documenting high stress, anxiety, and depression levels among law students).

\(^ {64}\) In his book \textit{Social Intelligence}, Goleman reports on a study of students at Princeton Theological Seminary who unknowingly participated in an experiment on altruism. Goleman, \textit{supra} n. 3, at 50. Even though some of the students were assigned a task related
are a few students who do not practice civility. Conversations with colleagues from many different institutions yield frequent complaints about rude behavior, suggesting that these students gather more attention and require more energy than others.

The need and reasons to teach law students civility in preparation for law practice have been well documented. In practice, lawyers may be required to be civil by procedural rules and individual courts. Judges also condemn uncivil behavior when they encounter it. Just as we teach students the rules of civil procedure, to the parable of the Good Samaritan, students who perceived that they were short on time failed to stop by a man groaning in pain and clearly in need of assistance. Id. Goleman notes that “[o]f the many factors that are at play in altruism, a critical one seems to be simply taking the time to pay attention; our empathy is strongest to the degree we fully focus on someone and so loop emotionally.” Id. Goleman goes on to note that “empathy alone matters little if we fail to act. Those students who did stop to help were exhibiting another sign of social intelligence: concern.” Id. at 96.

Illustrative of law faculty’s efforts to curtail uncivil student behavior was the AALS Annual Meeting, Section on Teaching Methods’ presentation, Classroom Incivilities II: A Play in Four Acts (Atlanta, Ga., Jan. 5, 2004) (program and notes on file with Author) (presenting a range of student incivilities and ways to address them). At every teaching conference I have attended, such as those sponsored by the AALS; the Gonzaga University School of Law Institute for Law School Teaching; the Legal Writing Institute; the Association of Legal Writing Directors; the Society of American Law Teachers; and individual law schools, I have heard professors complain about student incivilities. Interestingly, while I have heard multiple complaints about “students today” being unprepared, rude, inappropriately demanding, and offensive, colleagues rarely talk about their students who are prepared, engaged, sincerely interested in their learning, and committed to being professional. Consider if the roles were reversed and law students held regular conferences about law teaching—what would they say about their professors?

See generally e.g. Chin et al., supra n. 18; Christensen, supra n. 18; Rosenberg, supra n. 46; Weresh, supra n. 7, at 433–435 (arguing that professionalism and ethics should be taught in legal writing courses, Weresh cites ABA Section of Legal Education and Admission to the Bar, Legal Education and Professional Development—An Educational Continuum, Report on the Task Force on Law Schools and the Profession: Narrowing the Gap (ABA 1992) [hereinafter MacCrate Report] and ABA Section of Legal Education and Admission to the Bar, Standards for Approval of Law Schools (ABA 2005)).

For example, Arizona’s Rules of Civil Procedure provide that “[t]rials shall be conducted in an orderly, courteous and dignified manner.” Ariz. R. Civ. P. 80(a).

Federal District Court Judge Samuel Der-Yeghiayan requires that all attorneys before his court be civil or face sanctions, providing them with a written outline of expected behaviors when he first meets them. Samuel Der-Yeghiayan, U.S. Dist. Ct. J. of N. D. Ill., Commencement Address (Concord, N.H., May 21, 2005) (copy of transcript on file with the Author). Judge Der-Yeghiayan notes that he rarely has a problem with civility. If there is one, he warns attorneys that they are close to being sanctioned, which almost always causes attorneys to conform their conduct to his guidelines. Interview with Samuel Der-Yeghiayan, U.S. Dist. Ct. Judge, N.D. of Ill. (May 21, 2005) (notes on file with Author).

Unfortunately, it is all too easy to find examples of uncivil attorney behavior. See The Nelson Mullins Riley & Scarborough Ctr. on Prof., U. S.C. Sch. L., Recent Cases High-
dure and ethics, we should teach them about these civility rules. But teaching students about the published rules is only part of our job as teachers. Our students also need to learn about the “hidden” or “unwritten” civility rules that significantly impact practice. For example, the clerk of court who encounters a rude attorney is likely to be less inclined to schedule around an attorney’s conflicting plans. Similarly, opposing counsel may be less flexible when confronted with disrespectful behavior. Colleagues and supervisors may consider uncivil attorneys unsuitable for advancement. People working for attorneys may be less effective,


71 The American Bar Association currently states the following:

(a) A law school shall require that each student receive substantial instruction in:

(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
(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 at least one additional rigorous writing experience after the first year;
(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
(5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.


72 See David Leach, Presentation, The Formation of Physicians: Learning from Another Profession (Jt. Working Group Conf. co-sponsored by the ABA Sec. Leg. Educ. & Admis. to the B., Assn. of Am. L. Sch., and Natl. Conf. of B. Examrs., Chi., Ill., Oct. 1, 2004) (copy on file with the Author). Addressing how to evaluate physicians, Leach pointed out that “[k]nowing the rules is not enough. [Medical] [r]esidents need to prepare for the unknown. How they think is as important as what they think . . . (and may be more important over time).” Id. at 5.

73 Before the 1900s’ increasingly scientific approach to medicine, medicine was known as an “art and mystery.” Arnold & Stern, supra n. 25, at 17–18. “With science as a foundation of proven medical treatment, expertise became a fundamental responsibility of the good physician, above and beyond compassionate and committed care.” Id. at 18.

74 Through her empirical work conducting in-depth interviews with large-firm litigators, Kimberly Kirkland notes how many decisions about promotion are based on perceptions. Kimberly Kirkland, Ethics in Large Law Firms: The Principle of Pragmatism, 35 U. Mem. L. Rev. 631, 694–695 (2005). Kirkland also notes that firms value “good citizenship” in promoting colleagues to equity partner status. Id. at 701. Moreover, Kirkland notes that large-firm lawyers place a premium on civility, equating it to ethical behavior. Id. at 720–
productive, efficient, or helpful when they are treated without civility.\textsuperscript{75}

A recent survey of legal professionals supports teaching civility. In a 2005 statewide survey of the bench and bar in Arizona, respondents were asked to rank the importance of twenty-two professional skills, twenty-six subjects of legal knowledge, and twenty categories of professional values in being a successful lawyer.\textsuperscript{76} Interestingly, of the three areas—skills, knowledge, and values—values received the highest ratings, with skills second and knowledge last. The professional value “Act honestly and with integrity” was rated by 99\% of the respondents as “Essential” or “Very Important.”\textsuperscript{77} The fourth highest professional value was “Treat clients, lawyers, judges, staff with respect,” with 95\% of all respondents rating this as “Essential” or “Very Important.”\textsuperscript{78} Significantly, this professional value was rated as more important than any area of substantive knowledge\textsuperscript{79} and only one percent below the highest-ranked professional skills of legal analysis, reasoning, and writing.\textsuperscript{80}

722. While ethics are distinct from civility, these lawyers may have been inadvertently acknowledging the power and value of social intelligence in relationship building and practice productivity. The importance of having good interpersonal skills was supported by recent comments from a senior associate at a prestigious Arizona firm. When asked what the firm sought in its new hires, she stated that the firm looked for people whom they could trust to use good judgment and interact well with others. Those who made it to the interview stage were assumed to have the mental capacity to perform well as attorneys. The key question for applicants was, “Would your supervisor trust you enough to leave you alone in the room with their best client?” The firm did not assume that applicants had these skills, regardless of their level of academic success. Phoenix Law School’s Women’s Law Association Program (Mar. 2006) (notes on file with Author).

\textsuperscript{75} This is consistent with Goleman’s findings about social intelligence. See supra n. 61.


\textsuperscript{77} Id. The highest ratings for professional skills were “Legal analysis and reasoning” and “Written communication.” Id. These received equal ratings, with 96\% of the respondents marking them “Essential” or “Very Important” to being successful in practice. Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id. The highest rating for an area of legal knowledge was for civil procedure, which 87\% of the respondents ranked as “Essential” or “Very Important” to successful law practice. Id.

\textsuperscript{80} Id. This finding is also consistent with recent research that seeks to identify factors important to effective lawyering. Among the twenty-six factors associated with lawyering success as identified by Berkeley researchers Marjorie M. Shultz and Sheldon Zedeck were “building client relationships,” “ability to see the world through the eyes of others,” “listening,” and “developing relationships.” Linley Erin Hall, What Makes for Good Lawyering: A Multi-Year Study Looks beyond the LSAT’, Boalt Hall Transcript 22, 24 (Summer 2005) (available at http://www.law.berkeley.edu/beyondlsat/transcript.pdf). Similarly, other countries have noted the importance of professional skills, including civility, social, ethnic, and
Neuroscience also supports the importance of teaching civility: people suffer when civility and respect is lacking. Our brains depend on our social interactions to maintain emotional health. Interactions with people in work, home, and recreational settings create “a kind of emotional soup, with everyone adding his or her own flavor to the mix.” Through these interactions, we “catch” each others’ moods. Being treated well and interacting with happy people tend to lift our spirits; being treated rudely contributes to our feeling unhappy and angry. Regardless of their area of law or geographic setting, as part of their professional lives our graduates will interact with colleagues, adversaries, clients, members of the bar, staff, and countless others. If our graduates treat these individuals with respect, they will serve their clients and the profession well. These graduates are more likely to be emotionally healthy, and they are likely to inspire others to be more creative and productive. “When people feel good, they work at their best. Feeling good lubricates mental efficiency, making people better at understanding information and using decision rules in complex judgments, as well as more flexible in their thinking.”

Helping students develop civility also helps their learning in law school. Across multiple disciplines, people learn best when they are in a learning environment that provides them with a sense of community and when they are engaged in active learn-
Being a part of a community\textsuperscript{89} is facilitated when people trust each other and feel respected and valued. Active learning requires students to be engaged in completing exercises and tasks, rather than passively receiving knowledge.\textsuperscript{91} Active learning is complemented by teaching to students’ different learning styles, such as having students work with others in small groups.\textsuperscript{92} Many law students, however, report that they dislike working in groups.\textsuperscript{93} In addition to other complaints about working with classmates, students often express frustration being in groups in which other students dominate the discussion, are not prepared, and are disrespectful or unpleasant. Teaching civility, and asking students to practice it in class, helps with this teaching technique.

In the business world, researchers have noted that group work among professionals is more effective when people are civil.\textsuperscript{94} One business leader made an international research group’s day-long meetings “among the most focused, productive, and enjoyable of any [meetings]” these group members have attended.\textsuperscript{95} Among the written list of “process norms” this business leader identifies are every group member’s responsibility for keeping the group on task, intellectual skill development.”); see Comm. on Dev. in Sci. of Learning et al., \textit{How People Learn: Brain, Mind, Experience, and School} 144 (John D. Bransford et al. eds., Natl. Acad. Press 2000) [hereinafter \textit{How People Learn} (“New developments in the science of learning suggest that the degree to which environments are community centered is also important for learning. Especially important are norms for people learning from one another and continually attempting to improve.”)]; Levy, \textit{ supra} n. 4, at 56–65 (addressing how socio-emotional factors in the classroom affect law student learning); see also Bain, \textit{ supra} n. 12, at 76–77 (noting that exceptional teachers “took all their students seriously, and treated each one with respect”).

\textsuperscript{89} E.g. \textit{How People Learn}, \textit{ supra} n. 88, at 12–13.

\textsuperscript{90} Twenty years ago, Ernest Boyer, president of The Carnegie Foundation for the Advancement of Teaching, called for a greater sense of community as a way to improve a number of problems in education. Part of that community was building an institution that focused on learning, affirmed civility, valued connections, pursued diversity, and supported individuals. William M. McDonald, \textit{Preface}, in McDonald et al., \textit{ supra} n. 11, at xviii.

\textsuperscript{91} See Gerald F. Hess & Steven Friedland, \textit{Techniques for Teaching Law} 13–16 (Carolina Academic Press 1999). “Research shows that active learning methods facilitate the development of higher-level thinking (analysis, synthesis, evaluation) and skills acquisition, which are critical goals for most legal educators.” \textit{Id.} at 14.

\textsuperscript{92} See \textit{id.} at 132 (noting that “[h]undreds of studies have demonstrated that collaborative learning is more effective than competitive or individualistic learning methods for a broad spectrum of cognitive, affective and interpersonal goals”).

\textsuperscript{93} In response to one end-of-the-semester student evaluation question, “What did you find least effective in this course?,” my students regularly write “working in groups.” Conversely, other students note that “working in groups” is one of the most effective parts of the course. Colleagues at other institutions who also frequently engage students in groups report similar responses.

\textsuperscript{94} Goleman et al., \textit{ supra} n. 48, at 173.

\textsuperscript{95} \textit{Id.} at 180.
listening well, making sure others in the group contribute, and “rais[ing] questions about [the group’s] procedures.” These civility-oriented responsibilities make self-awareness important and group members accountable. No wonder these groups are enjoyable and productive, and groups in class could be equally so. Groups are more effective when their participants can infuse positive perspectives, humor, enthusiasm for and interest in collaboration, and playfulness.

Many students appreciate having civility included in a course’s goals, and I have included “professional engagement,” a large part of which comprises acting with civility, in a legal writing course because of student input. Years ago former students, then serving as teaching assistants, reported that asking students to act professionally would make legal writing classes more effective. These students had varying reactions to working in small groups, but all agreed that working in a small group was vastly improved when everyone in the group was respectful, considerate, and prepared. Aside from the students who were extremely shy and who found the notion of working with others exhausting, no matter how professional they were, other students reported that being with classmates who were respectful, helpful, and prepared greatly facilitated their learning.

Teaching professional engagement gave students guidance about how to treat others and how they could expect to be treated, and it gave them permission to speak up when they felt that they were not being treated that way. It helped students give and receive feedback from their peers. Asking students to be respectful also contributed to creating a safer learning environment. After students learned the course requirement that they treat others

96 Id.
97 Id. at 4 (noting that the reverse is also true; “whenever emotional conflicts in a group bleed attention and energy from their shared tasks, a group’s performance will suffer”).
98 When my colleagues and I first decided to teach and evaluate professionalism in our legal writing courses, having it comprise 20% of students’ grade, we called it “participation.” No matter what we said or wrote, however, students regularly persisted in perceiving participation as how frequently they talked in class, rather than the quality of their participation. Most students seemed to have lost sight of the importance of listening and being respectful. We later named that 20% of the course “professionalism,” which considerably improved student focus, but was viewed by some students as punitive and “grade schoolish.” Given the literature on learning and the value of student engagement, we have now named this course component “professional engagement.” As with many aspects of the course, we continually revise and refine the course in light of what we learn.
with civility, and that there would be consequences for them if they did not, students rarely engaged in actions that made others feel devalued, such as rolling their eyes, sighing, whispering, or passing notes when certain classmates spoke, actions that shamed and embarrassed many students. It was no longer acceptable to be uncivil in class.100

My perception was that requiring students to be civil contributed to building a stronger sense of class community, thus enabling greater student learning. But not all students agreed. Some students were infuriated by the notion that they were asked to behave in certain ways, arguing that such course requirements were inflexible and likely to be abused by professors who did not like these students. They found rules about civility demeaning, degrading, and demoralizing. They interpreted “being respected” as having the right to speak their thoughts in the way they wished and to engage in nonverbal acts of their choice. My response was that I appreciated their views, but as their professor my job is to do the best I can to help all students learn and develop as professionals. Most are investing tens of thousands of dollars in their legal education. I do a disservice to most students in the class if I allow a few students’ uncivil behaviors and words to dominate and disrupt others’ learning. And I do a disservice to the outspoken students if I do not let them know the importance of and provide opportunities for them to practice civility. When they are in class, they are part of a public discourse, and public discourse is most effective when people treat each other with respect.101

Outside the classroom, law students also benefit from practicing civility. As is documented by the many professionalism programs law schools now offer in their orientation programs for first year students,102 many legal educators stress that students enter the profession the day they begin law school. Many of us explicitly tell students that the reputations they establish in law school for having integrity, being honest, reliable, and responsible, working hard at their learning, and treating others with respect stay with them beyond commencement. To the extent that students show

100 For an account about the powerful forces of rejection among children in a kindergarten classroom, and an innovative and pioneering approach to building community, see generally Vivian Gussin Paley, You Can’t Say You Can’t Play (Harvard U. Press 1992).
101 See supra nn. 87–97 and accompanying text.
their classmates, professors, staff, and law school administrators that they are developing and committed to these values, the more likely these students are to get job referrals, glowing letters of recommendation, and names of potential contacts. After the first year, many students will be working in externships, clinics, or part-time legal jobs, positions where they will need to demonstrate their skills as soon-to-be lawyers. If they have understood the importance of and have practiced treating others with respect in the classroom, they will be better equipped to do the same in diverse legal environments. In law practice, “success in law (as in other fields) correlates significantly more with relationship skills than it does with intelligence, writing ability, or any other known factor.”

### III. HOW CAN LAW PROFESSORS AND SCHOOLS TEACH AND ASSESS CIVILITY?

Civility “can be taught and learned.” Law professors often object to this statement, arguing that law students should already know how to behave with civility, and if not, it is too late. But

---

103 In a former life I served as the Assistant Dean for Career Services. I regularly received phone calls from lawyers and judges asking about particular students or asking for names of people they should consider interviewing. Students and graduates also wanted to know about contacts and opportunities. I provided notice of all jobs to all students and graduates, but I was always willing to go out on a limb or make special efforts for students who had shown that they had integrity, valued competence, were reliable and responsible, and would treat all others with respect.

104 Rosenberg, supra n. 46, at 1229.

105 Goleman, supra n. 3, at 263. Teaching and learning are both important. See generally Thomas A. Angelo & K. Patricia Cross, Classroom Assessment Techniques: A Handbook for College Teachers 3 (2d ed., Jossey-Bass 1993) (“There is no such thing as effective teaching in the absence of learning. Teaching without learning is just talking.”).

106 This is similar to law professors’ complaints that they should not have to teach basic grammar. See Weresh, supra n. 7, at 429.

107 Several months ago a senior colleague and I were walking down the hall. Coming toward us was a second year law student with the designer logo “fcuk” (French Connection United Kingdom) on his shirt. “Now that’s the kind of person we’re supposed to educate to be a lawyer?” was the colleague’s comment. “Who would think to wear such a shirt? That is someone who will never learn how to be respectful.” This sentiment is also expressed in other disciplines, noting there is a widely held (although often unconscious) conviction that while it is possible to “grow” the store of knowledge we hold and the skill with which we use it, it is not possible to grow the human soul. Or, if it is possible, “soul work” is out of place in higher education . . . . But all education is a process of forming or deforming the human soul—whether or not we understand, acknowledge, or embrace that fact. The only question is whether we will be thoughtful about that process and try to direct it toward the best possible ends.
it is not too late. Law students are smart. They understand what matters. If we show that civility is important by naming it, modeling it, teaching it, providing feedback on it, and evaluating it, students will learn those skills. In teaching professionalism skills to his students, one professor of medicine provides them with what he calls the “three ‘E’s—expectations, experience and evaluation.”108 He first provides clear expectations for his medical students, naming the behaviors he seeks. Second, he tells them how they will be evaluated. And finally, he gives students opportunities to practice and get feedback on those skills.109 He has had no difficulty in having his students learn professionalism.110 As another physician noted regarding the teaching and measuring of medical professionalism, people “don’t respect what you expect; they respect what you inspect.”111 Teaching medical students to develop emotional and social skills is now a part of the medical school curriculum.112 Medical students must also show they have these skills to get their license to practice.113 We law professors can similarly ask students to be civil, explain what civility means, provide feedback on civility, and assess how they practice civility. Perhaps acting with civility might even one day be a bar requirement.114

Civility and professionalism are already being taught in many law school courses, such as in stand-alone courses on professional-

Parker J. Palmer, Forward, in McDonald et al., supra n. 11, at xi.
108 Stern, supra n. 11, at 5.
109 Id. at 8–12.
111 Cohen, supra n. 9, at v.
112 Bain, supra n. 12, at 165 (noting that while teaching these skills is accepted practice now, when medical professor Jeannette Norden first introduced these skills “not all her colleagues were pleased”); John Norcini, Faculty Observations of Student Professional Behavior, in Measuring Medical Professionalism, supra n. 9, at 153 (“There are at least five steps in administering a process for the assessment of professionalism: specifying the purpose, developing assessment criteria, training the faculty and informing the students, monitoring the program, and providing routine feedback.”). Authors contributing to Medical Professionalism, supra n. 9, describe many ways to teach and assess medical professionalism, for example, having medical students engage in standardized patient encounters, participate in surveys, develop portfolios, and using other instruments for short- and long-term teaching and learning. Id.
ism and interpersonal skills, which address many of the same issues and behaviors. And certainly teaching civility is already a part of many clinical and simulation-based classes, such as negotiation, mediation, trial advocacy, externships, and independent studies. Many legal writing colleagues also incorporate ethics and professionalism into required courses. Given the concern about law students’ and lawyers’ lack of professionalism, however, these efforts are not enough. Often when faculties have realized that students need to learn additional skills or values, or learn them in greater depth, faculties suggest that the newly identified knowledge or skill be incorporated into an existing course or added as a new stand-alone course. This has happened to many legal writing courses, which, as others have noted, become convenient places to incorporate the skills deemed important for law students to learn, but not important enough to be taught in almost any other required course.

Teaching civility is appropriate in any course, and teaching it in a legal writing course works well for several reasons. Legal

\[\text{For example, both Professors Longan and Rosenberg teach stand-alone courses that address interpersonal relationships. See Longan, supra n. 19; Rosenberg, supra n. 46, at 1229–1234.}\]

\[\text{See generally e.g. Chin et al., supra n. 18, at 895; Christensen, supra n. 18, at 320; Weresch, supra n. 7, at 427.}\]

\[\text{Stuckey et al., supra n. 1, at 3 (noting that “there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day in practice or to design a program of instruction to achieve those goals”). As the authors of the Carnegie study noted,}\]

\[\text{[E]ffective educational efforts must be understood in holistic rather than atomistic terms. For law schools, this means that, far from remaining uncontaminated by each other, each aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social—takes on part of its character from the kind of relationship it has with the others. In the standard model, in which the cognitive apprenticeship as expressed in the Socratic classroom dominates, the other practical and ethical-social apprenticeships are each tacitly thought of and judged as merely adjuncts to the first. That is why adherents of the additive strategy resist the idea that all experiences are critical, that they are inseparable, and that all three will be strengthened through their integration.}\]

\[\text{Sullivan et al., supra n. 54, at 191}\]

\[\text{Sourcebook, supra n. 65, at 45. The authors of the Sourcebook note that law schools have to make choices about what to include and how in-depth to teach material in the legal writing curriculum, noting that “[a]s more lawyering skills are added into the basic course, law schools must consider increasing the number of required credit hours or semesters, or risk sacrificing the quality of basic analysis, research, and writing instruction.” Id. at 47.}\]

\[\text{Id. at 10–11 (noting the importance of integrating ethics and professionalism into a legal writing course, and adding that legal writing can also help students learn “such professional requisites as . . . maintaining civil discourse”). Later, the authors argue that students in a legal writing course “should understand the importance of civility and professionalism.” Id. at 35. Suggesting that writing professors include teaching civility is not}\]
writing classes are required, relate to the practice of law, usually have smaller numbers of students, and often have teachers who are innovative, dedicated to student learning, and willing to try new approaches.\textsuperscript{120} With the infusion of skills and substance, law students are already practicing a range of lawyering tasks and skills in these courses, making them fertile places in which to teach about the practice of law and the “hidden” rules of civil behavior. And some of the most innovative teaching methods and ideas come from those teaching legal writing.\textsuperscript{121} Teaching civility and professionalism in a legal writing course is certainly not the only place to do so. But it is a great place to start, given its small class-size and focus on individual learning. Within that context, having students practice and learn civility may be more likely to succeed.\textsuperscript{122} That success can then be shared with colleagues and transferred to other courses.\textsuperscript{123}

\textit{A. Identify the Learning Goals}

As with teaching any other subject, when teaching civility, we first need to define our learning goals.\textsuperscript{124} Then we need to provide

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{120}] See \textit{generally e.g.} Chin et al., \textit{supra} n. 18, at 895; Christensen, \textit{supra} n. 18, at 320; Weresh, \textit{supra} n. 7, at 427.
\item[\textsuperscript{121}] \textit{Sourcebook}, \textit{supra} n. 65, at 53 (“[T]he LRW community is increasingly shaping classroom instruction based on modern teaching and learning theories.”). At every law teaching conference I attended, including those sponsored by the American Association of Law Schools (AALS), Gonzaga University School of Law Institute for Law School Teaching, the Legal Writing Institute, the Association of Legal Writing Directors, and the Society of American Law Teachers, I have been amazed and inspired by the exciting teaching and learning techniques tried, developed, and refined by legal writing teachers. I have not attended clinicians’ and academic success professors’ conferences, but understand them to be similarly innovative.
\item[\textsuperscript{122}] In addition to being innovative, writing professors are extremely supportive and generous, regularly offering to share materials and ideas and to brainstorm approaches to improve teaching and learning.
\item[\textsuperscript{123}] In teaching doctrinal courses, I have followed the methods in this Article in teaching civility, most recently in a class of sixty-six students.
\item[\textsuperscript{124}] “Students perform better when they know what goals they are trying to achieve.” Hess, \textit{supra} n. 6, at 99; Stern, \textit{supra} n. 11, at 9 (identifying a goal for physicians as choosing wisely “among equally worthy values—such as responsibility to patients versus respect for teachers and the hospital hierarchy”); see Barbara E. Walvoord & Virginia Johnson Ander-
\end{enumerate}
\end{footnotesize}
these goals to students. Articulating and publishing these goals requires more than just announcing that students must be polite to each other. As noted above, individual students, support staff, and professors, based on age, culture, and experience, could well interpret “being polite” differently and apply them differently in varied contexts. Instead, we need to specify what we expect. For example, to me, and to most of the American legal profession, being respectful includes being on time. And being on time for class means that students and I are in the class with computers, texts, and handouts organized and in place by the time class starts. To one of my students, treating people with respect may also mean being on time, but being on time may mean being physically present in class at the time the attendance sheet is circulated, usually within the first five minutes. For those students who do not include being on time in their notion of being respectful, it is important to identify timeliness as one of the parts of teaching civility and to explain why it is important. Coming from undergraduate classes, where quietly slipping into the back of a large lecture hall affects almost no one except the tardy student, stu-
students need to realize that being unprepared and late may distract the rest of the class and detract from classmates’ learning. Where students’ tardiness affects others, it is disrespectful.

Students benefit from learning this, and from understanding how it relates to practice. Even though being “on time” may seem like an obvious directive, in practice, as in the classroom, it is more nuanced. For example, in practice an attorney may have to choose between cutting off a supervising attorney and being late for a meeting with a different supervising attorney. This problem presents difficult choices. Thinking about the dilemma in advance, and providing both supervisors with notice of the potential conflict reduces the degree of incivility that would otherwise arise from being late or interrupting a meeting. Schedule conflicts frequently occur in school and practice; having students practice how to manage timeliness issues respectfully in law school can later serve them well when they enter the profession.

We need to further explore what is meant by “timeliness.” This may sound like tedious work, but it is what many of us do in our courses already.129 When we teach legal writing, we identify the many learning goals involved in composing or drafting a legal document, from large-scale organizing to analyzing and synthesizing statutes, regulations, and cases, applying and distinguishing facts, using precise language, and citing authorities accurately.130 Within each of those are a myriad of other goals, such as using facts, law, and policy to make analogies and distinctions and organizing arguments around persuasive thesis sentences. We need similarly to identify civility’s parts and complexities,131 the means by which we measure it, and communicate those goals and assessment measures to students.

Because we cannot know what our students intend, we must rely on what our students do and say, recognizing that civil behavior in one set of circumstances may be less civil in another. For example, in general, it is best not to interrupt others when talking.

---


130 Sourcebook, supra n. 65, at 5–46.

131 We may not need to be as explicit in defining and describing some behaviors. For example, all students would likely agree that it is rude to roll one’s eyes when a classmate speaks, thus needing no explicit directives from their teacher. In contrast, however, many students may disagree about the meaning of being on time and the degree to which being on time conveys respect.
To use an obvious example, if one student is talking, unaware that a hot cup of coffee has spilled behind her, interrupting to alert her to the danger is the civil thing to do. Or, if one student in the class tends to dominate class discussion, repeatedly making extensive comments, respecting the rest of the class may require the professor to interrupt and invite others’ comments.\textsuperscript{132} We need to name the actions and words that we expect to see when people are being civil, and then convey that they need to also use judgment,\textsuperscript{133} because these are not absolute rules.\textsuperscript{134} Naming the behaviors and the need to use judgment allows us to provide our students with something tangible and specific.\textsuperscript{135}

By way of example, in my courses, I have named some of these behaviors as being resourceful, taking risks, encouraging and allowing others to talk, being prepared, listening, having a positive approach to working with others, taking responsibility for independent learning, learning from mistakes, offering solutions when voicing complaints, and demonstrating effort and perseverance.\textsuperscript{136} Even when we name these attributes we seek to see in students and ourselves, it may behoove us to allow for an “other” category, the category of things students will do that, no matter how long we teach, we have never seen previously.\textsuperscript{137}

\textsuperscript{132}This suggests the more traditional form of teaching, where the professor is in charge of the classroom environment and expected to control class discussion. It is not the only model. Students may be involved in taking turns being the class leader and facilitator, part of which involves guiding the discussion, including asking some students to be quiet so others can participate.

\textsuperscript{133}Stern, supra n. 11, at 9 (noting that professionalism requires making wise decisions and articulating the reasoning behind the choices made).

\textsuperscript{134}Hess & Friedland, supra n. 91, at 6–7 (noting how law students frequently start law school searching for absolutes, trying to identify and memorize “the Good Law”). A student showed me a vivid example of this after I suggested to the class that they keep their sentences to about twenty-five words or less to aid the reader in understanding complex legal analysis. This student started submitting written work with many sentence fragments, a problem that had not appeared in his earlier work. After talking to him, I learned that he had an ear about how to write sentences, but no fundamental understanding of what each sentence required; as a result, after hearing about the value of fewer words per sentence, he proceeded to consistently insert terminal punctuation after the twenty-fifth word in a sentence.

\textsuperscript{135}For an example, compare the goal of “I want each student to think like a lawyer” with “I want each student to use law, facts, and policy to make coherent, organized written arguments about whether a court has personal jurisdiction over a party.”

\textsuperscript{136}Legal Skills Course Description and Handbook 9–10 (Franklin Pierce L. Ctr. 2006) (copy on file with Author). This is certainly not an exhaustive list, and the behaviors and attributes named should reflect the values the professor is trying to teach. These are ones that my colleagues and I have come up with after tweaking them for years. They remain a work in progress, and we continue to revise and modify them every year.

\textsuperscript{137}For example, one year a student had an aversion to wearing shoes. Given the stu-
In naming civility’s components, it helps to note that “being civil” is complex, much like being a parent, lawyer, or physician. There is no one right way to be a good parent, lawyer, or physician, no one formula, approach, or proven method. For example, just because your parenting methods help your first child develop wonderful habits, that does not mean the same parenting approach will work with your second. Part of civility’s complexity is recognizing that being civil is not an absolute condition, where someone either is or is not civil. Instead we can adopt the language of those teaching medical professionalism and name an incident of incivility as a “lapse.” This recognizes our human fallibility and acknowledges that mistakes are possible. Under stress, time-pressure, and high stakes, we may all act in ways of which we are not proud. In fact, mistakes or civility lapses may be some of the best learning tools. They allow us to provide feedback to students and to teach about ways to redress acts of incivility. They teach us when we are likely to engage in uncivil behavior, what we perceive as uncivil in others, and how we respond to those interactions.

As with other skills, it is helpful to recognize that the skills of practicing civility emerge over time and that the level of professionalism in a medical or law student is and should be different than that of an experienced practitioner. This developmental
approach to learning civility suggests that a goal in teaching civility might not necessarily be that all students perform consistently, but instead that all make gains in their understanding and practice. But what about the students who always appear to treat others with respect and dignity? It would first appear that these students have nothing to learn about civility. My experience is that students in this category frequently shy away from confronting those who treat others with considerably less respect. These are the polite and considerate students who will ask me after class if they can please avoid ever being assigned to a small group with so-and-so because she is offensive, obnoxious, and overbearing. For these students, the goal is to learn how to respond to these behaviors in a way that allows them and their fellow classmates to participate in meaningful, thoughtful, productive dialogue. 144

To arrive at civility guidelines—the naming and describing of behaviors that are expected from all course participants—may be best left to the nature of the individual class and professor. 145 One approach is to engage our students in a short in-class discussion, or out-of-class online discussion, about the behaviors they would expect and want from their classmates and teacher. 146 With different generations, cultures, and genders, we may find that one of the most important things we can do is engage in this conversation lights the need for formative, longitudinal assessment of learners’ professionalism, for the use of qualitative methods involving self assessment and reflection, and for setting stage-specific cut points for acceptable and unacceptable behavior, depending, perhaps, upon the principle of professionalism involved.

Arnold & Stern, supra n. 25, at 31.

144 This is a challenge for many of us. How many of us have looked at committee assignments and sought to be relieved of working with certain colleagues or inwardly cringed when we have a colleague whom we perceive to treat us disrespectfully?

145 Unlike other subjects, where students usually lack sufficient knowledge to identify appropriate learning goals in required law school courses, the majority of students can identify basic components of civility. This is easier for most of them to do from the perspective of experiencing someone else’s civil or uncivil behavior than to identify how others may perceive their actions.

146 Other educators have written about the advantages of having students work with the teacher in developing the goals, grading, and structure of a course. See e.g. Maryellen Weiner, Learner-Centered Teaching: Five Key Changes to Practice 23–45 (Jossey-Bass 2002). Professor Gerry Hess, author of Techniques for Teaching Law and founder of the Institute for Law School Teaching, notes that he regularly uses this approach in upper level elective courses, but not in teaching first-year students civil procedure because most students are still unaware of what kinds of skills, knowledge, and values they should be learning in law school, meaning that the professor needs to provide the focus and direction for the course. Personal telephone conversations with Gerry Hess (Aug. 2006–Apr. 2007) (notes on file with Author). Even though I teach civility in a first-year legal writing course, students have a notion of what it means to treat people with respect even though most have a limited understanding of what constitutes competent legal writing.
about what should be the behavioral norms for the classroom. This discussion allows the exchange to be reciprocal—we can make students aware of our perceptions of what is civil, and they can inform us and their classmates of the same. This method allows them to participate in the discussion and establish the civility criteria for the class.

My approach to teaching civility has changed over the years. Following a colleague’s approach, on the first day of class this year I engaged students in a discussion about the kind of class environment that best served individual students’ learning needs. Each student was asked to interview and then introduce a classmate, including one thing that was critical to creating an optimal learning environment. Within a few minutes, students had identified all the behaviors that I had previously required of them to earn full “professional engagement” points, such as being flexible and open about others’ views, being on time, being prepared, not dominating the discussion, contributing to a non-disruptive environment, participating in discussions, and sharing and being considerate of others’ educational, personal, and cultural backgrounds. In addition, they revealed the best learning environments.

---

147 Billante & Saunders, supra n. 2, at 31 (noting that “a policy for renewing and promoting civility should begin with an open and public debate aimed at defining a simple set of binding principles and core values”). The notion of renaming “participation” points “professionalism” points was suggested by former students, who noted that the term “participation” to most first-year law students meant “speaking and contributing in class” when what we were asking students to do was more than that.

148 Students know what makes them feel respected. Including them in this discussion is an important component of establishing a classroom environment where students and professor can practice civility. See William M. McDonald et al., Conclusion: Final Reflections and Suggestions for Creating Campus Community, in McDonald et al., supra n. 11, at 175–176 (noting that building a sense of community in higher education institutions requires involving students as major constituents and establishing civil methods of communication).

149 This is also showing them respect, since they do have knowledge and experience with this topic. The value students place on respect is demonstrated by Professor Levy’s empirical studies of law students attending a variety of law schools. Levy, supra n. 4, at 80.

150 I first learned about this approach from Stetson professor and former Pierce Law colleague Linda Anderson who used it in her first days of class. I am grateful to her and to so many others whose ideas I have used. Pat Hutchings, Vice President of The Carnegie Foundation for the Advancement of Teaching, validated this concept recently when she talked about making teaching “go public . . . . The idea is to move from a circumstance in which teaching is a seat of the pants enterprise that we all learn on our own through trial and error to one in which we stand on the shoulders of others.” A Tug toward the Center, 16 Natl. Teaching & Learning Forum 5, 6 (Dec. 2006).

151 This is not difficult to do in a class of eighteen to twenty-two students. In a larger-enrollment course, however, students could be broken into groups to collectively brainstorm and arrive at group rules, which are then shared with the class as a whole. For ideas about breaking large-enrollment classes into smaller groups, see Hess & Friedland, supra n. 91, at 131–148.
included having constructive feedback from me and classmates, engaging in open dialogue, disagreeing with respect, using humor appropriately, being with classmates who sought to know each other, recognizing preconceptions, supporting creativity and out-of-the-box thinking, and collaborating in providing a comfortable environment. They wanted me to provide clear expectations, stay on topic, apply and discuss learning material in class, test what I taught, use a variety of teaching methods, and not waste their time. They wanted me to start and end classes on time.\textsuperscript{152}

Rather than ending the discussion there, compiling a list of these “classroom guidelines,” and asking students to adhere to them, I asked all students to propose appropriate consequences for not adhering to a given behavior, and who was responsible for implementing that consequence.\textsuperscript{153} Their proposed consequences and methods of implementing them were far more creative than mine. If I kept the class over a few minutes, I agreed to bring candy to the next class. If any of us were late, we had to dance to our seat. Students who felt that they had been treated disrespectfully had to identify the specific actions that triggered their response and describe how these actions affected them. They were entitled to an apology, to themselves or to the whole class. I was expected to be organized and clear. None of us was expected to be perfect. Assuming that we generally met the class’s expectations, we were entitled to the occasional minor lapse of civility. But we were also expected to learn from our mistakes. And should anyone feel that a guideline needed to be added or altered, students or I could propose such a change.

I plan to continue this approach. Very few students had to dance to their seats; I had to bring candy several times. In past semesters I had been the sole enforcer, a role I did not enjoy but felt I needed to take because I believed in teaching students to be civil. In that role, I noted the details surrounding a student’s lapse of civility. At times this felt petty and punitive, to me and to them. In contrast, in this most recent semester, students and I monitored

\textsuperscript{152} Engaging students in designing the course is an approach advocated by experienced educator Maryellen Weimer, who notes that there are considerable benefits to student learning when the teacher does not hold all the power in the classroom. “Power sharing affects the environments in the classroom . . . . There is a much stronger sense that the class belongs to everyone. When something is ineffective, students are much more willing than in the past to help me fix it.” Weimer, supra n. 146, at 31.

\textsuperscript{153} Most of this was done online, through the course’s webpage. For the first few weeks of the class, minimal class time was used to review where we were in the process, answer questions, and explain the next step.
each other and were collectively responsible for the classroom atmosphere. There were fewer lapses in civility as well.\footnote{Barbara J. Mills, Helping Faculty Learn to Teach Better and “Smarter” through Sequenced Activities, in To Improve the Academy 218–219 (Sandra Chadwick-Blossey & Douglas Reimondo Robertson eds., Anker Publg. Co. 2006) (noting that we are motivated to learn when we have a degree of choice and control).} It is far more enjoyable to share this responsibility for building and maintaining a positive classroom environment, and it has helped me be a better teacher. During a mid-semester evaluation, I learned that a number of students thought we were spending too much time off-topic.\footnote{Getting student feedback was a valuable lesson about the inadequacy of self-perception: I had thought I was being open-minded and considerate of alternative views.} One of the students agreed to monitor the discussion and let me know after class when he believed we had strayed. Another student helped keep track of time.\footnote{At my institution, time is an issue; clocks throughout the building display different times. According to the clock in the cafeteria, a student could believe she still had five minutes before class, only to arrive in class and learn that it had been underway for several minutes. Computers and cell phones have accurate times, but the larger public clock faces tend to shape behavior, a problem exacerbated when a student does not know what particular clock the professor is going by. Because the clocks are run individually, setting one accurately does not guarantee consistency with others in the building.} This technique also gave students practice in shaping and being responsible for contributing to a civil environment. I expect that they will need to be similarly engaged if they want to be a part of a constructive workplace.

An alternative would be to define civility in advance, identifying our learning goals for students as well as the associated actions we expect them to take. In either case, to avoid the “civility” component of a course sounding like overbearing grade school mandates, it is important to explain to students why we are asking them to be civil.

If we truly want our students to practice civility, we need to model the civility behaviors we seek.\footnote{Sourcebook, supra n. 65, at 73 (noting that “LRW professors must recognize that they teach a course designed to introduce students to appropriate professional behavior and must demonstrate that professionalism. A professor who is respectful toward students and does not show bias or favoritism, for instance, becomes a good professional role model.”); Christensen, supra n. 18, at 327.} We teach not just by what we say, but by what we do.\footnote{Christensen, supra n. 18, at 327. “Professors who use behavior that is rude or disrespectful not only prevent their students from learning, but they also reinforce the worst stereotypes about attorneys.” Id.} Within the first few months of my first year in law school, my classmates and I were shocked to learn through the law school grapevine that some of our professors did not speak to each other. What, we wondered, did it mean for the future of the dispute resolution process if these intelligent leaders...
of the legal academy could not acknowledge each other’s existence? This distressing news confirmed what I had learned when I worked as a paralegal the year before law school—that almost all lawyers were smart and hard working, but fewer were kind, decent, and respectful. As one law school dean said to me following a professionalism presentation, “The problem with teaching professionalism is that so many of my faculty don’t understand what it is or how to practice it themselves.”\footnote{Conference, \textit{Conference on Teaching Professionalism} (Atlanta, Ga., Jan. 30, 2004) (notes on file with Author).} A colleague of mine who voiced dismay at a student’s wearing a T-shirt with a provocative label\footnote{See supra n. 107.} himself was known by faculty, staff, and students to regularly and openly ogle women. Students notice. We send strong messages when we are not available when we said we would be, fail to respond to students’ e-mails, or treat staff and colleagues without respect. Our students and those outside the academy may notice this more than we do. During a recent national conference on professionalism, the editor of a prominent legal periodical asked law school professors and administrators how many of their schools had separate faculty lounges and bathrooms. Responding to his co-speakers’ vociferous laments about the lack of respect and professionalism demonstrated by new lawyers and law students, he queried, “If you want them to be professionals, why don’t you treat them as professionals?”\footnote{Conference, \textit{Professional Challenges in Large Firm Practices} (N.Y.C., N.Y., Apr. 15, 2005) (notes on file with Author).}

Modeling civility does not mean that we coddle students. It means that we treat them with respect. We can still call on them and demand they participate. We can and should set high standards.\footnote{Hess \\& Friedland, supra n. 91, at 15–16 (referring to the American Association for Higher Education’s study of good practices in higher education, including “Principle 6: Good Practice Communicates High Expectations”).} We just need to do it the way most highly effective teachers do, “call[ing] on people the way [we] might do so around the dinner table rather than the way [we] might cross-exam[ine] them in a courtroom or challenge them to a duel.”\footnote{Bain, \textit{ supra} n. 12, at 131.} If we are going to model civility we should similarly take our students seriously\footnote{For an excellent essay on this topic, see Kent D. Syverud, \textit{Taking Students Seriously: A Guide for New Law Teachers}, 43 J. Leg. Educ. 247 (1993).} and treat them the way we “might treat any colleague, with fair-
ness, compassion, and concern.”" I try to practice what I preach, and encourage students and colleagues to let me know when I appear uncivil. This can hurt; I hear that I appear rushed, lack empathy, and am impatient, dictatorial, and controlling. But practicing civility means that we recognize its complexity and are willing to grow and change; we are, after all, talking about people and relationships. Practicing civility means that we are willing to seek, listen, and learn from others’ feedback.

B. Provide Opportunities for Students to Practice the Learning Goals

Once we have identified the civility behaviors we want students to learn, we need to allow students to practice and get feedback. Because civility is about the ways in which we treat and interact with others—something law students do in class on a daily basis—it is relatively easy to give them practice and feedback, especially in a legal writing class with its relatively small class size. Opportunities for multiple interactions abound in these classes as many legal writing classes frequently engage students in hands-on active learning exercises. These exercises require students to work in groups, edit each other’s writing, solve problems, and brainstorm strategies. Students further practice participating in productive and respectful relationships when they complete and receive feedback on their written work, meet with professors in individual conferences, work with teaching assistants, turn in assignments to support staff, and interact with those in the law school library. Professors in large-enrollment courses may not know all of their students’ names or require them to participate in class. They may learn more about their students’ performances only if the students earn very high or low scores on their exams. Writing professors, in contrast, know who their students are from

---

165 Bain, supra n. 12, at 145. Bain specifically points to law professor Derrick Bell’s way of treating his students with courtesy and dignity. Much of the class time belongs to the students, but he takes a few minutes at the beginning of each session to talk with them about their lives and to share personal moments from his own. . . . He listens to students, even when they strongly disagree with his views, and more likely than not he asks them a question rather than tells them they are wrong. Id. at 148–149.

the very first week of the semester. We are thus in a position to regularly observe students interacting with others, as well as to engage in individual discussions. With small classes, we can also more easily observe, provide feedback, and notice changes over the course of one or two semesters.\textsuperscript{167}

C. Provide Students with Feedback during the Course

To learn from their experiences, students need to receive formative feedback, which offers guidance and instruction on learning goals, but does not count as part of the student’s final grade.\textsuperscript{168} One way to do this is to provide whole class feedback by naming students’ effective behaviors, and then pointing out how what the students did facilitated the greater learning of the whole class. For example, a recent course I taught contained a fairly high number of eager, motivated, smart, and engaged students, some of whom were extremely enthusiastic about sharing their insights. It was difficult for these students not to blurt out a response. I appreciated their initiative and dedication to mastering material. But when students were involved in working through a problem, such as finding specific language in a statute, the eager students’ outbursts detracted from their classmates’ engagement. In the past, I would have asked the students outright to try to wait, teased them about being fastest to answer, spoken to them after class, or said nothing, but been annoyed and frustrated. In any event, my focus and energy would have been directed at the students’ inability to contain themselves at the expense of their classmates’ learning.

This time, having had the benefit of observing gifted colleagues teach,\textsuperscript{169} I tried to restrain my tendencies. When several bright students had jumped in to answer several hypotheticals during one class, they were commended for their swift analysis. Several minutes later these and other students did not blurt out

\textsuperscript{167} \textit{Sourcebook}, supra n. 65, at 89, 95 (noting the value of having full-time writing professors teaching no more than thirty to forty-five students per semester).

\textsuperscript{168} Stuckey et al., supra n. 1, at 9 ("Law schools should use best practices for assessing student learning, including criteria-referenced assessments, multiple formative and summative assessments, and various methods of assessment.").

\textsuperscript{169} During the 2005–2006 year, I was a Visiting Professor at Phoenix Law School, which matriculated its first full-time students that fall. I was fortunate to be surrounded by gifted and innovative teachers committed to engaging in best practices in teaching and learning.
answers but raised their hands. I told the class how grateful I was for seeing raised hands, as it allowed other students time to think, recognized that not all students processed quickly in public settings, increased the range of participants, allowed everyone to hear a range of perspectives, and conveyed respect for other students and the class environment. The same kind of whole-class feedback could be given about students engaging in any civil behaviors, such as exercising self-restraint. Emphasizing the positive—because most students do treat others with respect—runs contrary to most law school teaching, where we tend to focus on “what is wrong” rather than what is constructive and good. But it is a more uplifting, positive message than publicly criticizing a few incidents of disrespectful behavior.

This kind of feedback can come from classmates as well. We can ask students to complete a “minute paper” where they identify positive behaviors and words that they have experienced in class. This allows students to develop an awareness of what respectful behavior looks like, and to practice naming specific behaviors and their reactions to them. These minute papers can be collected and read aloud by the professor during class, or read later, compiled, and shared with students. Assuming that students complete these papers anonymously and do not name their classmates, they can safely express themselves and contribute to the classroom dialogue about professionalism. It allows students to more fully and actively participate in the democracy of the classroom; they learn what their classmates, as well as the teacher, think about classroom civility.

Providing positive group feedback also prevents students from being singled out, something many students find awkward and, by

\[\text{\textsuperscript{170} See generally Paula Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, 48 J. Legal Educ. 402 (1998).}\]

\[\text{\textsuperscript{171} Stuckey et al., supra n. 1, at 30 (“[T]oo many law school classrooms, especially during the first year, are places where students feel isolated, embarrassed, and humiliated, and their values, opinions, and questions are not valued and may even be ridiculed.”).}\]

\[\text{\textsuperscript{172} I was recently struck by how powerful positive reinforcement was when I took a yoga class from a new teacher. After having talked us through a difficult position, the teacher asked us to push ourselves a little bit more and deepen the pose. Upon our having done so, she pronounced us “perfect,” “gorgeous,” and “really beautiful!” saying the words as if she truly meant them. I was struck by how I had never heard any teacher call anything I did “perfect,” how empowered it made me feel, and how it made me learn more from this teacher than almost any other. Being a novice at yoga I knew that my pose was nowhere near perfect, but in the teacher’s words I heard that she valued the work, intention, and effort we put into it.}\]

\[\text{\textsuperscript{173} Gerald F. Hess, Minute Papers, in Hess & Friedland, supra n. 91, at 269–270.}\]
extension, disrespectful.174 Depending on the classroom environment and the progression of the course, it may be appropriate, however, to publicly single out students when they have made significant contributions. For example, to me, civil classroom behavior means participating in class discussion, neither dominating nor being silent. I ask students to participate because I want them to hear different perspectives, practice their oral reasoning skills, and learn from each other. This is extremely difficult for some students. There are times when, after talking to a very quiet student and hearing that the student is comfortable with the idea, I will call on her in class and then, once she responds, publicly congratulate her for sharing her views with the class. This is usually later on in the semester, when students know who is comfortable talking and who is not. They are usually delighted at a classmate’s risk-taking and join me in the applause and congratulations.

Using humor can also help with providing feedback, especially for minor lapses.175 Humor makes comments about lapses easier to take for the students and also lightens the mood of the class. That is not to say that using humor need trivialize a lapse. For example, when a cell phone goes off in class, I usually joke with students, asking with mock incredulity, “Did I hear a cell phone go off? I didn’t, did I? That was a bird or something, right?” The class usually laughs. The student whose phone it is usually also laughs, scrambles to turn off the offending noise maker, and apologizes. I smile, shaking my head and making a comment along the lines of, “You know you will never let that happen again, right? And none of the rest of you will either, right?” There follows a mad scramble when almost all students check that their cell phones are off. These situations are also rich opportunities to discuss the conse-

174 I learned the hard way that many students do not enjoy being the center of that kind of attention, even when they are being given high praise. They may be embarrassed about being in the spotlight or afraid of being resented by their peers. Of course, some delight in this attention, but this delight seems rarely to be shared by classmates.

175 Not everyone is comfortable using humor, but it can work well for some professors at some times. As a former college teacher noted, “Humor enhances the vital connection between teacher and student; it humanizes instruction. It builds classroom community. It aids communication and retention. . . .” Linc Fisch, The Legacy of Sad Sam: A Lesson in Humor, 16 Natl. Teaching & Learning Forum 12 (Dec. 2006). Fisch, a teacher for over fifty years, notes too that humor should be used carefully and only when it is directed to learning in some way. “It need not be elaborate, comedic, or flamboyant. A little bit can go a long way. It works best when it’s spontaneous and in the context of the material.” Id.

176 I use this approach when students have already been informed about class guidelines, either in writing, orally, or both; I am not skilled or quick enough to always come up with appropriately funny comments for unexpected lapses.
quences of similar lapses in practice. Asking students to consider the ramifications about cell phone interruptions in the context of a meeting with clients, real estate closing, court hearing, or negotiation session helps them build the connection between what is happening in the class and how this relates to their professional lives. Depending on the students in the particular class, the nature of the lapse, the topic being discussed, and where we are in the semester, some students will also joke with each other about incivilities, including teasing each other about what would happen to them in practice.

These same principles of providing group feedback can be applied when students have lapses in civility, although unless the lapses apply to most students, it is probably best to provide feedback individually in private.\(^\text{177}\) I have learned that many students are unaware of their lapses, or at least do not realize how their actions affect others. There was the day Louisa, a hard-working and bright student, loudly informed a classmate that his ideas were stupid. Talking to her alone after class, I learned that the rain-sodden ceiling in Louisa’s apartment had fallen on her bed the night before. Wet plaster threatened to damage all her possessions, including her computer. This committed student had been so focused on her own misery that she had not considered how her outburst would affect her classmate. She knew she was not being civil, but found it beyond her power to act respectfully. It was not her lack of knowledge of how to behave, but her inability to practice civility under great stress. In our conversation Louisa suggested that she should have just told her classmate what had happened and why she might not be the best company. It would not excuse her action, but it might help her classmate understand.

It was humbling to have this conversation with Louisa.\(^\text{178}\) I realized I could not just assume I knew why someone might have a lapse of civility. I had been lucky to first ask her how she was, and learn about her awful morning before I asked her to explain her behavior or conveyed my responses to it. It was also clear how hard it is for us to perceive the impact of our actions when we are under significant stress. Louisa had not meant to offend anyone, but she had been too caught up in her feelings of frustration and

\(^{177}\) We take criticism of our behavior very personally, much like we take personally comments about our appearance.

\(^{178}\) I wish I could say that I never had to learn these lessons again, but I would be wrong.
anger to notice what she was doing, pause, and choose a different response.

The incident helped me see the obvious: we truly master civility when we can practice it under stress, not just when we are well-rested, fed, valued, and have lots of time. It is the distinction between knowing what to do and actually doing the right thing. This is hard. Regardless of their careers, law students will not likely bask in such luxury in the working world. They will instead encounter tough conditions where they will be challenged to stay calm, acknowledge strong emotions, and respond appropriately to others. Giving them opportunities to practice and get feedback during class should help students build constructive relationships in practice.

It is well known that students come to class with experiences like Louisa’s and are under great stress. Ignoring this, I regret that I frequently conduct my legal writing classes as if all my students are as interested and invested in their legal writing as I am, and that this is a priority in their lives. And I do not always take the time to ask about their concerns because I am trying so hard to get as much learning as I can in the one-hour teaching slot I have twice a week. But students have other priorities and concerns. Over the years I have been saddened to learn belatedly about students being separated from their families while they are attending law school, sleeping in their cars because they have not yet found housing, or being unable to prepare for class because a child, spouse, or parent is in the hospital. One colleague addresses this by asking all her students to participate in five minutes of “Share Your Baggage” at the beginning of class. During that time, students take a few seconds to voice any pressing concerns or issues they have. The rule is that anyone can share a concern, but no one is allowed to try to solve the problem or comment upon it. The goal is for students and professor to put their concerns on the table. The effect is striking. By voicing a concern, students and professor can let it go, even if only temporarily. Only a few minutes of class time are taken up, but frequently after class students and professor will empathize or discuss ways to solve some of the problems. I wish I had done that in the class Louisa attended just after heavy

wet chunks of ceiling had fallen upon her. It might have given her a forum where she could publicly announce her disaster, and then move on, temporarily having given her concerns about her sodden apartment a resting place. Having Louisa also tell the rest of the class about her rain-sodden disaster might also let the rest of the class realize that she would need extra support that day. It could have opened a door for all of us to talk about how such disasters can threaten our ability to treat others with respect.

Regardless of how we provide feedback, if we are going to evaluate students’ civility, we must provide them with multiple opportunities to practice and get feedback. Giving students a single end-of-semester score for civility, similar to giving them one final exam with no other ways to practice and get feedback, is not helpful to student learning. As noted above, our perceptions of what constitutes civility are varied and complex. When students learn only after the fact that they were deemed to have multiple lapses of civility, lapses that may have lowered their grades, they have become enraged, especially if they had no idea that their actions would be considered lapses. In legal writing courses, we know that students learn best when we regularly and repeatedly give them feedback on drafts and assignments; we should do the same in teaching civility.

In addressing the students who behave with regular lapses of civility, it may be helpful for us to realize that these students may have been practicing these behaviors for years, in many cases being reinforced for doing so. This suggests that having them change their behavior will take a lot of time and effort. It will probably take more than one conversation such as I had with

\[\text{\textsuperscript{181} Hess \\& Friedland, supra n. 91, at 289}\]

\[\text{\textsuperscript{182} See id. at 289–290.}\]

\[\text{\textsuperscript{183} In the past, as we developed our approach to teaching and assessing “professional engagement,” a few students complained bitterly to administrators and colleagues that this component of the course was grossly unfair. Students felt that they had an idea about their overall performance on their research, analysis, and writing skills based on the extensive feedback they received during the course; this contrasted sharply with the lack of feedback on their skills of professional engagement.}\]

\[\text{\textsuperscript{184} Not in all environments, but in many environments, being uncivil or “high maintenance” may provide great individual rewards. For example, at my own and other law schools, I know of difficult law students who received extensions on assignments, waivers of school requirements, and admissions to restricted highly competitive electives because faculty and administrators wanted to avoid the perceived inevitable conflicts that would follow if they required these uncivil students to follow the rules required of all other students. Similarly, within legal education, uncivil and high maintenance faculty may receive lighter service and committee loads than colleagues by virtue of their being so difficult and unpleasant to work with.}\]
Louisa who was caustic after her wet ceiling collapsed\textsuperscript{[185]} because “[w]e have to work harder and longer to change a habit than when we learned it in the first place.”\textsuperscript{[186]} This means that we have to believe in the importance of teaching civility and commit ourselves to doing our best to have students learn to practice it. This takes a lot of energy. As noted above, being around people who are disrespectful is already emotionally draining. Having to regularly work with them to help them develop more effective interpersonal skills adds to our burden. In the face of grading papers, preparing for class, and all the other tasks we take on as legal writing teachers, why would we bother? We should bother because doing so is beneficial to our students, their clients, and the profession.

\textbf{D. Decide Whether and How to Grade Students’ Civility}

Grading is, as other educators have noted, one of the most important teaching and learning tools we have, and despite its problems, it is not likely to go away.\textsuperscript{[187]} That does not mean in evaluating civility, however, that students must be graded or that all students need to be graded on a curve. One approach is to have professionalism or civility count as a percentage of students’ grades. In our two-semester legal research and writing course, being civil—or showing professional engagement—counts as 10 to 20\% of the overall course grade. Unlike other graded assignments, students are not graded on an A to F scale. Instead, students start the course having been allocated “A’s” for that percent of the course. This grade of “A” is theirs to lose, making it possible for all students to receive perfect scores for civility. In fact, the vast majority of students do earn full points. Students lose points for being unprepared; repeatedly late to class; rude to classmates, professors, and staff associated with the course;\textsuperscript{[188]} or missing class without a valid excuse. Students understood that a single lapse rarely caused them to lose points;\textsuperscript{[189]} rather it was a holistic assessment of

\textsuperscript{185} See supra nn. 178–179 and accompanying text.
\textsuperscript{186} Goleman, supra n. 48, at 104.
\textsuperscript{187} Sparrow, supra n. 129, at 3–5 (citing Professors Barbara Glesner Fines, Jay M. Feinman, Steven Frieland, Philip C. Kissam, Gerald F. Hess, and many others).
\textsuperscript{188} We added interactions with others associated with the course after we learned that students might be respectful in class, but then would treat administrative assistants, teaching assistants, library staff, and other administrators rudely.
\textsuperscript{189} An exception to this is being unprepared for classes where students had been assigned to complete significant research and the class discussion is focused on that research. To avoid students from unfairly benefiting from their peers’ research, students who have
their overall performance. A student who regularly participated in class, treated others with respect, demonstrated a good faith effort on assignments, was prepared and on time to class, and helped facilitate others’ learning in class was not penalized for being slightly late to class on one or two occasions, or for committing one or two other minor lapses. Students who were regularly late, unprepared, disrespectful, or failed to show a good faith effort on assignments earned lower points.

An alternative to this holistic, “everyone can succeed” approach is to use an A–F scale, with students earning a range of points for civility, and with only a few earning “A’s” for the civility component of the course. We used this approach for a few years, but taking this approach was more difficult for my colleagues and me. It was difficult to make meaningful distinctions among some students. We could certainly distinguish the students who appeared from day one to be consummate professionals, students whom we would never hesitate to recommend for a job. And there were a few students who were often unprepared for class; less than respectful to classmates, staff, and professors; regularly submitted poor quality work; and who had, unfortunately, already drawn a great deal of attention to themselves in these negative ways. These extremes made it acceptable to identify those students earning the highest and lowest grades for civility or professionalism. The students in the middle, however, were much harder to differentiate. As others have commented, “the same person may turn out to be highly civil on one of our chosen indicators yet extremely uncivil on another.”

The multidimensional and complex nature of civility contributed to making it harder for me to measure students’ civility than others skills such as analysis, written coherence, and organization.

not completed their research are asked to leave the class until they have done so. Very rarely do students come unprepared to those classes.

190 Billante & Saunders, supra n. 2, at 18. Billante and Saunders note, In our focus groups . . . we encountered well-educated young people who readily give up their seat[s] on the bus for older passengers, and who would never dream of spraying a graffiti tag on the side of the vehicle, yet who saw nothing wrong in routinely evading their fare. How is their level of civility to be measured against, say, that of an adult who always pays the fare but who throws the ticket on the floor at the end of the journey?

Id.

191 This was not the only thing that made it difficult—other factors are the difference between having fleeting glimpses and slices of students’ behaviors, which may not be representative of their usual practices, and not having static papers to read, comment upon, and review as many times as necessary to be comfortable assigning a grade or score.
For example, I found it difficult to distinguish different lapses, such as differentiating students who appeared unprepared for class twice and students who were more than five minutes late four or five times during the semester. Depending on the class objectives and active learning exercise, a student’s lack of preparedness might only affect that particular student and would not necessarily be disrespectful to classmates. If, however, a student was unprepared on a day when students were working in small groups for most of the class, then that student’s being unprepared had a significant impact on the others in the small group. Sometimes students knew before class when they would need to be actively engaged in small group discussions, but not always. I was not convinced it was fair to penalize a student for being unprepared on a day when it might only hurt that particular student, or that the consequence for being unprepared should be different depending on the class.192

Comparing the lack of preparation with a student’s being late to class posed similar problems. There were times when the first few minutes of class were crucial for reviewing important matters, identifying in-class assignments, or clarifying points of confusion. Having students arrive late disrupted others in the class and meant that I would later be spending time with the student trying to make sure that student was caught up. At other times, the first five minutes were less significant, and a student’s late arrival was not very disruptive and would not require me to re-teach material. Even when students were late or unprepared, there were endless variations that made distinctions problematic. There would be the student who had “read” the material but had not engaged in sufficiently careful reading to glean anything from the reading other than passing his eyes over the page. That student could check off the reading assignment as having been completed, but was not prepared for in-depth class discussion. Similarly, there was the student who would arrive late but quietly slip into a seat, quickly figure out what was going on in class, and get himself up to speed by learning from classmates after class. And there would be the student who was a couple of minutes late but would need to crowd and disrupt others in the search for the power cord for the laptop, open a computer program with loud music, and noisily ruffle through papers searching for that class’s materials.

192 In terms of being prepared, as faculty we make similar distinctions. We may never be unprepared for teaching, but fail to do all the reading for a committee or faculty meeting.
Trying to arrive at meaningful ways of “grading” these behaviors was difficult. I sought to evaluate students the way I believed that they would be evaluated in practice. If, as new associates, they were very occasionally late to a meeting, but slipped in quietly, independently learned what they had missed, and contributed appropriately to that discussion, I doubted that their lateness would be a problem. On the other hand, if they were regularly late to professional engagements, their employers or clients would notice it and probably react unfavorably.  

Seeking to make grading civility valid, reliable, and fair, in the past I created rubrics, detailed scoring sheets, for civility grades. But because of the variations and difficulty making meaningful distinctions between students’ behaviors as noted above, I have found it to be more effective to take the approach that all students can earn full scores for civility. I see the loss of points not as a penalty for the students who have difficulty meeting the class standards, but as a recognition and reward for those who do. As long as students all have notice of the standards and expectations and opportunities to practice and receive feedback during the course, it seems fair to award full points to those students who treat others with respect and dignity. Students can also earn full points for showing demonstrated commitment and progress in developing civility skills. For example, a student who frequently acts in ways that others perceive as disrespectful early in the course, is given feedback about those perceptions, makes significant gains in changing those behaviors, and acknowledges and apologizes for lapses is someone who has, to my mind, earned full points for civility.

How important is it to allocate a percentage of a course grade to a skill such as civility? There is the argument that grading civility reduces its value, creating incentives to be civil only when...
there is something to be gained for it—such as a higher grade—but not when that incentive is lacking. But for better or worse, in law schools, grades are the coin of the realm. Grades are important to employers, and our schools are considered more rigorous when we award fewer high grades, and actually fail students who do not do well. Regardless of whether we decide to count civility as part of a student’s grade, by grading other parts of the course and not that, we send a message about what is important and what matters to these future lawyers.¹⁹⁸

That civility is hard to measure does not mean we should not measure it, just that we need to be careful about how. As an educator and leader in medical assessment has noted, “That which we measure we tend to improve.”¹⁹⁹ The corollary is that we measure that which is easiest to quantify. Ineffable attributes like civility may be measurable; we just need to keep working to develop better instruments to assess them.

E. Teaching Civility within an Institution

Changing a course is relatively easy; changing an institutional culture is considerably more difficult. Given civility’s complexities and importance, it would be helpful to teach it in more than one class or one setting and to provide students with increasingly more challenging and sophisticated opportunities to practice and develop their skills. Civility and professionalism are not isolated doctrines that can be learned in one place at one time.²⁰⁰ Changing behaviors and building the skills of civility and the kinds of emotional awareness and balance that are required to maintain composure and calm needs to take place over time. “A brief seminar won’t help, and it can’t be learned through a how-to manual.”²⁰¹

Ideally, a law school would identify the values that it considers significant, provide multiple ways for students to practice and receive feedback on those skills, and do so across all three years of

¹⁹⁸ See Sourcebook, supra n. 65, at 77 (arguing that having a legal writing course as the only pass/fail course in a students’ required course load suggests that the course is less important).

¹⁹⁹ Leach, supra n. 72.

²⁰⁰ Weresh, supra n. 7, at 428 n. 4.

²⁰¹ Goleman et al., supra n. 48, at 104. Goleman notes that “breaking old habits and learning new ones . . . requires an extended period of practice to create the new neural pathway and then strengthen it.” Id. at 158.
law school. My vote would be that, just as some schools use a “writing across the curriculum” approach, law schools could implement a “professionalism across the curriculum” or “civility across the curriculum” approach. Civility across the curriculum is possible, but implementing it would require a greater coherence and connection between courses and professors than currently exists in most law schools. Moreover, this ethic of professionalism and civility would need to be a palpable part of the entire law school, from staff to administration. Teaching civility in individual classes or even promoting it consistently throughout a law school generally is no guarantee that the complaints about civility will evaporate, but it is one step in the process. Moreover, professors could include a paragraph about civility in all letters of recommendation; if employers started asking about students’ civility and professionalism the way they ask about writing skills, then students and professors would be more likely to recognize the value of students learning civility skills.

**CONCLUSION**

Ensuring that law students learn civility may seem insignificant when so many other areas of legal education cry for the kinds

---

202 Physicians have noted that medical professionalism changes as physicians’ roles develop, and suggest that professionalism should be taught and measured over a career. “Assess each principle of professionalism at each stage of a medical career, but contextualize the principles, set stage-specific achievement levels, and approach assessment of professionalism from a developmental perspective.” Arnold & Stern, supra n. 25, at 28–29. As with other legal skills, values, and knowledge, civility should be taught and measured in law school and in practice.


204 “Law schools should . . . teach professionalism pervasively throughout all three years of law school.” Stuckey et al., *supra* n. 1, at 8–9.

205 The value of civility and its role in creating community is explained in McDonald et al., *supra* n. 11. Steps for creating campus community are noted in McDonald et al., *supra* n. 148, at 174–178.

206 “It is likely, however, that any improvement in these negative views will depend upon a sustained, multi-faceted approach aimed at improving the quality of legal representation, promoting the countless good deeds that lawyers do, and correcting any public misunderstanding of the nature of the legal practice.” Baker, *supra* n. 5, at 1316.

207 I am grateful to my colleague Ohio State University Associate Professor Mary Beth Beazley for this excellent suggestion. Beazley notes that she does this in all her letters of recommendation, a practice that I have adopted.
of changes advocated in *Best Practices*. Given the social, emotional, physical, financial, and intellectual benefits of practicing civility, however—for clients, colleagues, and learners—having law students learn civility is a goal worth pursuing. As the authors of *Best Practices* note, “Law schools should help students acquire the attributes of effective, responsible lawyers including . . . professional [skills] and professionalism.”\(^{208}\) The challenge is for law school teachers and administrators to engage in the heavy lifting of figuring out how to teach, assess, and sustain this learning. Individual professors may differ on how best to accomplish the task, but unless their efforts are supported and rewarded, it is unlikely that the frequent complaints about the incivilities of lawyers and law students will radically decrease. In pursuing this goal, as with any other change, it may be most successful if adopted incrementally. As educator Maryellen Weimer suggests, approach change from a long-term perspective; taking an incremental and systematic approach allows us all to grow into it.\(^{209}\) Thinking long term, if we can help our students learn civility, we can help create a more humane and emotionally healthy law practice environment. In my dreams, I fantasize about the day where lawyers are valued not just for how we think, but how we act and feel. I love the idea that one day describing someone as “acting like a lawyer” means that the person acts with humility, compassion, and grace, and, above all, treats others with respect.

---

\(^{208}\) Stuckey et al., *supra* n. 1, at 8.

\(^{209}\) Weimer, *supra* n. 146, at 188.
THE METHODOLOGY OF PERSUASION: A PROCESS-BASED APPROACH TO PERSUASIVE WRITING*

Cara Cunningham**
Michelle Streicher***

INTRODUCTION

Persuasive writing is an important and fundamental lawyering skill. Legal writing programs are designed in support of this belief. Indeed, an overwhelming number of law schools introduce persuasive writing in the first year,¹ and more than half of the core writing assignments students complete are devoted to it.² There also is a voluminous amount of scholarship written on the subject.³ Despite this collective experience, however, teaching persuasive writing remains a challenge, in part, we believe, because legal writing professors have not been taking a process-based approach to teaching it.⁴

© 2007, Cara Cunningham and Michelle Streicher. All rights reserved. The Authors especially wish to thank Professor Judith D. Fischer of the University of Louisville Louis D. Brandeis School of Law for her editorial insight, support, and guidance. The Authors also would like to thank their dear friend and mentor, Professor Pamela Lysaght of the University of Detroit Mercy School of Law, for her encouragement and support.

** Assistant Dean of Academic Initiatives and Assistant Professor of Legal Writing and Analysis at the University of Detroit Mercy School of Law.
*** Assistant Professor of Legal Writing and Analysis at the University of Detroit Mercy School of Law.

¹ Of the 184 schools that participated in the 2007 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, 151 introduce a “required advocacy course” to students in the first year of law school, compared to 23 that introduce it in the second year, and zero that introduce it in the third year. And, on average, schools assigned slightly more than two credits to this advocacy portion. ALWD & Leg. Writing Inst., 2007 Survey Results, question 13 (2007) (available at http://www.alwd.org/surveys/survey_results/2007_Survey_Results.pdf).

² Of the core writing assignments distributed to students in the 2006–2007 academic year, pre-trial, trial, and appellate briefs accounted for 317 assignments, whereas 277 assignments were devoted to office memoranda and client letters. Id. at question 20.


⁴ We note immediately that our use of the term “process” does not refer to the stage process model. Under this traditional legal writing model, “writing was seen as a linear
Initially, we used a “learn by example” approach, which is grounded in the idea that since we know persuasive writing “when [we] see it,” students can learn to be persuasive writers by evaluating other persuasive writing examples. While this method teaches students to recognize persuasive writing, we realized that it cannot be the sole means of teaching persuasion because it does not teach students the process of how to write persuasively, which, ultimately, may limit their ability to learn persuasive writing as a transferable skill.

This challenge provided the framework for an advanced persuasive writing class we developed four years ago for our moot court students. Our goals were to teach students how to create original, compelling, and truly persuasive papers and to present the brief-writing process as a series of standardized steps so students could transfer and apply these skills to future assignments. These goals seemed unexceptional in the sense that every legal writing professor wants his or her students to write well and learn transferable skills. Nevertheless we questioned whether original thoughts and creative ideas could be fostered by a standardized approach. Thankfully, we found they can.

This Article will focus specifically on the process of drafting statements of fact and arguments and a system of argument organization that we created to supplement the “learn by example” approach. In Part One, we discuss the limitations of the “learn by example” approach. In Part Two, we explain our method and how we teach it. And in Part Three, we explain why the method is effective.

process separated into discrete stages . . . . [Under this approach,] writing begins with pre-writing where a writer plans her thesis, then she writes it, performs whatever rewriting or revising that is necessary, polishes it, and turns in the finished product. Christopher M. Anzidei, The Revision Process in Legal Writing: Seeing Better to Write Better, 8 Leg. Writing 23, 27–28 (2002) (footnotes omitted). While our method does present writing as a series of steps, or stages, our approach differs greatly from the process model because our stages treat writing as a cycle of brainstorming, creating, and revising. For the benefits of our recursive writing model, see infra Part III.

5 See Justice Stewart’s famous reference to pornography: “I shall not today attempt further to define the kind of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .” Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

6 Although our techniques were developed for an upper-level advocacy class, they are transferable and equally applicable to any class that addresses persuasive writing. Indeed, we like the method so well that we use it in our first-year writing course with much success.
I. THE “LEARN BY EXAMPLE” APPROACH AND ITS LIMITATIONS

Although professors may not use the phrase “learn by example,” most use some learn-by-example techniques when teaching persuasive writing. Under this approach, professors may describe the goals of persuasive writing and pitfalls to avoid; distribute examples of good and bad persuasive writing; create a sample product in class; examine famous speeches; review high-profile case briefs and oral argument transcripts; explore the persuasive value of media arts, such as television commercials and print advertisements; and conduct role-playing exercises. While there are benefits to this approach, it should not be the only instructional method used to teach persuasive writing. In general, it does not address persuasive writing as a process, and this omission can create obstacles to student learning.

First, the “learn by example” approach focuses mainly on the “what” and not the “how” of persuasive writing. As a result, students may complete this aspect of their legal writing class with the ability to identify good persuasive writing but remain unable to achieve that level of persuasion on their own or in a different context. In other words, because students evaluate the end result, without an emphasis on the step-by-step process by which it was created, they ultimately develop only an appreciation for the difference between good and bad examples instead of learning how to create a good product themselves.

For fourteen examples of such techniques and more, see 16 Second Draft (Bull. of the Leg. Writing Inst.) 1 (Dec. 2001).

See infra sec. III(A) (recursive processes enable students to learn writing as a transferable skill); infra sec. III(C) (method supported by modern learning theories, which increases the likelihood that students will learn the substance and the writing process); see generally Steven Lubet, Advocacy Education: The Case for Structural Knowledge, 66 Notre Dame L. Rev. 721 (1991) (discussing use of method in teaching advocacy).

“[W]e learn things that work, but rarely why they work. Understanding why techniques work helps us translate them to other situations and to expand our repertoire . . . .” Linda S. Anderson, Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results, 5 Appalachian J.L. 127, 127 (2006) (discussing this idea in the context of helping law professors become more effective teachers).
In addition, using only the “learn by example” approach invites students to misuse examples. Without instruction on the process of creating a persuasive document, students tend to copy the structure and organization of the example, rather than replicate its persuasive qualities. This misuse of examples may be exacerbated by students’ misconceptions about legal writing. Often they do not see it as a creative process and are unwilling to accept that there may be more than one right answer to the same question.

II. A BETTER APPROACH: “LEARN BY EXAMPLE” + THE PROCESS = THE METHODOLOGY OF PERSUASION

Although we use the “learn by example” approach throughout the semester, we also include a great deal of instruction on a step-by-step process of persuasive writing. We recognize that certain aspects of our method are not novel. Nevertheless, when taken together, these steps become a recursive model of brainstorming and creating compelling facts and argument sections.

10 Louis J. Sirico, Jr., Beyond Offering Examples of Good Writing: Let the Students Grade the Models, 14 Persps. 160, 160 (2006) (“Perhaps all legal writing professors have offered students an excellent brief or memo as a model and then found themselves reading a stack of student papers that verged on being clones of the model.”).

11 Nancy Millich, Building Blocks of Analysis: Using Simple “Sesame Street Skills” and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing, 34 Santa Clara L. Rev. 1127, 1148 (1994) (describing that the use of creative thinking as an analytical tool helps students “accept the fact that there may be several different, equally ‘correct’ answers to the same question”).

12 We even structure the syllabus so it serves as a visual guide to the process. See app. A (our Advanced Advocacy syllabus).


14 At least one scholar has noted the benefits of an advocacy course that stresses the sustained use of facts, the use of complex case files, a de-emphasis on presentation as an end in itself, and that encourages students to learn how to structure facts and law into a
A. The Process

Our method focuses especially on two of the most significant sections of a persuasive brief: the Statement of Facts and the Argument (see figure 1, infra). Other portions of the brief and brief writing process (e.g., Statement of the Case, Summary of the Argument, point headings, thesis paragraphs, and editing) are taught by alternative means, including lecture and in-class exercises.

We introduce our entire method on the first day of class. When doing so, we stress that although the steps are presented as a series, the method is not linear but a cyclical or recursive process. To stress the importance of the process and to encourage students to think critically about it, the first assignment we distribute asks students to describe the process in their own words and evaluate how, if at all, it might help them work through a legal problem.

---

15 As one commentator observed, [N]ovice writers must abandon any allegiance to the traditional model of the writing process, the stage process model, because this linear theory does not adequately explain the complexities of the writing process. Instead, the recursive model more accurately describes the writing process because writers continually move back and forth among various writing activities . . . . Anzidei, supra n. 4, at 26.
FIGURE 1: THE PROCESS

(1) **Review** all case documents and **create** a case chronology, including citations to where individual facts can be found.\(^{16}\)

(2) Begin to **identify and research** the legal issues presented.

(3) **Re-review** the facts; **continue** to research and identify issues.

(4) Taking into account the issues presented and the relevant law, **characterize** the facts as good, bad, or neutral, and **record** your thoughts on the chronology document that was created in Step 1. (Note: Within the neutral category, facts should be characterized further as relevant or irrelevant.)

(5) **Outline and draft** the Statement of Facts.

(6) Taking into account strategies and themes that were identified through the fact characterization process (Step 4), **outline** your arguments using the Three-column Chart system.\(^{17}\)

(7) **Draft** arguments using the Argument Placement formula.\(^{18}\)

(8) **Coordinate** the Statement of Facts and the Argument sections\(^{19}\) while considering the strategies and themes identified through the fact characterization process (Step 4) that were adjusted through the process of outlining and drafting the arguments (Steps 6 and 7).

(9) **Finalize** the Statement of Facts and Argument sections.

(10) **Finalize** the entire document.

---

\(^{16}\) We use a commercially published case file that contains individual court documents, including pleadings, deposition transcripts, motions, briefs, court orders, etc. Given the amount of material, some students have expressed reluctance to compile a record synopsis that takes every fact into account. We, however, have encouraged them to do so. From a practical perspective, doing the work at the beginning actually saves time. Students become better acquainted with the file earlier in the process than their counterparts who did not devote time to this first assignment. Students who devote time to this assignment also are able to return to facts with greater ease because they have organized the material in a way that suits their individual learning style. And record compilation itself is a learned skill that attorneys need to master. The case file we use, while complete for academic purposes, pales in comparison to the multitude of documents and transcripts that make up a true appellate record.

\(^{17}\) The Three-column Chart system is described *infra* Section II(B)(3)(a).

\(^{18}\) This Argument Placement formula is described *infra* Section II(B)(3)(b).

\(^{19}\) The goal is to have students learn and appreciate how facts and arguments work together to further the point of the paper. To this end, it is crucial to discuss important facts in the Statement of Facts and Argument sections. Likewise, irrelevant or distracting material should be streamlined out of these sections. In short, the two sections must be consistent in terms of coverage, theme, and tone.
B. How We Teach the Process of Persuasive Writing

1. The Course

Students learn this method in our Advanced Advocacy class, which is a two-credit, fall semester course that is numerically graded. It meets one day a week for one hour and fifty minutes. We either team teach one section of approximately thirty to thirty-five students or teach individual sections of approximately fifteen to twenty students. The course is open to all students but required of all new members of our Moot Court Board of Advocates, which is composed of external moot court competitors and student moot court coaches.

Students work in two- or three-person teams, half for appellant and half for appellee, and, to the extent possible, moot court team members are paired together. This pairing process has helped teams build *esprit de corps* and learn how to work together before their specific moot court competition begins.20

As in most appellate writing courses, our students write various portions of an appellate brief throughout the semester. Then, after receiving professor and peer feedback, students rewrite these portions, compile them into a team appellate brief, and submit the document as their final writing assignment.

What might be a unique approach, however, is that we cluster specific portions of the appellate brief with the corresponding oral components, instead of looking separately at brief writing and oral argument in a linear or chronological way. For example, one week students learn how to draft a written Statement of Facts section and present it orally. Students return the next week with a draft section and present the piece to the class as if they were before an appellate panel.

In addition, written assignments are peer reviewed.21 At the beginning of the term, we teach students how to *effectively critiqu*...
a peer’s paper. We ask that they evaluate the paper as an objective reviewer and offer meaningful and constructive comments, instead of merely correcting typographical errors and citations. To this end, we instruct them on the difference between editing and proofreading.\footnote{See Enquist & Oates, supra n. 13, §§ 1.4–1.6, 15–21 (useful discussion of revising, editing, and proofreading).}

We also give them a set of peer-review questions to answer when critiquing a paper.\footnote{A sample Peer Review Instruction sheet for a full appellate brief is included as Appendix B. It comes almost directly from the list Terry Jean Seligmann provided in a 2001 Second Draft article, Terry Jean Seligmann, Testing the Waters, 15 Second Draft (Ball. of the Leg. Writing Inst.) 13 (June 2001). She disclaimed authorship of the list, noting that she had compiled it from sources that she could no longer identify.} These questions reinforce the teaching points we cover with respect to the appellate brief. For example, when peer reviewing a Statement of Facts section, a student is asked whether the author has a recognized and workable theme, uses appropriate tone and word choice, and cites accurately to the record. When peer reviewing a draft argument, a student is asked to evaluate whether the author has used an effective structure and helpful topic sentences, appropriate authority, and necessary facts in the analysis paragraphs.

The entire peer-review process takes one week per document. On the day a written assignment is due, each student submits a copy to the professor and exchanges another copy with a student who is not a member of his team. As homework for the week, the pair critique each other’s work and meet outside of class to discuss their comments. Students return the following week and submit a hard copy of their peer-review comments and a revised version of their assignment that incorporates some or all of the changes suggested by the peer reviewer. In this revised version, students are asked to explain why they accepted or rejected particular advice.

Students are evaluated on their peer review work, oral argument presentations, and revised written documents. While students also submit their draft written documents, usually one week before the revised documents are due, we do not grade the drafts per se. Instead, we collect the drafts and later compare them to the revised versions to evaluate how students incorporated peer-review feedback and whether they independently identified areas
that needed improvement. This is also a useful way to verify that students are working on the project in the early stages.

Although the majority of the semester is spent working through discrete aspects of the process, eventually, in the last weeks of the class, we come full circle and ask students to apply the entire process to their final written and oral assignments.

2. A Process for Creating a Persuasive Statement of Facts

Because the facts drive the creation of compelling themes and creative arguments, our approach to persuasive writing requires students to immerse themselves in the course case file, which presents the facts through a series of court documents, deposition transcripts, press clippings, etc. Students also continually evaluate these facts throughout the writing process.\footnote{Abraham P. Ordover, Teaching Sensitivity to Facts, 66 Notre Dame L. Rev. 813, 818–819 (1991) (discussing the benefits of using a case file rather than a “canned” fact pattern and the importance of continued factual evaluation).} We teach this portion of our method during Weeks III-V of the semester.\footnote{See app. A.}

We start by explaining Step 1, which requires students to review objectively the entire case file and to create a case chronology, with informal citations to the record. Students are expected to work through Steps 2 and 3, which involve issue spotting and research, as they review the case file. We then work through an in-class exercise that illustrates Step 4, which is a brainstorming technique that helps students evaluate the facts from their own and their opponents’ perspectives. The purpose of this step is not to help students become more familiar with the facts in general. Although it certainly helps achieve that result, we hope students are beyond that point after completing the case chronology exercise. Instead, the purpose is to teach students to read the facts with an eye toward developing arguments and strategic themes.

In this brainstorming exercise, students are split into two small groups: one for appellant and one for appellee. Each group is given an identical list of facts. We explain the legal issue and relevant law. The students are then asked to work through the list and characterize each fact as “good,” “bad,” or “neutral.” When we reconvene as a class and discuss each fact on the list, students for each side justify their characterizations.
The exercise involves a young girl who was struck and killed by a sports utility vehicle while riding her bicycle to school. The girl’s parents sued the county road commission, alleging that their daughter’s death was caused by a defectively designed intersection. The following sentence is the first that students are asked to review:

On September 1, 2004, Elizabeth Jones, age 8, was riding her new bicycle to school with four friends.

In their individual groups, students tend to gloss over this sentence as one single fact, and most students characterize it as neutral. When we reconvene as a class, we remind the students that this exercise is intended to help them identify facts that will bolster their existing arguments or lead to the creation of new arguments. We then ask them what argument either party could make based on the fact that the accident occurred at the beginning of the school year. Could the Road Commission argue that Elizabeth was inexperienced with the route because it might have been one of the first times she rode her bike to school? What about the fact that she was eight years old? Was it negligent for her parents to let her ride her bicycle to school? What argument could be made about the fact she was riding a new bicycle? Could the parents bolster their defense to a contributory negligence claim by arguing that they had carefully equipped her with a new top-of-the-line bicycle to prevent injury? Finally, is it significant that she was with four friends? The Road Commission might argue that the accident was not caused by the design of the intersection, but instead, that Elizabeth was distracted by her friends. Elizabeth’s parents might argue, again to rebut the negligence point, that they allowed her to go to school with her friends because there was safety in numbers. In any event, reviewing this one sentence, with all of its possibilities, is an eye-opening experience for students.

See also Ordover, supra n. 24, at 818–819 (An additional benefit to continual fact evaluation is that it helps students identify relevant facts and the permissible inferences that can be drawn from them.).
The exercise also sparks a discussion of what inferences are appropriate to draw from facts and what inferences go too far and begin to enter the realm of fiction. This point prompts a discussion of ethical obligations and an attorney’s role as an officer of the court.

Following this in-class exercise, we distribute the Fact Characterization assignment that students complete in teams using the assigned case file. In Week IV, students return with their completed Fact Characterization assignment, and we discuss it as a class, again having each side present their characterizations. At this point, we instruct them on the mechanics of writing and orally presenting the facts, paying particular attention to using facts in a way that reflects the themes and strategies they created in the fact characterization process. Finally, using the class case file, students complete the Statement of Facts assignment, which is Step 5 of our process.

Students return the following week to submit their written draft of the Statement of Facts and present it to the class as they would in an oral argument. Each presentation is several minutes long. Students introduce the case and present all or a portion of the facts. The class serves as a mock appellate panel, asking questions of the speaker and critiquing the presentation. We grade the oral presentations, the students’ peer review efforts, and the revised written fact sections. Students apply this feedback to write a Statement of Facts section for the final writing assignment, an appellate brief, and orally present these facts during the in-class moot court competition that takes place during Weeks XIII and XIV.

The most important thing to stress when presenting this material is that drafting the fact section is a recursive process, and facts must be drafted in tandem with the argument section. The more a student works through the facts, the better. At first, working with the facts helps streamline research efforts and identify issues. Continuing to consider the facts through the fact characterization and argument drafting sessions then takes students into more nuanced levels of argument and persuasion.

3. A Process for Creating Complete and Compelling Arguments

After completing the fact-oriented aspects of our process, students are prepared to move into argument development. This be-
gins in Week VI. We lay the foundation for the argument methods that follow by discussing brief writing in general and asking students to write a simple argument based on the class case file. The next week, we explain Steps 6 and 7 of our method.

a. Brainstorming the Argument: The Three-Column Chart System

Step 6 involves the use of a Three-column Chart system27 to brainstorm and create arguments (see figure 2, infra). The system is straightforward. Students create a chart with three columns. Column One is titled “Principal Argument Column.” In this column, a student outlines each argument he or she will raise in the written brief. Column Two is titled “Opponent’s Response Column.” In this column, a student identifies the points, including facts and legal authority that the opponent might raise in response to the student’s principal argument. Column Three is titled “Reply Column,” in which a student identifies a reply to the opponent’s argument, again including facts and legal authority.

27 For a discussion of the benefits of using visual techniques as a way of improving “law teaching,” see Angela Passalacqua, Using Visual Techniques to Teach Legal Analysis and Synthesis, 3 Leg. Writing 203, 205 (1997) (“Visual techniques are an efficient method of conveying and organizing information to all types of people.”).
b. Structuring the Argument: The Argument Placement Formula

Once we describe how to create a three-column chart, we teach students a formula for argument placement that is designed to give structure to the principal argument and incorporate the Reply Column material to achieve its maximum persuasive effect (see figure 3, infra). There are three options for placement of the Reply Column material. Option One incorporates the Reply Column material into the original principal argument. Option Two uses the Reply Column material as a rebuttal paragraph within the principal argument. Option Three transforms the Reply Column material into an independent, stand-alone argument that comes after the principal argument.

---

IRAC stands for Issue, Rule, Analysis/Application, and Conclusion. Enquist & Oates, supra n. 13, at 34.
FIGURE 3: REPLY COLUMN MATERIAL PLACEMENT FORMULA

<table>
<thead>
<tr>
<th><strong>Principal Argument Column</strong></th>
<th><strong>Opponent’s Response Column</strong></th>
<th><strong>Reply Column</strong></th>
</tr>
</thead>
</table>
| Argument in IRAC form.        | Identify your opponent’s response, including facts and legal authority. | Identify your reply to the opponent’s position, including facts and legal authority. This material can be incorporated into your brief using one of these three options:  
**Option One:** Incorporate the Reply Column material directly into your principal argument.  
*or*  
**Option Two:** Include the Reply Column material as a rebuttal paragraph within your principal argument.  
*or*  
**Option Three:** Incorporate the Reply Column material as an independent argument within your paper. |

After we explain the Three-column Chart method and the Argument Placement formula, we work through these steps twice in class.²⁹ We use a fictional, non-legal example involving ice cream first, because its simplicity allows students to focus exclusively on the method, rather than being distracted or intimidated by the

²⁹ For more detailed information regarding these examples, see the Legal Writing Institute’s Conference website, Conference News, Twelfth Biennial Conference of the Legal Writing Institute, Conference Information, Bibliographies and Handouts, http://www.lwionline.org/publications/documents2006/Streicher-CunninghamHandouts06.doc.
The principal argument is that vanilla ice cream is the most popular ice cream in the United States, and the author intends to cite a 2005 Annual Report of American Dairy Farmers regarding general vanilla ice cream sales to support this claim.

**i. Option One: Principal Argument Option**

If the contents of the Reply Column and Principal Argument Column are identical or very similar, and the Reply Column material improves the overall point of the section, we advise the students to write the principal argument (using the IRAC organizational structure) including information contained in both columns (see figure 4, infra). The chart that follows is an Option One example.

---

30 For a discussion of the benefits of using non-legal examples in the classroom, see Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 Leg. Writing 37, 38–39 (2001). As Professor Calleros explained,

Unless students can relate our words to some concrete experience within their present knowledge, our explanations will remain abstractions to most students, and many will continue asking the wrong question: “Yes, but what is the correct answer to your assignment?”

To help students understand their academic task, we can try to build on their schemata, their existing foundations of knowledge. By relating a new concept to a student’s existing intellectual foundation, we can help the student to assimilate the new concept more quickly. With each such learning experience, the student’s foundation of knowledge grows incrementally, providing a stronger basis for assimilating more new concepts, including increasingly complex ones.

*Id.* at 38. For additional sources that discuss the use of non-legal examples, see also Howard A. Denemark, *How to Alert New Law Students to the Ambiguity of Language and the Need for Policy Analysis Using a Few Minutes and the Directions on a Bottle of Salad Dressing*, 36 Gonz. L. Rev. 423 (2000–2001); Michele G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 Touro L. Rev. 349 (2005); and Millich, *supra* n. 11.
FIGURE 4: OPTION ONE OF THE GREAT ICE CREAM DEBATE

<table>
<thead>
<tr>
<th>PRINCIPAL ARGUMENT COLUMN</th>
<th>OPPONENT’S RESPONSE COLUMN</th>
<th>REPLY COLUMN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vanilla ice cream is the most popular ice cream in the United States.</td>
<td>Butter pecan is the most popular ice cream in the United States.</td>
<td>Vanilla ice cream is more popular than butter pecan.</td>
</tr>
<tr>
<td><strong>Support:</strong> 2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</td>
<td><strong>Support:</strong> 2006 survey in <em>Ice Cream World</em> magazine compared vanilla and butter pecan ice cream and found that three out of every five people preferred vanilla ice cream.</td>
<td></td>
</tr>
</tbody>
</table>

Under this option, the material in the Reply Column naturally fits within the principal argument. Before considering the opponent’s butter pecan ice cream argument, the author might not have looked for this information or, if acquired, may not have used it. However, after the author considers the opponent’s point, the Reply Column material becomes directly relevant, and it should be included as additional support for the principal argument. An IRAC of the revised principal argument would look like this:

IRAC OF OPTION ONE:

**REPLY COLUMN MATERIAL BOLSTERS PRINCIPAL ARGUMENT**

I: Vanilla ice cream is the most popular ice cream in the United States.

R: Authority to support the proposition:

- 2005 Dairy Farmers Report (general ice cream sales);
- 2006 *Ice Cream World* magazine survey (specific vanilla vs. butter pecan comparison).

A: Explanation that vanilla ice cream is the most popular.

C: Conclude section.

---

31 For the students, we print Reply Column material in red type.
Students should use Option Two if the Reply Column raises new points that were not raised in the Principal Argument Column, and the new points are related but might affect negatively the flow or structure of the principal argument if they were inserted directly within it (see figure 5, infra). Under this scenario, the principal argument is written using the material in the Principal Argument Column, and the Reply Column material is incorporated as a rebuttal paragraph(s) at the end of the analysis section of the principal argument.

**FIGURE 5: OPTION TWO OF THE GREAT ICE CREAM DEBATE**

<table>
<thead>
<tr>
<th><strong>Principal Argument Column</strong></th>
<th><strong>Opponent’s Response Column</strong></th>
<th><strong>Reply Column</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Vanilla ice cream is the most popular ice cream in the United States. — 2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</td>
<td>Butter pecan is the most popular ice cream in the United States.</td>
<td>Butter pecan ice cream cannot be more popular than vanilla because it poses a risk to human health. — In response to a 2001 U.S. Department of Health and Human Services report, the U.S. Department of Education has banned butter pecan ice cream from all schools because of peanut allergies in children. In each successive year since the ban, the Annual Preference Survey of the American Association of Ice Cream Producers noted that the percentage of people who prefer butter pecan as their favorite ice cream over vanilla has declined.</td>
</tr>
</tbody>
</table>
The Reply Column material contained in this chart is best suited for Option Two: rebuttal paragraph treatment. This material would not have seemed relevant when the author was researching only the principal argument. Indeed, it might have been confusing to refer to a ban on nut products at the same time as discussing the popularity of vanilla ice cream. However, this material is related to the specific debate about whether vanilla is more popular than butter pecan, and it fits naturally with a section devoted to that subject. Moreover, as long as it is presented after the idea that vanilla ice cream is the most popular, its insertion does not break the flow or disturb the tone of the principal argument. An IRAC of this material would look like this:

**IRAC OF OPTION TWO:**

**REPLY COLUMN MATERIAL AS REBUTTAL PARAGRAPH**

I: Vanilla ice cream is the most popular ice cream in the United States.

R: Authority to support the proposition:


A: Explanation that vanilla ice cream is most popular:

**Rebuttal Paragraph:** U.S. Department of Education ban and corresponding decline in popularity.

C: Conclude entire section.

A rebuttal paragraph might be written this way:

Unlike vanilla ice cream, butter pecan ice cream actually poses a risk to human health. In 2001, a report issued by the U.S. Department of Health and Human Services noted that over three million people are diagnosed with nut allergies each year, and a vast majority of these people are children. As a result of this report, the U.S. Department of Education banned nut products, including ice cream with nuts, from all schools. In each successive year since the ban, annual preference surveys conducted by the American Association of Ice Cream Producers reveal a consistent decline in the percentage of people who prefer butter pecan as their favorite ice cream over vanilla. Because preference
surveys taken after the government health report and subsequent ban note a six-year decline in the favoring of butter pecan ice cream, Appellee cannot legitimately assert that it is the most popular ice cream in the United States.

**iii. Option Three: Separate Arguments Option**

Students should use Option Three when the Reply Column raises new points that were not raised in the Principal Argument Column, and when these points would overshadow or outweigh the principal argument if included within it (see figure 6, *infra*). Under this scenario, two separate arguments should be created, using one IRAC for each. One IRAC, with its own point heading, is devoted to the Principal Argument Column material. The other IRAC, with its own point heading, is devoted to the Reply Column material and becomes an affirmative argument intended to dilute the persuasive value of the opponent’s principal argument.
### FIGURE 6: OPTION THREE OF THE GREAT ICE CREAM DEBATE

<table>
<thead>
<tr>
<th>PRINCIPAL ARGUMENT COLUMN</th>
<th>OPPONENT’S RESPONSE COLUMN</th>
<th>REPLY COLUMN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vanilla ice cream is the most popular ice cream in the United States. —2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</td>
<td>Butter pecan is the most popular ice cream in the United States.</td>
<td>Because of its health risks and an increasingly health conscious public, butter pecan is not the most popular ice cream. —Since the U.S. Department of Education ban, national ice cream preference studies show that the percentage of people who prefer butter pecan has declined in each successive year since the ban, and projected sales data indicate the decline will continue. —Popularity will continue to decline as children are exposed to other flavors and develop other preferences. —According to two separate studies reported in the <em>Midwest Journal of Medicine</em>, parents are changing household behavior to protect children with nut allergies. This shift includes purchasing more vanilla ice cream. —Manufacturers have spent less money to market butter pecan ice cream and have increased significantly the price per gallon to account for increased production costs.</td>
</tr>
</tbody>
</table>
The Reply Column material in this example should be incorporated into the paper as a separate argument (Option Three). It is too voluminous to be a simple rebuttal paragraph, and if an author attempted to use it as such, the Reply Column material would overshadow the principal argument, both in terms of its authority and its sheer volume. Used in its own IRAC, the principal argument is clean and focused, and the second IRAC, which will be built using the Reply Column material, further supports the principal argument but also preemptively steals thunder from the opponent.

**IRACS OF OPTION THREE:**

**REPLY COLUMN MATERIAL AS INDEPENDENT ARGUMENTS**

**Principal Argument**

I: Vanilla ice cream is the most popular ice cream in the United States.

R: Authority to support the proposition:

A: Explanation that vanilla ice cream is the most popular.

C: Conclude section.

**Second Argument**

I: Because of its health risks and an increasingly health conscious public, butter pecan is not the most popular ice cream, and its popularity continues to decline.

R: Authority to support the proposition:
   - Dept. of Ed. Ban;
   - National ice cream preference studies;
   - Projected sales data;
   - *Midwest Journal of Medicine* studies;
   - Price increase;
   - Production costs; and
   - Decrease in marketing.

A: Explanation of argument.

C: Conclude section.
This non-legal example illustrates how to create a three-column chart and structure an argument that takes the opponent’s position into account. After we have explained Steps 6 (Three-column Chart creation) and 7 (Argument Placement formula) in this context, we work through an in-class exercise using a legal example. To begin this exercise, we distribute a principal argument that was written without taking the opponent’s argument into account. We also distribute three completed three-column charts, with Reply Column material suited for each argument placement option. For each chart, students must identify whether the Reply Column material should be used as part of the analysis of the principal argument, as a rebuttal paragraph, or as an independent argument.

After making these decisions, students apply the Argument Placement formula and identify where to insert the Reply Column material. At the end of the in-class exercise, we distribute an “answer guide” that contains the original principal argument with the Option One, Option Two, and Option Three material incorporated and highlighted with margin commentary.

The answer guide gives students a sense of whether they understand the Argument Placement formula. It also is demonstrable proof that using the Three-column Chart method and Argument Placement formula improves persuasiveness. Indeed, students’ revised principal arguments that incorporate the Reply Column material are more organized, complete, and persuasive than their original arguments.

Finally, we ask students to apply these concepts to the course case file. At the end of this class, we distribute the Three-column Chart and Improved Argument assignments that students complete using the course case file. Students are asked to evaluate the principal argument they wrote in Week VI, create a three-column chart for that argument, and revise the principal argument by incorporating the Reply Column material.\textsuperscript{32}

After attending a workshop to develop oral advocacy skills,\textsuperscript{33} students return to class the following week with their revised

\textsuperscript{32}See app. A.

\textsuperscript{33}An interesting aspect of our class is an innovative workshop we developed with the Detroit branch of “The Second City,” a Chicago-based improvisational comedy group. This two-hour hands-on workshop focuses on commanding an audience, voice and diction, responding to questions, effective body language, and team and confidence building. The event has been extremely well received, and “The Second City” is working toward offering the seminar to law schools across the country.
principal argument and present it orally. Each student is given approximately five to seven minutes, and classmates act as appellate judges, questioning and critiquing the argument. Both the oral and written arguments are evaluated and peer reviewed, and after receiving this feedback, students re-write their principal argument a second time. This second revised version is graded. Then, at the end of the term, students present the written argument as part of the final appellate brief and orally present it as part of the in-class moot court competition.

4. Trouble-Shooting Each Option

When teaching the Argument Placement formula, it is important to remind students that there is no “right” answer. If a student is struggling with which option to use, the best approach is to pick an option, draft the argument according to the Argument Placement formula, and use the following trouble-shooting techniques, which can help students identify whether they are using the most effective option.

A student might be misusing an Option One structure if the principal argument loses focus or impact after the Reply Column material is inserted into the principal argument. This may be the case because the two points are not sufficiently related or the placement creates a problematic structure. In this instance, the solution is to use the Reply Column material as a rebuttal paragraph (Option Two) or as an independent argument (Option Three).

A student may be misusing an Option Two approach if the rebuttal paragraph material simply repeats the principal argument. If so, the solution is to use Option One and incorporate the rebuttal material into the principal argument. Another way to misuse Option Two is if the rebuttal paragraph overshadows the principal argument. For example, if a rebuttal paragraph requires full case discussion(s) or the material itself exceeds three or four paragraphs, there is a good chance that this material is too much for a rebuttal paragraph. The solution in this instance is to use the

---

34 When we are team teaching a large section, we break into two groups and work in separate classrooms in order to complete all arguments in one class period.

35 One potential structure problem occurs when there are repeated shifts between rule and analysis paragraphs.
third option and convert the rebuttal into an independent argument.

Finally, a student will know if he or she is misusing the third option if the stand-alone argument lacks legal authority or sufficient analysis—that is, if it contains insufficient material to justify using a separate IRAC. If so, the student should convert the material into a rebuttal paragraph (Option Two) or use it to bolster the principal argument (Option One).

III. WHY IS OUR METHOD EFFECTIVE?

Students have responded positively to our method. They have explained that they feel more comfortable approaching a writing project on their own and outside of the classroom because they have a clear process to apply. Moreover, we have noticed a dramatic improvement in the readability, creativity, and overall persuasive quality of their work product. Initially, we found it ironic that moving to a formulaic and mechanical approach to creative writing helped students become better writers. Beyond some initial surprise, however, we realized that there are legitimate explanations for the result.

A. Our Method Enables Students to Learn Persuasive Writing as a Transferable Skill

One of the biggest frustrations in teaching legal writing is that students do not recognize that their writing skills are transferable to other tasks outside the legal writing classroom. One way to increase the likelihood that transfer will occur is to use a method or process. The process of writing has been the focus of composition studies and pedagogy for more than thirty years, 39

---

36 These students are describing the recognized benefits of using a definitive method or process. “Models strive to capture the whole of something in an overall, integrated fashion. Models also show sequence, interconnection, pattern, flow, and organization. Models are critically important to mental functioning because they allow us to anticipate future actions, needs, and steps.” Paul Plsek, The Directed Creativity Cycle, http://www.directedcreativity.com/pages/Cycle.html 1 (accessed June 21, 2007).


39 Lad Tobin, How the Writing Process Was Born—And Other Conversion Narratives,
and has been found to enable students to focus on and better understand the core structure and purpose of a particular document rather than its “surface” features, which, in turn, permits them to use that structure in other contexts.\textsuperscript{40} Our method is grounded in the use of process to develop ideas and communicate information in the social context of the legal community.\textsuperscript{41} As a result, students become more creative and effective writers and, at the same time, are able to transfer the process to their future work as law students and, ultimately, as lawyers.

Our process approach to writing was informed by earlier approaches used in basic college composition classes. Prior to the late 1960s, writing or composition pedagogy focused on the product.\textsuperscript{42} This teaching method did not utilize an invention or brainstorming stage, and has been described as linear.\textsuperscript{43} Proponents of the product-focused method of writing provided little to no instruction on the composing process.\textsuperscript{44} Evaluation of the written product was done only after the student had completed a formal draft.\textsuperscript{45} Successful writers were identified as those who could “systematically produce a 500-word theme of five paragraphs, each with a topic sentence.”\textsuperscript{46}

In the late 1960s and early 1970s, composition theorists shifted their attention away from the product-driven approach and toward the process of writing. In promoting the process approach, theorists argued that “we cannot teach students to write by looking only at what they have written. We must also understand how that product came into being and why it assumed the form that it did.”\textsuperscript{47} “Process pedagogy,” as it came to be called, shifted the focus in Taking Stock: The Writing Process Movement in the 90s 1, 5 (Lad Tobin & Thomas Newkirk eds., Boynton/Cook 1994) (“Every single written product is the result of some process—and almost every process leads to some sort of product.”).

\begin{itemize}
  \item Oates, supra n. 37, at 9.
  \item Pamela Lysaght & Cristina D. Lockwood, Writing-across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications, 2 J. ALWD 73, 96–100 (2004) (explaining successful legal writing programs will use a comprehensive process approach as well as emphasize the social context within which the writing occurs).
  \item Id. at 78.
  \item Id.
  \item Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process, 64 Temp. L. Rev. 885, 888 (1991).
  \item Hairston, supra n. 42, at 78.
  \item Id. at 83–84 (citing Mina P. Shaughnessy, Errors and Expectations: A Guide for the Teacher of Basic Writing 5 (Oxford U. Press 1977)).
\end{itemize}
of writing away from the end product and toward the process of creation.\textsuperscript{40} The purpose of this shift has been explained by Donald M. Murray, an early proponent of the process method:

The process of making meaning with written language cannot be understood by looking backward from a finished page. Process cannot be inferred from product any more than a pig can be inferred from a sausage. It is possible, however, for us to follow the process forward from blank page to final draft and learn something of what happens.\textsuperscript{49}

Composition instructors who followed this method began to intervene in the writing process to provide feedback and guidance, rather than waiting to critique a finished draft or final submission.\textsuperscript{50} In this way, students were better able to understand and remedy the problems in a particular document and learned how to approach and write more effectively.\textsuperscript{51} In fact, the theory of the process approach to writing is that effective writing skills will be learned if an inexperienced writer is taught the processes, activities, methods, and strategies that an experienced writer uses.\textsuperscript{52} To that end, writing began to be taught as a process of recursive activities that include invention, organization, and revision.\textsuperscript{53}

The Process Pedagogy approach has been described as having twelve principal features:

1. It focuses on the writing process; instructors intervene in students’ writing during the process.


\textsuperscript{50} Kearney & Beazley, supra n. 45, at 888–889.

\textsuperscript{51} Id.


2007] The Methodology of Persuasion 185

(2) It teaches strategies for invention and discovery; instructors help students to generate content and discover purpose.

(3) It is rhetorically based; audience, purpose, and occasion figure prominently in the assignment of writing tasks.

(4) Instructors evaluate the written product by how well it fulfills the writer’s intention and meets the audience’s needs.

(5) It views writing as a recursive rather than a linear process; prewriting, writing, and revision are activities that overlap and intertwine.

(6) It is holistic, viewing writing as an activity that involves the intuitive and non-rational as well as the rational faculties.

(7) It emphasizes that writing is a way of learning and developing as well as a communication skill.

(8) It includes a variety of writing modes, expressive as well as expository.

(9) It is informed by other disciplines, especially cognitive psychology and linguistics.

(10) It views writing as a disciplined creative activity that can be analyzed and described; its practitioners believe that writing can be taught.

(11) It is based on linguistic research and research into the composing process.

(12) It stresses the principle that writing teachers should be people who write.54

Our method is illustrative of the process pedagogy of composition studies. For example, there are numerous “interventions” in the writing process: multiple peer review exercises, the use of charts to develop and organize arguments, and the opportunity to verbalize an argument before including it in a final document.

Further, our method emphasizes audience and purpose, an important feature of the process pedagogy, and it addresses critics of the process approach who argue that it fails to teach “the conventions of the particular discourse [community] and the needs of

54 Hairston, supra n. 42, at 86.
the audience or variety of audiences." Our method addresses this
deficiency because students are informed of the purpose of their
writing, the context for each document, and the audience (i.e.,
judge, client, opposing counsel). More specifically, our method
provides students with strategies for working with complex case files
that they will encounter in practice, allows for and encourages col-
laboration within the class, and emphasizes the purpose of comp-
ponent parts of the brief. In this way, as professors, we are able “not
only to convey information but also to transform students’ . . .
world view.”

In short, our methods have the potential to improve the trans-
ferability of persuasive writing skills. Instead of simply telling
students to think creatively about the facts, we provide them with
a system to organize and critically evaluate facts. Similarly, in-
stead of merely telling students to think of an opponent’s point
when crafting their principal argument, we provide students with
a concrete chart method to use in order to catalogue ideas. More-
over, we explain in great detail how to effectively place the material
to improve organization, readability, and tone. Working through
each of these tasks, using both legal and non-legal examples, stu-
dents learn how to use these processes when writing another law
school assignment or when working as an attorney.

B. Our Method Fosters Creative Thinking

Although there are many definitions of the term “creativity,”
two in particular capture the essence of our approach. The first
describes creativity as “the process of forming ideas or hypotheses,
testing hypotheses, and communicating the results. Implied in this
definition is the creation of something new . . . It involves adventu-
rous thinking, getting away from the main track, breaking out of

---

55 Adam Todd, Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing, 58 Baylor L. Rev. 893, 923 (2006); see also Lysaght & Lockwood, supra n. 41, at 96–100 (discussing the importance of incorporating process and social discourse theory into legal writing programs).

56 Lysaght & Lockwood, supra n. 41, at 98 (quoting Patricia Bizzell, Cognition, Convention, and Certainty: What We Need to Know about Writing, 3 PRE/TEXT 213 (1982)).

57 There are at least fifty to sixty different definitions of the term creativity. Calvin W. Taylor, Various Approaches to and Definitions of Creativity, in The Nature of Creativity: Contemporary Psychological Perspectives 99, 118 (Robert J. Sternberg ed., Cambridge U. Press 1988). And, indeed, it may be that the term defies one single, precise definition. E. Paul Torrance, The Nature of Creativity as Manifest in Its Testing, in The Nature of Creativity: Contemporary Psychological Perspectives, supra n. 57, at 43.
The Methodology of Persuasion

2007

The second definition, which draws on the first, emphasizes that creativity involves “finding new ways, making unusual associations, . . . seeing unexpected solutions[,] . . . generating possibilities, seeing unexpected connections, [and] introducing novelty.”

This Section seeks to explain why our method fosters creative thinking in students. To better appreciate the concept that creative thinking can be improved by, or at least reduced to, a formal process, it is important to understand its origins.

1. A Brief History of Creative Process Theories

“For many centuries, it was believed that human creativity resulted from forces outside the individual’s control.” In ancient times, it was believed that innovations were gifts from the gods or muses. It was not until the Renaissance that people began to understand their own role in the creative process. “The attitudes in this era mark the inauguration of humanistic philosophy, the belief that we ourselves are responsible for much of what happens to us.” During this time, creativity was seen as a matter of genetic inheritance. By the Age of Enlightenment, the revelations of “Copernicus, Galileo, Hobbes, Locke, and Newton solidified belief in the scientific process. Faith in humanism, or humans’ ability to solve problems through their own mental efforts, grew rapidly.”

By the twentieth century, as our knowledge of the human brain and psychology began to expand, scientists began to study in earnest the processes of human cognition and creativity. Although creativity had long been discussed in the context of traditional arts like music, sculpture, and dance, researchers began to examine creative thinking in a broad range of fields such as math-

---

58 E. Paul Torrance, Developing Creative Thinking through School Experiences, in A Source Book for Creative Thinking 31, 32 (Sidney J. Parnes & Harold F. Harding eds., Charles Scribner’s & Sons 1962) (internal quotations omitted).
60 John S. Dacey & Kathleen H. Lennon, Understanding Creativity: The Interplay of Biological, Psychological, and Social Factors 44 (Jossey-Bass Inc. 1998).
61 Id. at 15, 17; Scott G. Isaksen & Donald J. Treffinger, Creative Problem Solving: The Basic Course 3 (Bearly Ltd. 1985).
62 Dacey & Lennon, supra n. 60, at 24.
63 Id. at 15.
64 Id. at 25 (emphasis in original).
65 Id. at 33.
ematics, natural sciences, architecture, engineering, sports, business, industry, armed forces, and large scale organizations. 66

2. Creative Process Theories and Common Themes

Today, there are numerous creative process theories. 67 Despite the breadth of subjects studied and the number of corresponding methods, scholars suggest that there are consistent core concepts to these processes 68 that tend to be based on at least two common themes. 69 First, the creation process requires purposeful analysis, imagination, and evaluation. Second, people have direct control over the generation of new ideas. 70 Indeed, “[m]odern research in the social and behavioral sciences has demonstrated . . . that the concept of creativity does not have to be mystical or impenetrable, and that our power of reasoning, analysis, and experimentation can help us attain insights into the nature of creativity and its many faces or expressions.” 71

Alex Osborn is credited with “outlin[ing] . . . basic steps to help individuals and groups be more successful in creative thinking,” 72 and his central themes have become the basis for more modern discussions of creative problem solving, 73 which might be

66 Cropley, supra n. 59, at 5.
67 In 1976, Silvano Arieti discussed at least eight different creative thinking models. Silvano Arieti, Creativity: The Magic Synthesis (Basic Bks. 1979). Since that time, several additional theories have emerged. See Isaksen & Treffinger, supra n. 61, at 5 (“[R]ather than finding that we are unable to develop systematic theories of creativity, there is almost an overabundance of such theories.” (Emphasis in original)); Plsek, supra n. 36. It should be noted, however, that these theories are not without critics. Indeed, scholars have argued that creative thinking is a subconscious process that cannot be quantified or sequenced in a method. See Max Wertheimer, Productive Thinking 192 (Harper 1945) (“[T]he aim to get at the elements of thinking they cut to pieces living thinking processes, deal with them blind to structure, assuming that the process is an aggregate, a sum of those elements. In dealing with [creative] processes they can do nothing but dissect them, and thus show a dead picture stripped of all that is alive in them.”); see also Arieti, supra n. 67, at 18 (citing W. Edgar Vinacke, The Psychology of Thinking (McGraw Hill 1953) (Vinacke was “particularly critical of the theories that assume the creative process always unfolds in a given sequence of steps.”)).
69 Plsek, supra n. 36.
70 Id.
71 Isaksen & Treffinger, supra n. 61, at 3.
72 Id. at 6.
73 Id. at 8.
persuasion most akin to legal writing. Osborn identified seven phases that are instrumental to creative thinking:\footnote{74}{Alex Osborn, \textit{Applied Imagination: Principles \& Procedures of Creative Thinking} 125 (Charles Scribner's \& Sons 1953). At the time of the writing, however, Osborn did not characterize the steps in the same formal way they are seen today. Instead, he noted, “[T]hose who have studied and practiced creativity realize that its process is . . . one which can never be exact enough to rate as scientific. The most that can honestly be said is that it usually includes some or all of these phases . . . .”}

(1) Orientation: Pointing out the problem;
(2) Preparation: Gathering pertinent data;
(3) Analysis: Breaking down the relevant material;
(4) Hypothesis: Piling up alternatives by way of ideas;
(5) Incubation: Letting up, to invite illumination;
(6) Synthesis: Putting the pieces together; and
(7) Evaluation: Judging the resulting ideas.\footnote{75}{There also are useful creative problem solving ground rules to consider when working through the various creative process stages: (1) Defer judgment: It is important to keep one's mind open to all possibilities and to avoid using evaluation prematurely, which will inhibit the free flow of ideas; (2) Look for many ideas—quantity breeds quality; (3) Accept all ideas; (4) Make yourself stretch—extend yourself; (5) Take time to let ideas simmer—incubation; (6) Seek combinations. Isaksen \& Treffinger, \textit{supra} n. 61, at 17–19.}

Our method will not transform a relatively un-creative person into a creative one. Nevertheless, our process mirrors the well-recognized steps of creative thought. It asks students to work through the creative process on at least three separate occasions: first with the facts, second with the arguments, and finally with the facts and arguments together. In turn, every student’s existing creative potential is increased.\footnote{76}{“Psychologists long ago accepted the tenet that any primary ability can be trained—that even an average potential can be developed by exercise . . . . Thus creative power can be retained or regained—and it can actually be stimulated into growth.” Osborn, \textit{supra} n. 74, at 67–68.}

Moreover, this method strikes the appropriate balance of brainstorming, analysis, and evaluation to help students become more creative. It includes review and revision, two critical steps to creativity. “Repetitive [writing] is . . . essential [to] creative work . . . . Each time we re-view something we re-vise it, seeing
new aspects of the same thing.” Repetition plays a constructive role in the creative process.  

C. Our Method Is Consistent with Modern Learning Theories

Modern learning theorists describe ways that students acquire, process, retain, and recall information. Our method is consistent with these theories, and, as a result, students can better understand the substantive law and underlying facts presented in a legal problem, which, in turn, increases the likelihood that they can create more accurate, sophisticated, and nuanced arguments. This consistency also increases the likelihood that students will retain our method and successfully recall and apply it to future assignments.

A detailed discussion of the numerous learning theories is outside the scope of this article, and they have been well covered by other authors. Here, we will focus on four techniques or teaching themes that are consistent with learning theory research: (1) start with the basics in a subject area and then introduce increasingly complex material; (2) use a variety of teaching methods; (3) give students the opportunity to apply material and receive feedback; and (4) encourage autonomous learning.

The first theme suggests that professors should “start with information within the student’s preexisting knowledge base and work towards the student’s learning more complex materials that require more complex levels of thinking.” Consistent with this


78 *Id.* at 81. Among other examples, Jeffrey discusses one poem that Wordsworth wrote originally in 1798, and edited again in 1799, 1805, and 1850. *Id.* at 71–72. Although we do not have that time span in our semester-long course, her point is well taken.


80 Lysaght & Lockwood, *supra* n. 41, at 75–76, 92–94.

81 *Id.* at 92–93 (citations omitted); see also Margaret C. Wang, *Adaptive Education Strategies: Building on Diversity* 2 (Paul H. Brookes Publ. 1992) (“[S]uccess in learning is maximized when students are provided with experiences that build on their initial compe-
theme, our method presents the writing process as a series of understandable steps that build upon the basic legal writing skills students have already developed. It also breaks the task of writing an appellate brief into small portions that are spread over the course of one semester. Students focus on discrete portions of the brief, mastering (or at least applying) skills, techniques, and substance that relate to each portion, before moving on to the next series of assignments. With this sturdy foundation, students are prepared for the challenge of completing the final writing assignment, which demands a more sophisticated demonstration of the writing process and nuanced application of the substance.

Second, we use various teaching methods in an effort to reach every type of learner and to help students link our material to their “preexisting knowledge base.” In our first class, we present our process in its entirety, via lecture, PowerPoint slides, a handout showing the process in chart format, group discussions about the process, and a writing assignment where students describe our process in their own words and critically evaluate it. Students then learn how to use our process and apply it and the substantive law throughout the semester by reading class materials, listening to lecture and student evaluations, debating during in-class exercises, standing behind the podium vocalizing their ideas, acting as judges and offering critiques, writing their own work, and evaluating others’. These activities offer something for every type of learner, increasing the likelihood that these learners will apply and understand the method and substantive law and will ultimately learn transferable skills.

Consistent with the third theme, students have multiple opportunities to apply learned material and to receive immediate feedback. They receive instruction on the method; have in-class opportunities to work through it and the law, individually and in groups, and receive feedback; apply the specific aspects of the method and law to their individual written and oral assignments;

tence and that are responsive to their learning needs.”); Jacobson, supra n. 79, at 172 (discussing the benefits of using incremental assignments).

82 The types of learners we focus on are visual learners (holistic thinkers who absorb information presented in its entirety); kinesthetic learners (tactile learners whose learning is linked to physical movement and who “learn by doing or touching”); aural learners (learners who best absorb material by listening); oral learners (those who use talking to process information or develop ideas); and verbal learners (those who best absorb information through written text and visual aids). See Jacobson, supra n. 79, at 150–156.

83 Lysaght & Lockwood, supra n. 41, at 93.

84 Id. at 93–94.
and, after receiving student and professor critiques of both, as well as offering their own critiques of others, incorporate all that they have learned by rewriting these discrete portions as part of the final appellate brief. In sum, students are more likely to learn our method and be able to apply it in future situations because they have had repeated exposure to it with feedback along the way. They also will have learned the substantive law and will be able to develop nuanced, polished points.

Finally, the structure of the class and its atmosphere encourage autonomous learning. Adult learning theories reveal that today’s law students are motivated to learn when they have opportunities to apply what they learn and to receive feedback, to feel respected as participants in their education, and to see how the course material is relevant. Because the concepts of application and feedback were discussed above, this section will focus on respect and relevance.

It has been suggested that communicating respect for students and expecting them to perform at a high level will increase student motivation, enjoyment, and independent learning. Generational considerations may bear on whether professors are able to successfully communicate this information to students. Today’s students are of a different generation and may have a different concept of what constitutes respect.

They are likely to expect that adults, including law school professors, treat them as equally capable adults, simply lacking the specific knowledge of the faculty, but possibly bringing knowledge that the faculty member does not have. Rather than a hierarchical structure, involving learned instructors and ea-

---

85 Id. at 94 (internal citations omitted). For a discussion of creating autonomous learners through a “Facilitative Method,” see Jim Andersen, Courageous Teaching: Creating a Caring Community in the Classroom (Corwin Press 1995). A successful teacher, acting as facilitator, encourages students’ personal growth and enables them to actively learn. Id. at 18–19. A professor does so by directing the underlying process, arranging learning activities and questions in a respectful manner so that every student has the potential to contribute to the next important step or question. The facilitator draws out the best each student has to offer. Through creating a conducive learning environment, the facilitator assists students with becoming more aware, responsible, and competent.

Id.; Wang, supra n. 81, at 3–4 (“The term ‘adaptive’ refers to the modification of school learning environments to respond effectively to student differences and to enhance the individual’s ability to succeed . . . .”).

86 Anderson, supra n. 9, at 138.

ger students, their vision of the law school world... involves 'differently-abled,' responsible adults sharing knowledge with each other in a mutually symbiotic manner.88

This characterization helps explain why students are engaged in our course. We set an extremely collaborative tone and work the class more as a lab than a lecture-based class. Students are regularly on their feet, either presenting behind the podium or debating during in-class exercises. They are encouraged to “spread their wings” and experiment with various presentation techniques. Classmates are always encouraged to ask questions and to offer comments and critique, both during and after presentations. We sit at the back of the class and offer critiques, after students have had the opportunity to do so, either reinforcing points or addressing issues that the students did not raise. In addition, written assignments are peer reviewed. Our motivation in structuring the class this way was to create a safe environment where students would be willing to speak and to stretch their minds. We show students that we seek and value their input, and they respond.

The structure of our class also helps students see the relevance of our class material. While it is important that students see how tasks will serve them in practice, “explaining how a particular task or assignment fits into the objectives of the course establishes relevance for adult learners.”89 Our approach of breaking the appellate brief into sections and coupling the written and oral components of each discrete section achieves this result. It permits students to see and explore the connection between the brief-writing process and the oral argument, rather than seeing them as two separate and isolated events. Students then are more inclined to devote themselves to learning and applying the course material.

D. The Method Addresses Common Persuasive-Writing Problems

1. Failure to Develop or Effectively Present a Theme

The development and inclusion of a theme is a necessary component of persuasive writing. A good theme can often make the

88 Anderson, supra n. 9, at 131 (citing Tracy L. McGaugh, Generation X in Law School: The Dying of the Light or the Dawn of a New Day? 9 Leg. Writing 119, 130 (2003)).
89 See id. at 144.
difference between a winning or losing argument because it provides the audience with a motivating factor that can carry the day. To be successful, the theme must work with both facts and arguments. However, many students do not incorporate a theme, or their attempts to do so are not successful.

First, students may not include a theme within their paper because they do not know how to develop one, or they may have an unsound theme that leads them to use an inappropriate tone or take unsuccessful positions. Our method forces students through their facts multiple times and requires that every fact be considered and rated for relevance and importance. This helps students brainstorm potential themes. Moreover, a student is able to develop a theme that is supported by the facts. Our method then takes the students to the argument-drafting stage and asks them to evaluate the argument and fact sections in tandem, coordinating the two sections. This process helps students verify that their theme is appropriate.

Second, students may think they have created a theme only to find that they have actually created a legal theory. We address this problem through our fact characterization exercises and in-class discussions. Inevitably, when working through the Jones exercise involving the young girl’s death or our case file, students refer to legal theories when asked to describe their theme. For example, when we ask students to describe a theme for the Jones exercise, legal arguments like negligence or liability inevitably creep into the discussion. In response, we encourage them to drop the legalese and consider what images can be invoked by the facts. Specifically, we ask them what can be done with the fact that Elizabeth’s bike was new. Students tend to discard this fact unless it supports a specific legal theory. We ask them to think again and decide whether it could be used to create an image of a happy young girl with a scrubbed face riding her new, shiny bike to school. This might be a backdrop against which the legal theories can be framed. Repeated exposure to the legal theory and the theme helps students appreciate the difference between the two.

Finally, students may have an appropriate theme, but they might not know how to integrate it throughout their entire paper. The theme may appear in the Statement of Facts through tone or choice of words, but it might never appear again. Our process of brainstorming and drafting facts and arguments in tandem also addresses this issue. Because students coordinate these sections, they are more likely to be able to carry the theme throughout.
2. Statement of Facts: A Lost Opportunity to Persuade

When writing a Statement of Facts section, students generally struggle with how to draft compelling fact sections that personalize clients, motivate the reader, and set the foundation for the analysis that follows. This might be the case for some students because they write the facts early on, in an attempt just to put pen to paper, or at the end with the goal of quickly satisfying the requirements of the submission. When the student writes before knowing enough about the case to make informed decisions about which facts to highlight, or too late in the process to adequately develop them, the end result may be a lost opportunity to persuade.

This lost opportunity may take shape in several forms. It could be that the statement is an objective rendition of the facts, as opposed to a compelling story that motivates the reader. Or it could take an undiscriminating approach where the student includes every fact presented in the file without making any decisions about what facts are necessary and what facts should be highlighted or downplayed. Or the fact section could have an inappropriate tone, one that leaves the reader wondering whose brief he is reading. An example of this problem might be a criminal defense lawyer calling his client “the convicted murderer,” or the attorney representing the estate of a deceased child referring to his client as “the estate” or “the appellant” rather than using the deceased child’s name. These problems can be reduced by our method of requiring the students to critically evaluate the facts multiple times before the final writing assignment is submitted.

Because our method helps students better understand how to approach their role as advocates, it may encourage them to devote more time to developing persuasive fact sections. In our course evaluations, students often describe the Fact Characterization exercise as the time when the proverbial light bulb “went on.” One student went so far as to describe it as the best class she had ever had in law school. Beyond what they hear and read in class, after completing the exercise, they develop a new appreciation for the power of the Statement of Facts section, they understand that they can and should tell a unique story, and they see that the reader should be able to identify the side for whom the section is written based solely on the tone of the document.
3. **One-Dimensional Arguments**

One significant problem with writing persuasive arguments is that students often do not strike the appropriate balance between making their own affirmative arguments and responding to their opponents’ points. Students tend to create arguments in a vacuum, without regard to the strength and placement of their opponents’ arguments. Or students write from a purely defensive standpoint, focusing solely on why their opponents are wrong, never presenting their own affirmative arguments.

Our Three-column Chart system and the Argument Placement formula help students strike the appropriate balance between these two extremes. Those students who argue in a vacuum cannot help but present a more complete argument after going through the three-column system because it forces them to look at the total picture. Because they have to identify their argument, their opponents’ reply, and their own response, their arguments will be more complete. For those students who tend to argue defensively, the Argument Placement formula helps them strike an appropriate tone. Under the formula, the advocate’s position is always presented first and the opponent’s position is relegated to a place of less prominence, either in the rebuttal or a second, stand-alone argument.

Finally, the Argument Placement formula improves the organization and flow of the paper, which enables students to incorporate more complex and nuanced arguments while at the same time maintaining the document’s readability. The charts help students outline each argument individually, and the Argument Placement formula helps students keep the paper on track.

4. **Students Make Superficial Revisions Only**

Our approach also addresses the concern that students do not usually make major substantive revisions to their papers during the revision process. A recent study has shown that students tend to revise at a “micro” rather than at the “micro” and “macro” levels.90 This phenomenon occurs in part because students are novice

---

90 Anzidei, *supra* n. 4, at 38–39. “Micro-revisions” are defined as “any revision that would correct a perceived surface error in the text without providing new information or changing the substantive meaning of the text.” *Id.* at 37 (citations omitted). “Macro-revisions” are defined as “any revision that would change the substantive meaning of the
legal writers and do not see the need for these substantive changes. The problem also may be exacerbated by pre-existing beliefs that macro-revisions are a form of punishment or involve moving “backwards” in the writing process.

Our coupling of oral and written assignments and the recursive nature of our process encourage students to make better use of revision opportunities. First, the structure of our class promotes macro-revisions. As a result of our process, students reconsider and rework their ultimate argument only after drafting, orally presenting, responding to judges’ questions and defending their positions, and receiving feedback. This helps them discover substantive errors, consider different approaches and strategies, and re-visit their original decisions about how to approach the problem.

Second, our process is recursive, and students are taught from the beginning that working through the facts or an argument several times is not a punishment or an indication that they have done something wrong. While it is hard to undo pre-existing ideas, we work hard to do exactly that. We explain that working through the cycle is rewarding because doing so increases the likelihood that they will create a persuasive product.

E. It Works

Finally, our method is effective because it works. While we have seen a noticeable improvement in our students’ papers, the most objective evidence comes from our moot court results. While our school has always had an energized and hard-working group of national moot court competitors, since this class began, our moot court teams have improved substantially. The first year we saw our students’ brief scores improve. The second year, our students began to move beyond the preliminary rounds in competitions. In the third and fourth years, they began to move into the final

---

91 Id. at 39, 40–41.
92 Id. at 35. (“For inexperienced writers, the idea of revising conjures up memories of their youth when they learned to spell by writing all the words they got wrong on their spelling test twenty times over.” (Citations omitted)).
93 Id. at 28.
94 Id. at 44.
rounds. In short, our students are beginning to win significant awards. 

CONCLUSION

Our method has been called “overt.” We took this comment as high praise because that was exactly our goal. Our method was intended to break down the mystery of persuasive writing and give students concrete steps to follow. Happily, we found that applying this process also increases the likelihood that students will persuade by creating complete and better organized papers that include theme, appropriate tone, and novel and interesting connections of fact and law.

---

95 Some of these include National Champions—Niagara International Law Competition (2007), Best Brief—NYU Immigration Law Competition (2007), and Finalist & Semi-finalist teams at the PACE Environmental Law Competition in 2006 and 2007. Further data about our students’ awards is available from the authors.
APPENDIX A

ADVANCED ADVOCACY SYLLABUS

[NOTE: ITALICS denote peer-reviewed assignments. ASTERISKS indicate that students are required to schedule at least one conference with the professor during the course of the semester. Specific conference time is set aside in weeks VII, VIII, XII, and XIII. The professor reserves the right to deduct up to ten points from a student’s overall point total for failing to attend and adequately prepare for and participate in such a conference.]

WEEK I

Topic
- Goals and Structure of the Class
- Introduction to Persuasion: Historical and Non-Legal Examples
- Overview of the Appellate Process; How to Review a Case File; and Standards of Review

Class Description
- Before class, students read various historical documents and speeches. In class, students receive the first or last name of one historical figure that was part of the assigned reading. They have to find the classmate with the other half and, as a team, identify the historical person and discuss what made him/her persuasive. Each team then “presents” its historical figure, and we discuss the historical figure as a class.
- The historical evaluation takes us to ethos, pathos, and logos. We then review non-legal examples of persuasion in the form of print and TV ads.
- Process Description assignment distributed
- Case Synopsis assignment distributed

Assignment(s) Due or Returned

WEEK II

Topic
- Overview of the Appellate Process continued
- Identifying & Framing Legal Issues
- Peer Review Techniques
Class Description
- Brainstorming session re: legal issues and research strategies for our case file
- Peer review handout distributed

Assignment(s) Due or Returned
- Process Description & Case Synopsis assignments due

WEEK III
Topic
- Identifying & Framing Non-Legal Issues
- Themes and the Art of Persuasion
- Creating a Compelling Statement of Facts

Class Description
- Discussion of case synopsis material; Brainstorming possible themes from case file
- Statement of Facts method introduced
- Jones fact characterization in-class exercise
- Fact Characterization assignment distributed

Assignment(s) Due or Returned
- Case Synopsis assignment returned

WEEK IV
Topic
- Presenting a Compelling Statement of Facts (Oral and Written)

Class Description
- Discussion of Fact Characterization assignment
- Lecture re: writing and how to orally introduce case & facts
- Statement of Facts writing assignment distributed

Assignment(s) Due or Returned
- Fact Characterization assignment due (For peer review, appellants review appellants and vice versa)
WEEK V

**Topic**
- Statement of Facts continued

**Class Description**
- Oral presentation of case introduction & facts

**Assignment(s) Due or Returned**
- Peer review comments and revised Fact Characterization assignment due
- *Statement of Facts assignment due (For peer review, appellees review appellants and vice versa)*

WEEK VI

**Topic**
- Brief Writing Strategies and General Writing Review

**Class Description**
- Initial Argument assignment distributed

**Assignment(s) Due or Returned**
- Peer Review comments and revised Fact Characterization returned
- Peer review comments and revised written Statement of Facts due

WEEK VII

**Topic**
- Making Complete and Compelling Arguments
- The Three-Column Method
- Student Conferences*

**Class Description**
- Three-column method introduced; *Batir* exercise
- Evaluation of Initial Argument assignment in context of three-column method
- Three-Column Chart assignment distributed
- Revised Argument (one IRAC of one argument with demonstrated Option Two or Option Three format) distributed
Assignment(s) Due or Returned
- Peer review comments and revised written Statement of Facts returned
- Initial Argument assignment due

WEEK VIII

Topic
- Second City Workshop
- Student Conferences*

Class Description

Assignment(s) Due or Returned
- Peer Review of Initial Argument assignment due

WEEK IX

Topic
- Strategies for Oral Argument Presentation and Rebuttals

Class Description
- In-class exercise

Assignment(s) Due or Returned
- Peer Review comments of Initial Argument returned
- Three-column Chart assignment due

WEEK X

Topic
- Argument & Counter-argument cont.

Class Description
- Final Appellate Brief assignment distributed
- Oral presentation of argument/ counter-argument/rebuttal
- Appellants/appellees paired

Assignment(s) Due or Returned
- Revised Argument assignment & outline of oral argument due
WEEK XI

Topic
- Argument & Counter-argument cont.

Class Description
- Continued oral presentation of argument/counter-argument/rebuttal

Assignment(s) Due or Returned
- Outline of oral argument, Peer Review comments, and edited Revised Argument assignment due

WEEK XII

Topic
- Student Conferences*

Class Description

Assignment(s) Due or Returned
- Peer Review comments and edited Revised Argument returned

WEEK XIII

Topic
- Student Conferences*

Class Description

Assignment(s) Due or Returned

WEEK XIV

Topic
- Moot Court Competition

Class Description

Assignment(s) Due or Returned
- Final Appellate Brief due
APPENDIX B

PEER REVIEW INSTRUCTIONS*

(1) Put yourself in the role of an educated and skeptical supervisor. Read the entire document once without making any notes or comments.

(2) On a separate sheet of paper, write your name (as the peer reviewer), the name of the author of the document you are reviewing, and your answers to the following questions.

(3) What are your initial thoughts and impressions of the entire document?

(4) Read the Statement of Facts section a second time. Based on the facts alone, can you identify which party the author represents? Did the author use appropriate tone and word choice? Were you left with an impression of which side should win? Did the author cite appropriately (form and sufficiency) to the record?

(5) Read the Argument section a second time, focusing on the organization and order of the points being made. Identify where the flow of argument is less effective, where points might be re-ordered, or where you see faulty logic.

(6) Look at the topic sentence of each paragraph and comment on the relationship between the topic sentence and the content that follows, the clarity of the sentence, and its tone. In total, do the topic sentences direct the reader through the paper?

(7) Discuss the author’s use of authority. Did the author select the best authority to support his/her claim? Are there alternative or additional sources you would have chosen? If so, why? Have the cases/statutes been accurately described and synthesized?

(8) Discuss the analysis. Are the conclusions explained sufficiently? Has the author developed the argument/facts rather than reciting them and leaving you to draw the desired conclusions? Ultimately, are you persuaded? Why or why not?

(9) Note any other observations or edits (i.e., writing style, sentence structure, grammar, citation, and typos).

---

* This list is taken from Professor Seligmann’s article, Terry Jean Seligmann, *Testing the Waters*, 15 Second Draft (Bull. of the Leg. Writing Inst.) 13 (June 2001).
TEACHING FOUNDATIONAL CLINICAL LAWYERING SKILLS TO FIRST-YEAR STUDENTS

Stefano Moscato*

INTRODUCTION

In Taking Lawyering Skills Seriously, their contribution to the Clinical Law Review’s 2003 symposium issue celebrating the twenty-fifth anniversary of Gary Bellow and Bea Moulton’s The Lawyering Process: Materials for Clinical Instruction in Advocacy,¹ David Binder and Paul Bergman suggest a clinical program model that takes effective skills training seriously.² Binder and Bergman argue that the best way to transfer students’ clinical experiences to the practice of law is through “skill-centered” clinical courses. That is, rather than molding classroom and live client work to the assortment of problems that arise out of a clinic’s cases over the course of the school year, clinical programs might offer a menu of


²Much of the discussion among clinical law commentators concerns how, and where, to strike the balance between what have been identified as the two primary—and sometimes incompatible—goals of clinical legal education, namely effective skills training on the one hand and promoting social justice on the other. See e.g. Deborah L. Rhode, Access to Justice 193 (Oxford U. Press 2004) (challenging law schools to do better in persuading law students to make “access to justice a more central social priority”); Stephen Wizner, Beyond Skills Training, 7 Clin. L. Rev. 327, 328 (2001) (arguing that clinical legal education should be more focused on exposing students to an experience from which they may conclude “that they should become active participants in the struggle to extend the availability of legal services to the poor”); Stephen Wizner & Jane Aiken, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 Fordham L. Rev. 997, 1011 (2004) (adding to Rhode’s challenge in arguing that “clinicians must strive to inculcate in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice”); see also Binder & Bergman, supra n. 1 (citing William Pincus, Educational Values in Clinical Experience for Law Students, 2 CLEPR Newslnr. (Sept. 1969), for the identification of these two competing goals). Without minimizing that important problem, I leave that debate for others and, like Binder and Bergman, instead take it as a given that effective skills training is in fact a critical component of clinical legal education.
courses organized primarily around the skills we hope students will adopt and use in the practice of law. The authors offer various approaches, adaptable across substantive areas, which such “skill-centered” clinical offerings can implement to teach students those skills that are not well-taught in practice.

In the wake of the recent publication of Roy Stuckey’s Best Practices For Legal Education (the report arising out of the Clinical Legal Education Association’s five-year-long Best Practices Project) and the Carnegie Foundation for the Advancement of Teaching’s contemporaneous report, Educating Lawyers, there is a renewed emphasis on clinical skills that builds on the conversation started by Bellow and Moulton. My aim in this Article is to add to that conversation and build upon Binder and Bergman’s model by focusing on preliminary clinical instruction (what I will refer to as “foundational” instruction) law schools must offer to make upper-division clinical instruction more effective. Part One argues that for students to leave law school with a collection of transferable skills (that is, having a conceptual understanding of the principles underlying the various lawyering skills they are likely to make use of in practice and having processed that understanding through methods such as active learning, repeated opportunities to practice, and meaningful feedback) students must obtain a foundation for these skills prior to entering upper-division clinical courses. That foundation should include an introduction to the following: fact-gathering, theory development and inferential reasoning, basic questioning techniques, obtaining chronologies, and T-funnel questioning. Each of the foregoing skills must otherwise be covered at the outset of both litigation- and transaction-oriented clinical offerings.

Part Two of this Article suggests that introduction to these foundational clinical lawyering skills probably should be integrated into the first-year curriculum. I say “probably” because that approach is not without substantial drawbacks. Part Two discusses some of the common problems associated with implementing

---

3 Binder & Bergman, supra n. 1, at 207.
4 Id. at 212–218.
7 Id. at 197–202; Binder & Bergman, supra n. 1.
this teaching of foundational clinical skills in the first year. For example, a typical refrain among law students is that their first-year legal research, writing, and skills courses divert them from what they perceive as their main goal—learning doctrine. First-year students also tend to believe that lawyering skills exercises impede their ability to prepare for stressful doctrinal exams. Thus, including skills training in addition to the traditional legal writing program is not likely to be popular with first-year law students. Moreover, students’ ability to transfer what they learn in the classroom to other contexts best occurs when students have repeated opportunities to practice those skills over time and in different and increasingly more complex settings, and where they receive meaningful feedback on their performance (including self-evaluation). This means devoting substantial time and scarce resources to skills instruction, perhaps at the expense of writing instruction.

Part Three, then, offers possible approaches that provide students with context for skills-based instruction and make the clinical aspects of the first-year curriculum more meaningful; concurrently the suggested approaches stress ways to ensure that students learn skills transferable to practice without diluting instruction in legal writing and research. The Article concludes by arguing that implementing the model suggested here, or any other model designed to help law students gain sufficient exposure to those lawyering skills they are likely encounter in practice, must be a joint effort between the clinical and legal writing communities.

I. THE REQUISITE FOUNDATIONAL SKILLS

The overwhelming majority of law students do not end up in a law practice that takes on the same types of public interest matters that the students worked on in their law school clinical or externship experiences. For the learning experience to be most effective, clinical skills—be they fact development, interviewing, counseling, trial advocacy, negotiation, deal-making, and the like—should be taught in a manner that ensures that the students will be able to transfer what they learned about performing that skill to the new contexts in which they find themselves post-
As Binder and Bergman explain, transferable lawyering skills are best learned if the students have several, repeated opportunities to practice those skills over time, and receive meaningful feedback on their performance, and evaluate their own performances. Moreover, skills transfer is best achieved through

---

8 Binder & Bergman, supra n. 1, at 198.
9 Id. at 201; see also Stuckey et al., supra n. 5, at 166 (explaining that experiential learning pedagogies are “based in an understanding that students must perform complex skills in order to gain expertise”). In other words, a meaningful experience with any particular skill cannot be limited to reading a “how to” manual about that skill, watching videotaped examples or reading transcripts of that skill in practice, or watching other students perform. While each of the foregoing is not without value, the student is unlikely to gain any substantial development of the skill without repeated, active practice in either a real or simulated setting. Id. at 125 (“One cannot become skilled simply by reading about skills or watching others perform lawyering tasks. One must perform the skills repeatedly, preferably receiving expert feedback.”).

10 See id. at 122 (“If [students’] performance is to improve, they need practice accompanied by informative feedback and reflection on their own performance.”). Instructor feedback is meaningful only if it is that—actual feedback—and given within the context of the pattern at issue. For example, assume a student is preparing a direct examination of a client for an unemployment insurance appeals hearing about the client’s alleged misconduct in his treatment of a customer. Assume the student’s direct examination includes the question “What happened next?” in the part of her direct immediately following the discussion of the interaction with the customer. It would not be particularly constructive for the instructor to simply strike out that question and replace it with “At any point after the customer left the store, did you talk to your manager about what happened? When? Tell me about that meeting.” Instead, if the goal is promoting long-term transfer of direct examination techniques, a class discussion of what might happen if the student were to ask such a question—the witness’s potential confusion, the ALJ interrupting the flow of the hearing because of her displeasure with such a vague and potentially broad question, etc.—followed by giving the student the opportunity to correct her own mistake may well permit the concept to become encoded in the student’s memory about this particular questioning technique. Because of the realities of live-client litigation, going through that type of back-and-forth exercise is impracticable, and thus starting out with a simulation (or series of simulations) is more suitable if this type of constructive feedback is to be valued. Moreover, an actual experience of dealing with a confused witness or annoyed judge might have the type of impact on the student that is much more likely to stick with her. Of course that cannot be done at the expense of the client, but it can be done at the expense of a volunteer simulated client or judge.

11 See id. (“[Students’] learning will be strengthened further if they develop a habit of ongoing self-assessment.”). I have found written self-critiques to be a terrific learning tool. In videotaped simulation exercises, I ask the students to break down their performances segment by segment (by referencing the videotape counter) according to whatever set of skills they practiced during the exercise. Students are encouraged to discuss both what went wrong and what went right, the latter of which ensures recognition of patterns they effectively have adopted. Perhaps because the typical student is very uncomfortable watching himself on videotape, I have found that most student are far, far more critical (and aware) of their performance when watching it on videotape and being forced to write about it as opposed to simply commenting on it after the exercise. Students also are more likely to accept “negative” feedback from the instructor as instructor and student watch the tape once again together after the student has written his self-critique rather than where such feedback is offered directly following the exercise. See also Steven Hartwell, Six Easy Pieces: Teaching Experientially, 41 San Diego L. Rev. 1011, 1017 n. 14 (2004) (suggesting that “the act of writing—of turning perception into the written word—typically has a signifi-
practice in different and increasingly more complex settings, beginning with repetitive exposure in different contexts to any particular technique, followed by longer simulation exercises that may incorporate a handful of problems or a number of techniques, and eventually culminating in “full-blown” simulated or live-client experiences.\(^{12}\)

With these principles in mind, many law schools offer skill-centered clinical courses that allocate different lawyering tasks to separate courses or offer live-client courses whose cases are likely to focus on a specific (and limited) set of skills or both.\(^{13}\) Each course, then, more effectively results in transfer because it focuses classroom discussions and simulations on one or two lawyering skills and the most important techniques (or skills that are not well-taught in practice) underlying those skills.\(^{14}\)

A. “Something’s Gotta Give”

Because this skill-specific approach relies upon repetition in shifting contexts, there simply is not the time over the course of a single semester (or much less a quarter) to cover all aspects of the particular skill(s) being taught in the course. Binder and Bergman suggest that “nuts and bolts” items that are easily learned in practice can be omitted.\(^{15}\) For example, a course on deposition-taking

\(^{12}\) Binder & Bergman, \textit{supra} n. 1, at 197–202. Because most clinics’ live-client cases provide neither varying contexts nor the opportunity for performing increasingly more complex tasks, Binder and Bergman advocate the use of simulations (either instead of or in addition to the live-client work) as the “ideal vehicle for providing repeated opportunities for practice and feedback in a variety of factual settings that promotes conceptual understanding and thus transfer.” \textit{Id.} at 202.

\(^{13}\) \textit{Id.} at 213–215. UCLA School of Law, for example, offers skill-specific clinical offerings such as Depositions and Discovery in Complex Litigation, Interviewing and Counseling, Trial Advocacy, Public Policy Advocacy, Negotiation Theory & Practice, Mediation, Appellate Advocacy, as well as transactional clinical offerings such as Renegotiating Basic Business Contracts, Venture Capital Formation and Financing, Public Offerings, and Environmental Aspects of Business Transactions. For a complete list of UCLA School of Law’s clinical offerings (both simulated and live-client), visit UCLA Law Clinical Program, \textit{Clinical Courses}, http://www.law.ucla.edu/home/index.asp?page=1733.

\(^{14}\) Binder & Bergman, \textit{supra} n. 1, at 213–215; \textit{see also} Stuckey et al., \textit{supra} n. 5, at 133 (“Professional skills instruction in most United States law schools does not produce sufficiently proficient graduates. The fact of the matter is that very few, if any, simulation courses develop proficiency in any professional skill to the level that a new lawyer needs. Some skills instruction is better than none at all, but law students will not develop adequate entry level lawyering skills as long as professional skills instruction for most law students is relegated to one course in the second or third year of law school.”).

\(^{15}\) Binder & Bergman, \textit{supra} n. 1, at 205.
skills can ignore close coverage of areas such as preliminary admonitions and the closing “usual stipulations,” which even in the live-client context, can be read from a script or can be handled by the supervising instructor. Similarly, tasks like subpoenaing witnesses to appear at a trial or hearing, sending notices to consumers or employees that sometimes must accompany document demands, and other administrative tasks can be handled by a clinic paralegal.

But merely omitting “nuts and bolts” items is not enough. To have sufficient time to expose students to repetition in shifting contexts, clinical instructors also should be able to assume that students have knowledge of those baseline clinical techniques that form the foundation for clinical courses. It makes little sense to offer skill-specific courses but require individual clinical instructors to spend a substantial amount of their instruction time covering baseline foundational techniques, such as those described below, at the expense of sufficient repetition and context variety. For each clinical offering to move quickly into repetition of more complex techniques associated with the particular lawyering skill or skills on which the course focuses, it is imperative that students begin their clinical experience with the foundation for those skills already having been laid.

There are a variety of techniques that invariably apply to a whole host of lawyering skills. These include: (1) fact gathering, theory development, and inferential reasoning; (2) question formation; (3) eliciting chronologies; and (4) T-funnel questioning.

1. **Fact Gathering, Theory Development, and Inferential Reasoning**

There are few important skills that lawyers—particularly litigators—use that do not require understanding how to develop legal case theories and how to identify material facts that support those theories. Moreover, one of the most difficult skills for law students to master is articulating the inferences that tie facts to the contentions critical to a dispute and developing evidence that tends to strengthen (or rebut) those inferences. No client or witness interview, deposition, written discovery request, direct or cross examination, or mediation would be complete without asking questions designed to uncover or limit facts tending to prove a con-
tention critical to the dispute or tending to strengthen or to rebut desired intermediary inferences.\footnote{For a detailed discussion of developing theories and strengthening generalizations, see David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (2d ed., Thomson/West 2004).}

Even in non-litigation settings, interviewing and counseling require at least some basic theory development of the potential dispute. When interviewing a walk-in client in an immigration clinic, for example, the lawyer must give some thought to what types of facts must be developed for the client to be able to obtain a Visa or asylum, and she also may want to ask questions designed to uncover facts that strengthen the inferences tying the client’s story to the prerequisites for obtaining the Visa. Transaction-oriented skills are less likely to require factual development of legal theories, but proposed deals do require inquiry into potential terms, potential risks involved with the deal, and similar considerations; identifying those areas of inquiry resembles the theory development process.

Therefore, before students take clinical courses such as interviewing, depositions, discovery, trial advocacy, or mediation—and particularly live-client courses centered on any of these skills, the students should have a foundational understanding of how to develop case theories.

2. **Question Formation**

Learning how to ask well-crafted open-ended, closed, and leading questions is necessary across a spectrum of lawyering tasks, such as interviewing, mediating, taking a deposition, and conducting a direct examination or cross examination.\footnote{See Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing among Simulated and Real Clinical Experiences*, 7 Clin. L. Rev. 123, 129 (2000).} Without a foundational introduction to these techniques, clinical instructors would have to spend substantial instruction time teaching students these skills. For example, learning the client/witness/opponent’s version of relevant events requires much more than an open-ended “tell me everything that happened” question; therefore students would benefit greatly from having a foundational understanding of how to formulate appropriate questioning topics and how to articulate those topics into effective open questions. Similarly, the line between “true” closed questions and those that are closed in form,
but leading in effect, can sometimes be unclear, and students should understand the ethical underpinnings of how they might impact the client/witness/opponent’s answers based on the wording of the question.

3. **Eliciting Chronologies**

Like basic question formation, knowing how to obtain a cohesive chronology is important to many lawyering tasks. Obtaining a complete understanding of a client’s story or a witness’s version of events (whether sympathetic, neutral, or adverse) usually requires developing a timeline of relevant events. Similarly, most persuasive litigation stories have a narrative structure. In the transactional setting, effective client representation requires an understanding of the history leading up to a proposed deal, including an account of prior dealings between the parties and the course of discussions and negotiations prior to seeking legal advice. Likewise, spotting potential risks in a deal often necessitates a forward-looking inquiry into how the deal will play out over time. It makes good sense, therefore, for students to enter their upper-division clinical curriculum with a foundational understanding of how to define a timeline, ask the initial question to get the witness to start the timeline, move the timeline along, and check for potential intervening gaps.

4. **T-Funnel Questioning**

It probably is not an overstatement to assert that no effective interview or deposition can take place without employing the T-funnel questioning pattern. Not all information relevant to a problem or dispute fits a neat chronological inquiry. Furthermore, people often forget the chronological order of events, but still remember important details when probed through effective T-funnel

---

18 Binder et al., *supra* n. 16, at 229–232.

19 Although most readers probably are familiar with what I refer to as “T-Funnel” questioning, I will briefly describe it here: A T-Funnel begins with a series of open-ended questions about a topic or event (e.g., “Tell me everything you know about X,” “What else do you know about X,” etc.) designed to uncover what the interviewee recalls about the subject without being suggestive. When the interviewee indicates that she can recall nothing else, the questioner moves on to closed questions, which are designed to stimulate recall of other potential matters regarding the topic or event in question. In theory, the combination of open and closed questions will allow the questioner to uncover all information that might be drawn from the interviewee’s memory about the topic or event in question.
questioning. Most theory development questioning lends itself to the T-funnel pattern, since lawyers typically will seek to uncover more information than is likely to arise out of direct inquiry alone. In the transactional setting, the T-funnel pattern typically can be used to inquire about a whole host of topics, such as the client’s objectives, the terms of a proposed deal that the client has considered, a description of the client’s (and the other party’s) business, and a variety of transaction-specific topics. Even within the timeline context, T-funnels often are useful to explore the details of events arising along the timeline and to search for potential gap-filling events.

Accordingly, all students should have a foundational understanding of how the T-funnel pattern works, how to identify appropriate closed questions at the “bottom” of the T-funnel, and how to recognize (and how to deal with) important information that is not relevant (or at least not directly related) to the T-funnel topic.

**B. Using a Clinical Skills Foundation Course to Supplement Clinical Experiences**

As with any model, there are flaws in offering a menu of skill-centered clinical courses rather than traditional “case-centered” clinics. In the latter, students typically engage in and receive concurrent instruction in a wide range of lawyering tasks—including interviewing and counseling, negotiating with adversaries, motion practice, drafting pleadings and written discovery, researching factual and legal matters, developing case strategies, taking and defending depositions, and representing clients in court or administrative hearings—the students’ tasks will vary with the needs of whatever cases are active in the clinic in any given semester. While some argue—with good reason, as explained above—that such a survey approach to clinical skills training, especially in the context of high-pressure and quick turn-around, live-client litigation, “is ill-suited to the successful transfer of lawyering skills,” it

---

20 Id. at 167.
21 Id. at 213–221, 227–229.
22 See Binder & Bergman, supra n. 1, at 194–197 (describing a handful of such traditional law clinics).
23 See supra nn. 8–14 and accompanying text.
24 Binder & Bergman, supra n. 1, at 202. Binder and Bergman explain that traditional case-centered clinical programs devote inadequate time to too many skills and such an experience is unlikely to result in transfer. They further suggest that relying exclusively on
would be a stretch to suggest that students get no benefit at all from exposure to many of the lawyering tasks they likely will employ in practice.

In a clinical program that offers specialized skill-centered courses, on the other hand, a student who has the opportunity to take, for example, an Interviewing course, a Depositions course, and a Trial Advocacy course will be well-prepared for many of the clinical skills she is likely to use in a litigation practice. The reality, however, is that it is a very rare student who is fortunate enough to have such a complete clinical experience.\footnote{At UCLA School of Law, for example, only one-fifth (62 of 303) of the 2005 graduating class took more than one clinical course, and only 10 of those students took as many as three clinical courses. More than one-third (118 of 303) never took a single clinical course.} To begin with, taking so many clinical offerings can occur only by sacrificing at least some core Bar Exam courses, and anecdotal evidence (at least in my experience) suggests that the typical law student is hesitant to forego taking those core courses. More importantly, schools simply do not have the resources or the space to offer enough skill-centered clinical courses to satisfy student demand.\footnote{For example, UCLA School of Law offered during the 2004–2005 school year a total of 23 clinical courses (14 of which were live-client courses) with 306 available spots for an upper-division student body of 636 students. Accordingly, the average UCLA student is able to take just a single clinical offering over the course of his law school tenure, and more than half the student body (167 of the 303 students in the 2005 graduating class) never takes a live-client course. See also Gary S. Laser, \textit{Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law}, 68 Chi.-Kent L. Rev. 243, 277–278 (1992) (finding that "[m]ost law students take no more than one or two skills courses while in law school"); Lucia Ann Silecchia, \textit{Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?} 100 Dick. L. Rev. 245, 281 (1996) ("It is also undeniable that at many law schools students are given little opportunity to take skills courses beyond their first year.").}

As a result, it is difficult for law school clinical programs to succeed in effectively teaching those clinical lawyering skills that are not well taught in practice given that most students will be exposed only to a very small sampling of those skills. Of course, there is no easy answer to this dilemma. I suggest, however, that including a mandatory foundational clinical course in the curriculum can ease the transition from law school graduate to lawyer when a graduate is faced with a task he did not have the oppor-
tunity to practice during his law school clinical experience. If, for example, a law school graduate had taken only an Interviewing & Counseling course, he should be able to draw upon his foundational clinical skills in taking on new legal tasks such as preparing a discovery plan, propounding discovery, taking depositions, and representing clients in court.

II. PLACEMENT OF FOUNDATIONAL CLINICAL TEACHING IN THE CURRICULUM

I have argued in Part One that law schools should include in their curricula a course covering foundational clinical lawyering skills. The question then is, where does it make the most pedagogical sense to place this foundational clinical teaching? Part Two offers some suggested approaches and concludes that introduction to these foundational clinical lawyering skills probably should be made a part of the first-year curriculum.

A. Integrating Foundational Clinical Skills into First-Year Legal Writing and Research Curriculum

The most logical place to include the foundational clinical teaching discussed in this Article is in the first-year legal analysis, research, and writing curriculum as part of an integrated “Lawyering Skills” course. Much has been written in recent years arguing that the first year’s focus on doctrine may be too limiting and questioning continued exclusive reliance on the traditional Socratic method; commentators have advocated instead for alternative teaching, such as problem-centered learning and using simulations in the traditional classroom. The Carnegie Foundation’s recent

---

27 See also Silecchia, supra n. 26, at 281 (“A course that introduces students to a range of skills has the distinct advantage of ensuring that students are at least familiar with the full range of skills that they may need upon graduation. While first year students will not have truly mastered any of these skills, this is the only way to ensure that all students will, at a minimum, have a basic familiarity with a broad range of skills.”).

28 Moreover, those skills will have been further developed and reinforced in the Interviewing and Counseling course (or whichever other upper-division clinical offering he chose to take).

29 I use “Lawyering Skills” to describe this course because that is the title used at UCLA School of Law. Other law schools that integrate foundational clinical skills with the first-year LRW course may use a different title such as “Lawyering” (NYU), “Legal Practice” (Michigan), and the like.

30 See e.g. Stuckey et al., supra n. 5, at 97–104 (recommending that law schools
Educating Lawyers report, for example, suggests that a simulation-based “integrated” approach to doctrinal classes would allow students to connect the conclusions they draw in performing legal analysis with the “rich complexity of actual situations that involve full-dimensional people” and force them to consider the social consequences and ethical underpinnings of those conclusions.31 Others explain that a problem-centered approach to doctrinal classes might lead to greater retention;32 would introduce students to the notion that they must develop a theory of the case to advocate effectively;33 and would help students “become aware of the complexity of and interplay among substantive, writing and ‘people’ skills in the practice of law.”34 That debate is largely outside the scope of this Article, but it does suggest that an integrated Lawyering Skills course that includes coverage of foundational clinical skills may provide a good opportunity to fill some of the deficits in most first-year curricula.

One obvious drawback to the first-year integrated Lawyering Skills option is that there arguably is less time available to teach...
and practice writing and research skills. LRW faculty at law schools nationwide feel pressured to spend as much time as possible trying to teach legal writing skills.\(^{35}\) So the question posed by many legal writing program directors is, “How can sufficient time be devoted to developing research and writing skills if the class time devoted to them must be ‘diluted’ with training in other skills?”\(^{36}\) A simple response is to say that students invariably will need foundational clinical skills in order to practice law. LRW program directors would be well served, then, to “recognize and affirm the pedagogical value of teaching these additional [lawyering] skills.”\(^{37}\)

Perhaps most importantly, demonstrating to first-year students from the outset the overlap and interdependence between legal writing and the clinical techniques described in this Article is critical to the effective teaching of lawyering skills.\(^{38}\) While students no doubt know that whatever legal issue they are presented with in a LRW assignment reflects an underlying set of facts, their analysis of the interaction between facts and rules can only benefit from a broader understanding of the varying contexts in which...

---

35 A 1995 survey of law school legal research and writing programs found that 93 of the 111 program directors surveyed reported that if they could have additional class hours, they would spend that extra time on writing and research training. Silecchia, supra n. 26, at 262–263. Eighty-five of the 111 directors similarly identified the development of “competency in legal writing and analysis” as the single most important goal of their programs. Id. at 263. While the Legal Writing Institute’s annual surveys do not directly address this issue, the data from the most recent survey suggests that most LRW courses continue to focus on legal research and writing. See ALWD & Leg. Writing Inst., 2007 Survey Results, 11–13 (2007) [hereinafter 2007 Survey Results] (available at http://www.lwionline.org/survey/surveyresults2007.pdf) (reporting that only 24 of 181 programs surveyed include “other oral skill[s]” in their curricula and that only 7% of classroom time is spent on such “other” activities). Anecdotal evidence from my recent interviews of UCLA School of Law faculty who teach in the Lawyering Skills program supports the same conclusion. These faculty reported that they prefer to spend as much time as possible on teaching writing and written analysis and typically pare down the clinical skills portion of the curriculum because, the argument goes, those are skills students will have the opportunity to develop through upper-division clinical courses, whereas the first year is the only chance to develop much-needed writing skills.

36 Silecchia, supra n. 26, at 266. For a good survey of the widespread belief that recent law school graduates have poor writing skills, see Susan Hanley Kosse & David T. ButleRitchie, How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study, 53 J. Leg. Educ. 80, 86 (2003).


38 See Anthony G. Amsterdam et al., Lawyering by the Book 4–5 (N.Y. U. Lawyering Program 2006) (explaining that lawyers operate in the four dimensions of rule interpretation, fact investigation, desire, analysis and contextual dynamics, and management, and that the “dimensions of lawyering work never stand in isolation; they interact, and effective lawyering requires attention to these interactions”).
those facts are developed.\textsuperscript{39} Integrating legal writing and clinical techniques would also demonstrate to students that identifying potential evidence and exploring that evidence can only be accomplished in the context of legal theories—potentially theories that students will have researched and analyzed in their research and writing assignments.\textsuperscript{40} In other words, the research and writing instruction will benefit from the students’ broader understanding of what it means to be a lawyer and represent a client.\textsuperscript{41} As one commentator has noted, in an integrated Lawyering Skills course, “the research and writing process has much greater context because students see—in very practical terms—the ways in which research and writing are closely related to broader issues in the practice of law. When they are removed from their vacuum, the importance of research and writing becomes more apparent.”\textsuperscript{42} Without that context, students often are unmotivated to learn and become jaded by the learning process.\textsuperscript{43}

\textsuperscript{39} \textit{Id.} at 7–8 (explaining that “the facts we perceive, remember, express and comprehend are not mechanical representations of objective reality, but selective constructions that are profoundly influenced by the interactive contexts in which they are perceived and reported, and invariably skewed by our physical senses, memory, language, and identity”).

\textsuperscript{40} Chestek, \textit{supra} n. 37, at 76 (further rationalizing that “[d]eciding what facts must be uncovered to support or defeat certain legal theories provides students a new and highly engaging way to practice the skill of legal analysis”); see also Stuckey et al., \textit{supra} n. 5, at 16 (“Students who receive instruction that is contextualized by reference to problems or professional settings seem to believe that more is expected of them, and treat associated intellectual tasks with a greater seriousness of purpose and a higher level of engagement.”); Silecchia, \textit{supra} n. 26, at 267–268 (arguing that “retaining an in-depth focus on research and writing cannot come without answering [a] set of equally hard questions: Can research and writing be taught without a realistic context in which students can see how these skills are applied? . . . Are research and writing more likely to capture the sustained interest and attention of students if they are taught in conjunction with other skills that are more ‘inherently interesting’?”).

\textsuperscript{41} Broad introductory instruction that includes clinical lawyering skills also is consistent with the model first-year curriculum suggested by Stuckey. Stuckey et al., \textit{supra} n. 5, at 206 (“The first year should provide the building blocks for the progressive acquisition of knowledge, skills, and values in the upper class curriculum and in law practice. . . . The goals of the first year should also include beginning the process of helping students develop their legal problem-solving expertise, self efficacy, and self-reflection and lifelong learning skills. . . . First year students should be given an overview of the program of instruction and how it is designed to prepare them for practice by progressively building their knowledge, skills, and values toward competence.”).

\textsuperscript{42} Silecchia, \textit{supra} n. 26, at 280–281; see also Maranville, \textit{supra} n. 17, at 128–129 (“Adult learning theory suggests that our students will learn best if they have a context for what they are learning. . . . Thus, attempting to interview a client about a personal injury claim will provide a specific form of context in learning torts.”).

\textsuperscript{43} See e.g. Engler, \textit{supra} n. 30, at 156 (arguing that under the traditional model, “[b]y the time students gain exposure to more contextualized presentation of the law in trial practice, simulation, or clinical courses, they are in their second or third year and they have already adopted a hard-to-shake account of law and law practice”); Maranville, \textit{supra} n. 17,
In addition to providing much needed context, integration of foundational clinical skills into the LRW curriculum is, I believe, necessary to teaching legal writing. Law student writing often suffers due to its failure to construct arguments in a logically reasoned manner—i.e., the ability to articulate the intermediate inferences (or minor premises) needed to reach the ultimate question(s) posed by the assignment, and the ability to recognize and articulate the inferences to be drawn from the facts, holdings, and policy rationales of the cases the student is analyzing. Rather than “diluting” instruction in writing skills, devoting LRW class time to teaching students about inferential reasoning in the context of developing potential evidence should actually serve to improve their aptitude in constructing well-developed written arguments.

Perhaps the biggest drawback to successful implementation of the integrated Lawyering Skills approach is that many first-year law students deem their LRW courses as “unworthy of the same level of attention as the other more ‘substantive’ courses.”\textsuperscript{44} Anecdotal evidence\textsuperscript{45} suggests that law school culture in the first year tends to convey the message—do well on your first-year doctrinal classes and everything else will fall into place.\textsuperscript{46} Between the focus

\footnotesize{at 138 (arguing that the traditional model “fail[s] to motivate our students, to encourage their passion for the law”). In addition to motivating students through context, an argument could be made that clinical lawyering skills also are “intrinsically more interesting than basic research and writing—particularly from the point of view of the first year student.” Silecchia, \textit{supra} n. 26, at 282.}

\footnotesize{\textsuperscript{44} Chestek, \textit{supra} n. 37, at 58; see also Kosse \& ButleRitchie, \textit{supra} n. 36, at 95 (lamenting the “second-class status” of LRW courses at many law schools). This mindset is likely exacerbated in non-graded, partially-graded, or otherwise “differently” graded LRW programs, which comprise 26 of the 181 respondents to the most recent survey conducted by the \textit{Association of Legal Writing Directors and Legal Writing Institute. 2007 Survey Results, supra n. 35, at 8. Even among “major writing assignments,” fifty of the respondents reported that fewer than 75\% of such assignments are graded. \textit{Id.} at 14. I suspect that at any institution where not all major writing assignments are graded, it is even more likely that oral lawyering skills exercises are not graded. And even where LRW assignments and exercises are graded, many schools assign such a small number of credits to the LRW course that any assignment will have little impact on the students’ cumulative GPAs. \textit{See id.} at 7 (reporting that the average respondent assigns a mere 2.25221 to 2.36 credits per semester during the first two semesters to its LRW course).}

\footnotesize{\textsuperscript{45} Anecdotal evidence is based on my own observations as well as from my interviews of former students at UCLA School of Law.}

\footnotesize{\textsuperscript{46} My own personal experience mirrors that perception. I still can recall attending my Contracts class on the day my first-year section’s first legal writing memorandum was due. The class started with the professor noting several absences and expressing outrage that students would think a legal writing assignment could possibly be worthy of missing class. His comment was something to the effect of; “Don’t you realize that a memo doesn’t matter a wit to employers compared to how you perform in your substantive classes?” While this professor’s perception likely overstates some employers’ mindset (many do pay attention to applicants’ LRW grades), it is probably true that the typical employer relies on students’}
on grade point averages and the stress of preparing for doctrinal exams, the last thing a typical first-year student wonders is, “Am I learning practical skills that will help me be a better lawyer three, five, or ten years down the road?” Accordingly, a successful first-year Lawyering Skills curriculum that includes a clinical skills component must attempt to find ways to alleviate the concerns raised by this mindset. Part Three of this Article offers some possible approaches to making the clinical aspects of the first-year Lawyering Skills curriculum more meaningful, but absent a significant shift in the first year’s focus on doctrine suggested by the commentators cited above, some student resistance to an integrated Lawyering Skills class is likely to remain.

Another legitimate concern is that students may feel overwhelmed with the amount of work and information they need to absorb in an effective clinical skills component to a first-year Lawyering Skills class.\(^{47}\) One commentator responds to this concern by noting that, on the contrary, “[s]ome students will appreciate the fact that the extra work is a necessary side-effect of this teaching method. They may view the work as similar to a ‘lab’ course they took in undergraduate school—the sort of course where you worked hard and learned a great deal, for a small number of credits.”\(^{48}\) Whether or not that assertion proves to be empirically true,\(^{49}\) we should be mindful of these concerns—especially in correlation with the baseline assumption that doctrinal classes “matter” more—in devising a first-year Lawyering Skills curriculum that includes a clinical skills component.

Finally, students who are not interested in pursuing a career in litigation may feel that too many of the foundational clinical lawyering skills covered are litigation-centric. However, not only can this criticism also be leveled at traditional research and writing assignments, which typically include law firm memoranda and

\(^{47}\) For example, Kenneth Chestek recognizes the additional burdens his “moot case” approach imposes on students: “They will be meeting and interviewing clients and witnesses, taking depositions, and participating in document reviews and discovery. They will almost certainly have a much more substantial record to review and digest in order to write their final briefs than would students in a more traditional class.” Chestek, supra n. 37, at 78.

\(^{48}\) Id. at 79.

\(^{49}\) Chestek’s anecdotal evidence from his student evaluations suggests that his students indeed do enjoy the skills-inclusive format and recognize the benefits thereof despite a workload that may not be commensurate with the unit credits for the course. Id. at 68–70.
persuasive briefs based on a litigation model, but the best response is that the clinical skills described in Part One, such as fact-gathering, theory development and inferential reasoning, question formation, eliciting chronologies, and employing the T-funnel questioning pattern, are not litigation-specific. On the contrary, each of these skills could transfer to a variety of fields, including transactional practice or criminal law. If that reality is communicated to the students, this integrated Lawyering Skills approach may actually lead to the opposite result: “A broader-based program offers a more realistic view, and makes those students not inclined to litigate more invested in the first-year program.” Moreover, a broad-based first-year Lawyering Skills course that touches upon a variety of skills may make it easier for students to choose appropriate upper-division clinical electives.

In sum, any law school that wants to design an effective first-year skills program must be mindful both of potential student resistance and of the pressures felt by many legal writing faculty to not “dilute” instruction in legal writing and research. Part Three of this Article will attempt to offer a model that takes these concerns into consideration.

**B. Stand-Alone Foundational Course**

An alternative approach would be to leave clinical skills out of the first-year curriculum and instead offer a foundational “Clinical Lawyering Skills” course in the fall semester of the second year as a prerequisite to taking any upper-division clinical courses. This approach, which would be consistent with CLEA’s model best practices curriculum, arguably might have some advantages over the...
first-year Lawyering Skills approach. First, it would allow first-year students to focus exclusively on writing and research skills in the first year and not be overwhelmed with learning clinical skills (especially given that the importance of these skills may not be obvious to them so early in their legal education). Second, it would alleviate the time pressures faculty might feel in covering the entire curriculum of an integrated first-year Lawyering Skills model. Third, this approach might allow for separating out distinct foundational-skills courses—for instance, one as a prerequisite to litigation-oriented clinical offerings, and another for transactional courses. While it is true that the foundational clinical skills mentioned in this Article are useful for litigation as well as non-litigation skills, in-class exercises focusing on litigation- or transaction-centered tasks and simulation scenarios would give more relevant contexts to students' foundational learning and would better ensure high student interest and effort.

While I propose this potential alternative to respond to the concerns of those in the LRW community who might express some resistance to the integrated Lawyering Skills model, I do not believe that a stand-alone foundational clinical skills course is pedagogically the best approach. As explained in Part II(A) of this Article, I believe it is critical to the effective teaching of legal writing that students appreciate the interaction between written legal analysis and the clinical techniques described in this Article. Effective development of written legal analysis simply cannot take place independently from the facts underlying the legal issue in question, how those facts are perceived, how that perception is influenced by the contexts in which those facts arise, and what strategic choices those contexts might require the lawyer to make in constructing these written arguments.54 Other drawbacks to the stand-alone approach are resources and inertia. Instead of tinkering with an already-existing first-year LRW program, such an approach would require taking resources away from that program and allocating limited resources (faculty and space) to second-year Clinical Lawyering Skills courses. I am realistic and cynical enough to realize that asking law schools to re-think their allocation of resources is a broader recommendation than I am willing to tackle with this Article.55

54 See supra nn. 30–43 and accompanying text.
55 A stand-alone clinical skills foundational course as the final component of a three-
For these reasons, Part III of this Article will focus on possible approaches to devising an integrated first-year Lawyering Skills curriculum.

III. INTEGRATING FOUNDATIONAL CLINICAL SKILLS INTO THE LRW CURRICULUM

A number of law schools already have attempted to integrate foundational clinical skills into the first-year legal research and writing curriculum. However, the focus at most of these programs appears to remain on the traditional trio of legal writing, research, and analysis, with little (if any) introduction to clinical lawyering skills. Section A, below, describes a representative handful of approaches that appear to invest substantial time to foundational clinical teaching, each of which might serve as a working model. Section B then attempts to offer some additional guidance for how to integrate foundational clinical skills into the first-year LRW curriculum in a manner that balances the goal of teaching transferable skills with the potential downsides of the integrated Lawyering Skills approach discussed, supra, in Part II(A).

or four-semester LRW curriculum might be easier to sell at those law schools whose LRW programs already extend into the second year. According to the most recent data, approximately 25% of schools (46 of 177 respondents) have moved in that direction. 2007 Survey Results, supra n. 35, at 7. These schools presumably already have made some judgments in favor of allocating limited resources to extended LRW instruction. Directors and faculty at those schools also likely would perceive the “time-crunch” issue described above (trying to squeeze in skills instruction into an already full writing instruction curriculum) as not insurmountable.

The 1995 Silecchia survey found that 17 of the 111 respondents identified their programs as following the “lawyering skills” model. Silecchia, supra n. 26, at 253. While the annual surveys conducted by ALWD and the Legal Writing Institute do not directly address this issue, the data from the most recent survey is consistent with Silecchia’s findings. 2007 Survey Results, supra n. 35, at 11–13 (reporting that 24 of 181 programs surveyed include “other oral skill[s]” in their curricula. Moreover, the developments over the last decade in thinking about the role of experiential learning in legal education, see e.g. Stuckey et al., supra n. 5; Sullivan et al., supra n. 6, and the concurrent re-tooling of LRW course at many law schools during that time, suggests that more law schools have adopted or are considering adopting an integrated “Lawyering Skills” approach.

Data from the 2007 Survey Results suggests that little class time is spent on introductory clinical skills instruction of the type described in this paper: The average program dedicates over 50% of classroom time to lecture, Q&A, or other discussion, less than 10% of classroom time is spent on individual exercises, and a mere 7% of classroom time is spent doing “other” activities (where clinical skills exercises likely would be reported). 2007 Survey Results, supra n. 35, at 11–13; see also Silecchia, supra n. 26, at 257.
A. Existing Models

1. UCLA School of Law Lawyering Skills Program

Billed as a “foundational clinical course,” UCLA School of Law’s year-long Lawyering Skills program attempts to introduce students to fact development, questioning techniques, interviewing, and client counseling, in addition to the traditional LRW menu. These skills are introduced in the second semester in the context of preparing a client’s case (a breach of contract/age discrimination simulation). Students first are introduced to basic interviewing skills, such as developing chronological timelines. After several opportunities to practice these skills on each other, students prepare to interview a volunteer from UCLA’s Witness Program, who plays the role of the client. Typically, a handful of students lead the questioning and move the timeline along, but all students are afforded the opportunity to ask questions of the client.

Following this basic foundation for the interview process, the class moves on to more complex skills, such as obtaining details of topics or events through T-Funnel questioning, developing theories of the client’s case, and converting those theories into follow-up interview questioning. In-class exercises include brainstorming potential evidence relevant to the crucial issues in the case using such techniques as developing evidence that supports or contradicts generalizations about the critical facts to prove in the case.

---

58 For a brief description of UCLA School of Law’s Lawyering Skills Program, see https://law.ucla.edu/home/index.asp?page=49. Details included in this Article are based on my interviews with instructors in the program.

59 Id. (stressing that “[t]hese skills are taught using the clinical method, with the client’s perspective firmly in mind and with the students learning by acting as lawyers”).

60 UCLA’s Witness Program utilizes the services of approximately 200 community volunteers, many of whom are repeat players in the various simulation exercises used by the Lawyering Skills program. New simulations often are preceded by an introductory meeting with the various volunteers who will participate in the simulation, which helps assimilate the volunteers into the fact pattern and gives them some sense of the goals of the exercise. Using volunteer witnesses from outside the law school (many of whom are former or would-be actors who thoroughly enjoy getting into their roles) helps bring the simulations to life and tends to increase the likelihood that the students will be committed to the exercise.

61 In order for students to process the learning experience—i.e., develop a foundation for the concept—Binder and Bergman advocate beginning with simple tasks before moving on to more complex ones. Binder & Bergman, supra n. 1, at 201. Thus, UCLA’s Lawyering Skills program starts with the non-threatening “interview your classmate” setting before moving on to interviewing the client.
brainstorming potential evidence using the historical reconstruction technique, and searching for evidence that might explain a particular theory. Once again, a volunteer from the Witness Program—either the same client, or a different volunteer playing the role of another witness in the case—is called upon to allow the students to practice these skills.

Finally, following in-class exercises designed to introduce students to appropriate questioning patterns on direct and cross examination and how to construct a closing argument, the students are given the opportunity to take this simulated case to trial. Students are divided into small teams and take responsibility for one specific component of the trial (for example, the direct examination of one witness). Working as a team, students begin by using the same brainstorming techniques discussed above to identify what evidence exists in the case file tending to prove the contentions at issue in the case. The student team then jointly drafts its portion of the trial proceeding, and a team representative participates in that component of the trial—with volunteers from the Witness Program again playing the roles of client and witnesses, and community volunteers sitting on the jury and deliberating at the conclusion of the trial.

While the UCLA School of Law Lawyering Skills model is fairly effective in teaching foundational clinical skills, it is not without its flaws. First, limited faculty resources invested in the program are such that much of the instruction must be done lecture-style, and as a result many students do not have enough opportunity to practice the skills. For example, while all students participate in the preparation for the various simulation exercises, only a handful of students have the opportunity to drive the questioning in the mock interviews and conduct the mock trial. As mentioned in Part One of this Article, knowledge retention and transfer are unlikely to occur without repeated active student participation in practicing the skills they have read about and discussed in class.62

Second, the skills exercises and mock trial are not graded. The results-oriented law school atmosphere discussed above63 not only

---

62 See supra n. 9 and accompanying text; see also Binder & Bergman, supra n. 1, at 198–199 (explaining that clinical skills concepts are unlikely to become encoded in students’ long-term memories if the students do not have the opportunity to practice the skills); Chestek, supra n. 37, at 61 (“Research suggests that active learning is almost always a more effective way to learn than passive learning.”); Hartwell, supra n. 11, at 1011 (quoting the Confucian maxim, “Tell me, and I will forget. Show me, and I may remember. Involve me, and I will understand.”).

63 See supra nn. 44–46 and accompanying text.
places the first-year student’s focus on doctrinal classes, but, perhaps more significantly, on grades. The recent graduates I interviewed were unequivocal in their assertion that the vast majority of first-year students give short-shrift to the ungraded skills exercises and as a result get very little out of them. As one put it, “to value ungraded assignments on the basis that you will eventually have better skills as a lawyer, that it may help you better perform as an associate, or that you will be more likely to land an offer is simply countercultural.”

Third, the skills-based instruction is not introduced until the second semester, wholly separate—i.e., out of context—from the legal research and legal writing assignments arising in the first semester. Students do present an oral argument of a motion in the second semester (for which they also wrote the persuasive brief) on behalf of their client, but without full integration of skills training from the beginning of their first year, they are unlikely to see much contextual connection between the facts cited in the motion and the fact development techniques they are later taught.

Finally, the culminating segment of the skills component (and the one to which the most resources are allocated) is the mock trial. While students do gain some benefit from exposure to trial advocacy, and they do benefit from an introduction to the basic questioning techniques employed in a trial setting, students likely would be better served by ending with a more “foundational” exercise that is designed to pull together all the clinical skills described in Part One of this Article.

2. The “Moot Case” Approach

Professor Kenneth Chestek’s “moot case” approach ties most (if not all) of the assignments given in the first-year LRW course to a single, simulated case that the students work on for their entire first year as the lawyers for one or the other side of the case. During the course, facts are revealed in stages, akin to what might happen in the development of a real case. Preliminary legal re-

---

64 See supra pt. I.
65 For a thorough description of the “moot case” model, see Chestek, supra n. 37, at 64–68.
66 Id. Professor Chestek employed this model in the Legal Practice course while at University of Michigan Law School from 2000–2003; he currently teaches Legal Analysis, Research and Communication at Indiana University School of Law/Indianapolis, where he employs a scaled-back version of the “moot case” model.
search and writing assignments include only enough facts to set up the legal issues.

Over the course of the year, students develop the factual record by interviewing the client, interviewing and deposing relevant witnesses, exchanging letters with opposing counsel (a student in another section), and reviewing documents ostensibly produced during the discovery phase of the case. Each student typically is assigned either to interview or to participate in the deposition of a single witness, after which students spend several class periods sharing what they learned. During this process, students might discover that some of the causes of action are not viable in light of the factual record, leading to class discussions of which legal issues should remain at the disposition stage of the case later in the year.

The factual record in turn becomes the basis for a persuasive brief the students are assigned to write. As part of that process, students have to sift through information that may be conflicting or irrelevant and make decisions about which facts to use in their briefs. The sides then exchange briefs and participate in an oral argument on the dispositive motion. Finally, the students are assigned to negotiate a settlement of the case.

This model appears to provide the context for the lawyering process that Part Two argues is necessary both to engage students and to give them a broader understanding of what it means to be a lawyer and represent a client. Chestek’s student feedback suggests that students feel more invested in the problem through the moot case approach and they “therefore are able to write more passionately about it.”\(^{67}\) Students commented that they were able to identify with the client and “wanted to do a good job for the client because they had a sense of how important the case was to the client.”\(^{68}\) Because of the nature of the division of labor in developing the factual record, students learned to work collaboratively and cooperatively—perhaps a pleasant respite from the competitive culture typically found in first-year classrooms.

A potential downside to basing an entire course on a single case is that students do not get exposed to varying settings. And since each student participates only in a single interview or deposition, the model also might lack sufficient active and repetitive

---

\(^{67}\) Id. at 71.

\(^{68}\) Id. at 72.

\(^{69}\) Id. at 72–73.
learning necessary to promote transfer. As discussed in Part One of this Article, students might be better served (and might get a more well-rounded introduction to clinical skills) by repeated opportunities to conduct small bits of the questioning patterns associated with the various questioning skills—e.g. an initial interview, a theory development interview, a deposition, a direct examination, and a cross examination. Finally, the sheer number of skills covered over the course of the year in Chestek’s model—closed-universe memorandum, legal research memoranda, interviewing, depositions, document review, written communications with opposing counsel, persuasive writing, oral argument, and settlement negotiation—might cause concern that each of these skills is not covered with enough depth to foster retention, and that students might feel overwhelmed with all the work (though of course that depends on the number of credits assigned to this course).

3. New York University School of Law Lawyering Program

Using several simulations of varying complexity, NYU School of Law’s Lawyering Program attempts to expose students to counseling, fact investigation and research, negotiation, mediation, and preparation of witness testimony. The program’s goals appear to be quite consistent with providing the type of clinical skills foundation described throughout this Article. Fact development, including an introduction to affidavit drafting and client interviewing, comes up fairly early in the syllabus, and the Lawyering Program’s written materials repeatedly emphasize the interaction and interplay between rules, fact development, and contextual dynamics. Students work collaboratively and regularly interact with faculty in planning, executing, and reflecting upon their work. Each of the simulation exercises begins with a research, discus-

---


71 Chestek, supra n. 37, at 72–73.

72 See N.Y. U. Sch. L., supra n. 70 (“NYU is . . . committed to giving sophisticated, in-depth attention, from the first year of legal study, to the interactive, fact-sensitive and interpretive work that is fundamental to excellence in practice. The Lawyering Program makes good on that commitment.”); Margaret Martin Barry et al., Clinical Education for this Millennium: The Third Wave, 7 Clin. L. Rev. 1, 42–43 (2000).

73 See Amsterdam et al., supra n. 38.
sion, and planning phase, followed by an implementation phase in which students carry out their plan by drafting legal documents, interviewing witnesses and clients, and engaging in negotiation and written and oral advocacy.  

A distinctive feature of NYU’s Lawyering Program is that tenure-track faculty members are integrated into the program to supervise the videotaped simulation exercises that are done in small group conferences of two to five students. Small group exercises include videotaped client interviews, counseling sessions, client interviews for purposes of a negotiation exercise, videotaped negotiation sessions, client interviews for purposes of a mediation exercise, mediation strategy sessions, mediation sessions with professional mediators, and oral arguments before federal and state judges. Each simulation exercise concludes with a critiquing phase where, in small groups, students and their faculty supervisors analyze the choices they made in the earlier phases. According to the Lawyering Program’s Mission Statement, these critiquing exercises are designed for “developing professional habits such as discipline, confidence, and the ability to critically and objectively evaluate one’s own work.”

The significant individualized instruction and repeated opportunities to conduct a variety of simulated lawyering exercises in differing contexts suggests that the NYU model implements many of the aspects of transfer and retention discussed in this Article. Former NYU students have reported that they found the Lawye-

74 See id. at 15–16 (describing the Lawyering Exercises); see also N.Y. U. Sch. L., Mission Statement, http://www.law.nyu.edu/lawyeringprogram/home/mission.htm (accessed Fall 2005), which states, In each of the Lawyering Program’s exercises, students attempt to solve problems or answer questions, often by working in pairs or small groups. For each exercise, collaborative planning, execution, and reflection are as fundamental as the legal research and writing components. Educational studies have demonstrated that adults more effectively develop skills when they work together, which explains the “study group” phenomenon that many law students find so useful.

75 Chestek, supra n. 37, at 72–73; N.Y. U. Sch. L., The Lawyering Program: Curriculum, http://www.law.nyu.edu/lawyeringprogram/curriculum/curriculum.htm (accessed Nov. 21, 2007) (“Each Exercise involves close interactions with faculty, either in role as supervising attorneys or out of role as conveners of more traditional classes.”).

76 See Amsterdam et al., supra n. 38, at 15–16 (describing the Lawyering Exercises).


78 See N.Y. U. Sch. L., supra n. 70.

79 Supra nn. 8–14 and accompanying text.
The Journal of the Legal Writing Institute

The Lawyering Program approach to have been quite meaningful, in part because they were able to retain the principles of legal analysis as a result of contextualized training in a skills program. Because of the emphasis placed on thorough critique of the simulation exercises, the legal analysis process is intertwined with self-reflection, thus providing the framework for learning from experience.

On the other hand, there are obviously significant costs associated with NYU’s model. Most law schools simply cannot afford—and likely do not have the space to support—a program that includes no less than seven faculty-supervised small group sessions and two individualized critiquing sessions. In addition, some may be concerned that the Lawyering Program devotes insufficient time to teaching legal writing.

4. New York Law School’s “Standardized Client” Model

New York Law School’s Lawyering course is modeled after the NYU Lawyering Program but makes use of a “standardized client” as a less expensive alternative to the individualized instruction and feedback NYU students receive. The course includes three videotaped “standardized client” exercises, each in different contexts. The purpose of the exercises is to introduce students to interviewing and counseling. In the first exercise, the students each conduct an initial interview of a client with a tort claim. The second exercise also consists of an interview, this time of a witness in

---

80 Meyer, supra n. 77, at 794–795.

81 Id. According to the Lawyering Program’s Mission Statement, The Lawyering Program mission statement emphasizes critical thinking about lawyers’ work by encouraging students to critique themselves and each other after each simulation. Small group critiques provide an optimal context for developing professional habits such as discipline, confidence, and the ability to critically and objectively evaluate one’s own work. Moreover, carefully structured peer critiques enhance motivation, as students become responsible for providing constructive, thoughtful feedback to their colleagues. Students develop versatility by working with and learning from peers who have varied strengths, views, experiences and identities. The ideas and solutions that students bring to and take from the critique process are as important as the strategies they formulate and execute prior to and during each Lawyering exercise.

82 N.Y. U. Sch. L., supra n. 70.

83 See generally Amsterdam et al., supra n. 38; see also N.Y. U. Sch. L., supra n. 75 and individually linked web pages.

84 For a detailed description of the “standardized client” model and New York Law School’s Lawyering course, see Grosberg, supra n. 77, at 856–866.
a contract case. In the final exercise, students are to counsel a client in an adverse possession case.

Like NYU’s Lawyering Program, NYLS’s course relies on critique and feedback as the principal teaching tool other than the “doing” itself. The “standardized client”—an actor playing the role of client or witness—provides feedback to the student at the conclusion of the exercise through a detailed checklist prepared by the program’s faculty. Instructors then compile those checklists and comment to the class on their observations of a limited number of videotaped exercises. They also provide some statistical findings on the exercise, from which instructors often are “able to show that the problems and challenges faced by the students were typically experienced by many others.” 85

While NYLS Professor Lawrence Grosberg finds the standardized client checklist feedback method to be “a fair, reliable, and much more cost efficient method of providing individual feedback” than NYU’s program,86 the risk is that students might not find a checklist form to be of much use, let alone one filled out by the witness rather than by a trained instructor. The NYLS model otherwise appears to do well in attempting to provide varying, relevant contexts and in limiting the range of foundational skills to be introduced so as to promote repetition and transfer. In light of the mere two units allocated to this course, however, it is unclear that much active learning occurs outside of the three simulation exercises.

5. William & Mary School of Law “Small Law Office” Model

The William & Mary Legal Skills program employs a “small law office” model that incorporates facets of both the “moot case” and NYU models.87 In this two-year course, students receive classroom instruction in a variety of skills as well as legal ethics. They concurrently assume the roles of lawyers in the simulated client representation component of the course, each student becoming one of approximately sixteen “associates” in a simulated law office.

85 Id. at 858–859.
86 Id. at 858.
87 For a detailed description of William & Mary School of Law’s Legal Skills program, see William and Mary School of Law, Legal Skills, http://www.wm.edu/law/academicprograms/legalskills/.
Over the course of the two-year program, students take cases from inception through appeal, tackling clinical skills such as client intake, client counseling, negotiation, mediation, complaint drafting, written discovery drafting, oral advocacy, plea negotiation, trial planning, direct and cross examination, introducing evidence, opening and closing statements, and appellate oral advocacy along the way. Like the NYU model, this program uses a variety of complex simulations in different settings.

The law office model seems quite appealing in concept; by representing a client over time and taking cases all the way to trial and through the appeals process, students work with factual records they have developed themselves. Also, like the “moot case” model, the law office model likely produces collaborative, cooperative, highly contextualized effort. However, taking cases from beginning to end might again require coverage of too many skills, even over a two-year period, for students to receive the appropriate amount of in-depth coverage and repetition necessary for retention and transfer. Coverage of so many skills can only be done at the expense of repetition or of adequate legal writing instruction (or both). For those law schools that devote only a single year to their LRW programs, taking a case all the way from beginning to end—and stopping at every necessary turn along the way—appears to be a rather ambitious model to follow.

B. Additional Considerations in Creating an Integrated Lawyering Skills Model

I have argued in this Article that transfer of lawyering skills best occurs when students have repeated opportunities to practice those skills over time and in different and increasingly more complex settings, and when they receive meaningful feedback on their performance (including self-evaluation). I have also argued that if we are to include a foundational skills component as a part of the first-year Lawyering Skills curriculum, we must be mindful of the potential drawbacks to that approach, including concerns about the possible dilution of instruction in legal writing and research,

---

88 Maranville, supra n. 17, at 139.
89 This is especially likely to be true at William & Mary in light of the fact that the Legal Skills program disposes of the school’s Legal Ethics requirement as well as its research, writing, and skills curriculum. Wm. & Mary Marshall-Wythe Sch. L., Legal Skills, http://www.wm.edu/law/academicprograms/legalskills/overview3.shtml (accessed Sept. 25, 2007).
combating the first-year results-oriented mindset, and the possibility that students may feel overwhelmed by the skills-based instruction.

With these concerns in mind, I offer the following suggestions:

- Using two (perhaps three) simulations should be sufficient to provide a variety of settings. At least one of the simulations should involve something other than a typical civil litigation problem, such as a contract-drafting exercise. The simulations should be used side-by-side, so that the students have repeated opportunities to practice each of the skills in the varying contexts.

- The simulations should be introduced at the beginning of the year—not in the second semester, as some of the above-described models prefer—in order to give the students context for all of the skills covered, written or otherwise, from the outset. As in many “real” cases, the initial case assignment might come in the form of a brief memorandum from a senior lawyer in the students’ hypothetical firm, with just enough facts to describe the legal issue(s) the students will be asked to research and analyze. Knowing that the case’s factual record will be developed in later exercises (through a client interview, witness deposition, and the like) should lead to more engaged learning even during basic introductory research exercises. This model also lends itself to useful detours into topics that arise naturally from the context of the case simulations, such as “sneak-previews” into related skills and discussions of ethics and justice issues.

- In order to provide the best context and pique student interest, simulations should mirror issues the students are studying in their doctrinal classes. One intriguing possibility might be to coordinate with a professor in a doctrinal class and pick an important case the students will study in that class later in the semester, and simulate that specific case based on the factual record contained in the parties’ briefs (obviously, a case whose briefs are available on-line would be best). The timing could be organized so that the

---

90 Lawrence Grosberg, whose New York Law School Lawyering course utilizes the “standardized client” model, has advocated for creating a standardized client counseling simulation based on this sort of doctrinal-skills collaboration. Grosberg, supra n. 77, at 863–865. Some law schools already are exploring the integration of LRW with doctrinal classes.
students read the actual case in their doctrinal class soon after the Lawyering Skills “work”—whether an objective memorandum analyzing a legal issue on which the client is counseled, or a persuasive brief/oral argument—has been done. Back in the Lawyering Skills classroom, the students might be assigned to read the brief submitted by the attorney for their “client,” and the class could explore whether other arguments could have been made in the case (or the arguments crafted differently) in light of the factual proposition/potential evidence/inference exercise they previously would have done in the case.

- Students need not work on all aspects of each simulation from beginning to end. So long as there is some correlation in the use of a simulation from one assignment to the next, the simulation should feel sufficiently “real” for the students to become invested without being overwhelmed with an overabundance of skills and tasks. For example, the initial simulation might consist of a corporate client seeking advice on the legality of a contemplated business decision and form the basis for the initial closed universe legal memorandum as well as an introduction to basic counseling techniques. That same client might then call to report a legal problem arising out of that business decision and give a very sketchy account of the facts over the phone. That phone call could lead into an introduction to fact gathering, theory development, and inferential reasoning, followed by questioning skills exercises, and ultimately a legal research memorandum based on the facts that have been developed. Another simulation might not begin with a counseling prob-

At Pace Law School, a required first-year class is “Criminal Law Analysis and Writing,” which is described on the school’s website as: An exploration of the substantive aspects of criminal law with a focus on the criminalization decision, goals of punishment, elements of criminal conduct and defenses to criminal charges. Also covers legal research and the legislative process and requires numerous writing exercises in criminal law, concluding with an appellate brief and an argument before a moot court.

lem, but rather might be an already active case that has been inherited from another lawyer and already has had significant factual development and soon will reach the dispositive pleading stage.

• All simulation exercises should be crafted with the foundational techniques described in Part One of this Article, and only that foundation, in mind. For example, students need not learn how to conduct a full-blown client interview—they can get the basic foundation for interviewing by learning how to develop a chronological timeline. Similarly, they can learn how to obtain details of topics or events through T-Funnel questioning and practice executing a variety of T-funnel topics, without needing to place them in the context of a full theory development interview or deposition. They can learn about and practice asking open, closed, and leading questions, without needing to conduct a complete direct or cross examination.

• Devoting significant resources to full-blown mock trials or negotiations makes little sense given that the goal is simply to lay a foundation for future skills development in upper-division clinical offerings or in practice. The majority of skills-instruction time should be devoted to learning about and practicing fact gathering, theory development, and inferential reasoning—the latter of which, as discussed above, also is integral to developing effective writing skills. Moreover, eliminating a full-blown mock trial or negotiation would have the added benefit of giving Layering Skills instructors additional time to concentrate on teaching writing skills.

• Clinical skills instruction should consist of limited, if any, lecture. Students should delve into each new skill with a small, simple simulation-based exercise, perhaps practiced in groups with other students, followed by class discussion. The instructor also can play the role of the witness during these preliminary exercises, with students taking turns asking a handful of questions. Coming up with potential evidence and theory development topics also should be done first in small groups and then as a class, albeit in connection with a thorough class discussion specifically demonstrating the significant usefulness of that skill in undertaking a wide variety of skills.
• All students must have the opportunity to practice each skill. Once a skill has advanced to the point of an out-of-class simulation exercise (i.e. with a community volunteer or actor playing the role of the client or witness), students cannot simply observe others practicing the technique. Instead, students should be divided into small groups (of approximately five students), told to prepare together (including preparing any necessary potential evidence lists prior to identifying questioning topics), and then take turns questioning the witness (or counseling or whatever other skill is at issue), each for approximately ten minutes. This can most reasonably be achieved if, like at NYU, other clinical faculty are involved in supervising some of the simulation exercises.\footnote{Many faculty members already volunteer for such activities as Moot Court, and in my experience, clinical faculty in particular tend to help other clinicians with simulation exercises in upper-division clinical offerings, so this could be achieved purely on a volunteer basis. Understanding that their participation in these first-year exercises will ultimately ease their own instruction in upper-division clinical offerings also should encourage clinical faculty to volunteer. In the alternative, giving participating faculty a mere one unit credit per year to supervise and give feedback on a handful of simulations should not put a significant strain on law school resources.} Involving clinical (and other) faculty also would have the added benefit of giving legitimacy to the simulations, because they may then be regarded as bearing the imprimatur of faculty who teach clinical courses the first-year students likely look forward to, and makes it clearer that the first-year skills class is a critical component of the entire clinical curriculum.

• The importance of effective fact gathering might be demonstrated by instructing different witnesses to give slightly different information or to withhold certain information unless asked in a particular way or both. Following an out-of-class simulation exercise, each small group can be required to prepare, and then exchange with all other teams, a list of facts. A class discussion about what types of questions (e.g. what T-funnel topic, etc.) might have produced a desired fact could be fruitful. Similarly, forcing the students to use the factual record they actually developed (supplemented only if necessary) in preparing a written assignment such as a legal research memorandum or persuasive brief would highlight the importance of effective fact gathering, as will a discussion of how the results in a legal research memo-
randum or the arguments in a persuasive brief might change depending on the factual record.

- Meaningful feedback on simulation exercises should begin with student self-critiques in the manner described in Part I of this Article. Students should be encouraged to break down their performances both in terms of what went wrong and what went right, the latter of which ensures recognition of patterns they have adopted. Not only are these self-critiques valuable learning tools, but the instructor can comment on them in the same way as she comments on any other written work-product, thereby ensuring continued practice and feedback on student writing skills.

- All aspects of the Lawyering Skills class should be graded. Perhaps the best mechanism for grading skills-based exercises is the written self-critiques, in that they measure a student’s ability to recognize what he did and why it worked or did not work, rather than measuring the student’s actual performance during the exercise. An added benefit, once again, is that the student’s writing performance can be taken into account in grading skills-based exercises.

CONCLUSION

In order for a clinical program to effectively promote transfer of lawyering skills, preliminary student-wide clinical instruction probably should be made a part of the first-year curriculum. It should not be too difficult to convince clinicians that their students would be better prepared if they obtain a foundational understanding of important clinical skills before undertaking their upper-division clinical offerings, and thus my main critics, I suspect, will be legal writing program directors and instructors. Although many legal writing instructors may have legitimate concerns with the first-year “Lawyering Skills” approach, the model I have offered should help give context to skills-based instruction and make the clinical aspects of a first-year curriculum more meaningful, without overly diluting instruction in legal writing and research.

Ultimately, though, my model’s success likely depends on the clinical faculty’s willingness to bear part of the burden by volunteering to help supervise the simulation exercises that are so critical for promoting transfer. Accordingly, any push for modifying a
law school’s first-year legal writing curriculum in the manner I have suggested must begin with and have the backing of the school’s clinical faculty. I hope that this Article will open and help focus the conversation between clinicians and legal writing professors, and that it reminds both groups that we all have the same interests in mind: ensuring that our law students gain sufficient exposure to those lawyering skills they are likely encounter (and that likely will not be well-taught) in practice.
LEGAL RESEARCH TRAINING: PREPARING STUDENTS FOR A RAPIDLY CHANGING RESEARCH ENVIRONMENT

Sanford N. Greenberg

I. INTRODUCTION

In May 2005, I participated in Chicago-Kent College of Law’s Symposium on the Future of Legal Research. The symposium brought together legal writing professors and law librarians interested in how we could best train law students to conduct legal research. My most memorable moment of the symposium occurred when one of the participants referred to print legal resources as “dead tree icons.” Although perhaps offered half in jest, the phrase dramatically captured a widespread belief that print sources are becoming increasingly obsolete. Anecdotal evidence suggested that many law libraries are no longer updating some print sources and that other print sources are being eliminated entirely. Moreover, according to a recent article, even where print sources still exist, they are sometimes used sparingly, if at all, by attorneys more comfortable with online research. But before legal research professors and law school librarians completely abandon the effort to get students to genuflect in the direction of the dead tree icons, we wanted to determine whether the print primary sources, secondary sources, and finding tools on which many of us had been primarily trained were truly becoming an endangered species. To begin to answer that question, we conducted a survey of Chicago-area lawyers, hoping that their experiences and opinions could help us de-
velop approaches to better prepare the legal researchers of tomorrow.2

Based on our survey, the answer to the question about the ascendency of online legal research over print research is a resounding “yes, but.” Our survey indicates that attorneys rely heavily and increasingly on online research sources, both commercial and non-commercial.3 The survey also indicates a widespread belief that the online onslaught will only increase in coming years.4 However, the survey also reflects considerable dissatisfaction with new attorneys who sometimes appear to be overly eager to jump online before using print resources such as treatises to get an overview of a new area—and perhaps thus to prepare to use commercial online sources more efficiently.5

But if the increased cost of print resources and other factors indeed make such resources increasingly unavailable in academic, firm, and government libraries,6 then perhaps legal research pro-

---

2 Several Chicago-Kent colleagues and I developed and coded the survey. The survey consisted of both structured and open-ended questions.

For an overview of the survey participants, see infra nn. 10–12 and accompanying text. The 125 attorneys who completed the survey do not represent a scientific sample of either Chicago-area or all United States attorneys. Nonetheless, the survey produced a wealth of useful data and advice, much of which echoes the views of the legal research professionals cited throughout this Article. Also, much of the data and advice from the 2005 survey was corroborated by a similar survey that we conducted in 2007 in preparation for our Back to the Future of Legal Research Symposium. Details on the characteristics of the 204 respondents to the 2007 survey can be found at the website of the Back to the Future of Legal Research Symposium. Sanford N. Greenberg, Attorney Survey 2007, http://www.kentlaw.edu/academics/lrw/future/handouts/greenberg%20powerpoint.pdf (2007). Unless otherwise noted, all statistics in this Article are from the 2005 survey.

3 Infra nn. 13–17 and accompanying text. In this context, “commercial” refers to fee-based sources such as Westlaw and Lexis, and “non-commercial” refers to sources ranging from free government websites to advertising-supported search engines such as Google.

4 Infra n. 18 and accompanying text.

5 Infra nn. 32–43 and accompanying text. Because our survey was conducted online, it possibly attracted an atypically computer-savvy set of respondents. Thus, the survey results indicating the limitations of online research and the continuing significance of print research are all the more notable.

6 Twenty-five percent of the respondents (27 of 108) to the attorney survey indicated that their firms had cancelled or planned to cancel at least some print subscriptions. More than 75% (38 of 49) of the firm librarians who responded to a companion survey indicated that their firms had cancelled or planned to cancel such subscriptions.

Despite this apparent decrease in print subscriptions in law firm libraries, some legal research experts still contend that both print and electronic materials are necessary in a quality law library. Michelle M. Wu, Why Print and Electronic Resources Are Essential to the Academic Law Library, 97 L. Libr. A. 233, 235, 247 (2005) (arguing that “a twenty-first century academic law library requires both traditional print materials and electronic resources” in part because “practitioners have always relied on academic libraries to provide less frequently needed or esoteric documents; now, as their costs of business increase, they are also downsizing their basic print collections and turning more to local law libraries to
Preparing Students for Rapid Changes in Research

fessors and librarians should stop introducing law students to the dead tree icons. If print media are going to be gone before our students’ careers are barely started, why keep sending students into the library to learn how to use print reporters, secondary sources, digests, and citators? My tentative answer to that question is that some of the skills that we typically associate with print research—how to conceptualize a problem, how to access a resource through an index or table of contents, and how to evaluate the credibility and authoritativeness of a resource—are skills that remain valuable in the increasingly online future of legal research.7

Thus, a major challenge facing legal research professors is how to integrate print and online research training without seeming hopelessly old-fashioned to our tech-savvy students.8 A second challenge suggested by the survey is to encourage new attorneys to make greater use of free online alternatives to fee-based online services while sensitizing them to issues of the reliability of free sources.9

II. THE 2005 SURVEY PARTICIPANTS: AN OVERVIEW

We conducted our online survey between January and April 2005 at SurveyMonkey.com. One hundred and twenty-five attorneys responded to the survey. Our respondents ranged from sole practitioners to attorneys working for large firms and government agencies (see table 1).10 A large majority of our respondents practice in Chicago’s Cook County and surrounding areas.11 Nearly

---

7 See infra nn. 46–69 and accompanying text.
8 Cf. Ian Gallacher, Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation, 39 Akron L. Rev. 151, 166 (2006) (observing that today’s law students “are comfortable with the internet, uncomfortable with books and libraries, and are headed for an unpleasant rendezvous with the traditionalists who still inhabit law firms, and who have very different ideas about the relative merits of books and electronic legal research”); Patrick Meyer, Think Before You Type: Observations of an Online Researcher, 13 Persps. 19, 19 (Fall 2004) (noting that although many students are skeptical about the need to learn print research techniques, “many firms now expect associates or law clerks to utilize some combination of online and print research”).
9 See infra tbl. 5; infra nn. 70–77 and accompanying text.
10 In addition to asking about the size of the respondents’ local office, we asked about the size of their overall firm, company, or government agency. Ninety-four respondents answered that question, with forty-three (45.7%) indicating that their employers’ overall size is 101+ attorneys.
11 Respondents were asked to identify their “primary geographic practice area.” One
20% practice primarily in Federal court. Approximately one-third have been in practice five years or less, while just over a third of the respondents have been in practice for sixteen years or more (see table 2). Respondents reported a wide range of practice specializations, with most engaging in civil litigation; family law; labor, employment, or employee benefits law; or criminal law (see table 3).

### TABLE 1

<table>
<thead>
<tr>
<th>No of Responses</th>
<th>Response %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sole Practitioner</td>
<td>12</td>
</tr>
<tr>
<td>2–6 Attys.</td>
<td>32</td>
</tr>
<tr>
<td>7–15 Attys.</td>
<td>13</td>
</tr>
<tr>
<td>16–30 Attys.</td>
<td>8</td>
</tr>
<tr>
<td>31–50 Attys.</td>
<td>7</td>
</tr>
<tr>
<td>51–100 Attys.</td>
<td>12</td>
</tr>
<tr>
<td>101+ Attys.</td>
<td>38</td>
</tr>
<tr>
<td>N/A</td>
<td>1</td>
</tr>
</tbody>
</table>

hundred twenty respondents answered this question, which also offered the option of “Federal court” in addition to geographic areas. Approximately 70% of the respondents reported that their primary practice area is Cook or a nearby county.
Preparing Students for Rapid Changes in Research

HOW LONG RESPT. HAS BEEN IN PRACTICE
[NO. OF RESPTS. = 122]

<table>
<thead>
<tr>
<th>No. of Responses</th>
<th>Response %</th>
</tr>
</thead>
<tbody>
<tr>
<td>0–5 years</td>
<td>33.6%</td>
</tr>
<tr>
<td>6–10 years</td>
<td>15.6%</td>
</tr>
<tr>
<td>11–15 years</td>
<td>13.9%</td>
</tr>
<tr>
<td>16 or more years</td>
<td>36.9%</td>
</tr>
</tbody>
</table>

RESPT.’S PRIMARY PRACTICE AREA
[NO. OF RESPTS. = 120]12

<table>
<thead>
<tr>
<th>No. of Responses</th>
<th>Response %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Litigation</td>
<td>51</td>
</tr>
<tr>
<td>Lab./Empl./Employee Benefits</td>
<td>16</td>
</tr>
<tr>
<td>Family</td>
<td>15</td>
</tr>
<tr>
<td>Criminal</td>
<td>13</td>
</tr>
<tr>
<td>General Practice</td>
<td>7</td>
</tr>
<tr>
<td>Transactional/Real Estate</td>
<td>7</td>
</tr>
<tr>
<td>Trusts &amp; Estates</td>
<td>5</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>2</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>8</td>
</tr>
</tbody>
</table>

12 Some of the respondents who chose the “other” category identified more than one
III. THE ONLINE ONSLAUGHT

We learn most of the job-specific skills on the job itself. With the advent of electronic researching, at some point the books will be phased out anyway. At least, once the old fogies retire.\textsuperscript{13}

Our survey confirms what any legal research professor must suspect: the students that we train are entering a profession that relies heavily and increasingly on online research. Whether answering open-ended questions on recent or anticipated trends in legal research or reporting their own primary research sources, the respondents paint a picture of a world dominated by online, not traditional print, research.\textsuperscript{14} It also will come as no surprise to legal research professors that the two major commercial powerhouses, Westlaw and Lexis, dominate the online research landscape.\textsuperscript{15} But other commercial vendors and a vast variety of non-commercial resources also help fill in the online picture—a picture that is changing rapidly: “The Internet plays host to a dizzying array of websites, some free to the public, some on a pay-as-you-go basis, which have expanded the horizons of research. Law, which had once been the most book-centered of disciplines, is morphing before our eyes.”\textsuperscript{16}

When asked to identify changes during the past five years in legal research resources and methodologies, our survey’s respond-
ents repeatedly mentioned either online resources generally or non-commercial websites or both. 17 Fifty-six of seventy-four respondents (75.7%) noted the growing reliance on electronic/online research. The following comments are typical:

- I do not see many attorneys in the law library. Most research is done electronically.
- Online is now essential, not merely convenient.
- Much more is done electronically—printed publications being cut from library’s collection.

Thirteen respondents (17.6%) noted the use of government websites or other free resources, with several respondents specifically mentioning the Google search engine.

Responding to a question on anticipated changes in the next five years, the survey respondents indicated that they expect these trends to continue. 18 Thirty-eight of sixty respondents (63.3%) envisioned a growing reliance on electronic/online research, with some predicting that print research will virtually disappear. For example:

- I think there will be a continuing trend away from print to only online resources.
- As print materials become more expensive, there will be a greater reliance on electronic media.

Seven respondents (11.7%) looked forward to a greater availability of free online sources.

When asked to identify their own primary research sources, our respondents overwhelmingly reported that they are more likely to use online rather than print sources. More than two-thirds of

17 The question read as follows: “What changes have you seen in the last five years in legal research resources and in the ways you or other attorneys at your organization do legal research?” Seventy-four of the 125 respondents answered this question. Answers were coded (1) less print/more online; (2) growing availability of free (online) resources; and (3) miscellaneous. More than one of the three codes could be assigned to a given response.

18 The question read as follows: “What changes do you anticipate within the next five years in legal research resources and in the ways attorneys do legal research?” Sixty of the 125 respondents answered this question. Answers were coded (1) less print/more online; (2) growing availability of free (online) resources; and (3) miscellaneous. More than one of the three codes could be assigned to a given response.
the 109 respondents who answered this question chose the “commercial online resources” option.\(^{19}\) Only fifteen of 109 respondents (13.8%) chose the “print materials” option, while eleven (10.1%) indicated that they do most of their research using online, non-commercial resources, such as court and government websites.

Although only one in ten respondents reported that they rely primarily on such non-commercial resources, nearly six in ten reported using free web resources at least occasionally.\(^{20}\) Of the sixty-four respondents who identified specific non-commercial sources that they use, forty-seven (73.4%) reported using at least one government site, twenty-eight (43.8%) reported using FindLaw.com,\(^{21}\) and nine (14.1%) reported using a search engine such as Google.

When asked to describe the frequency of their use of various online sources, our respondents indicated that they are much more likely to use one of the two commercial powerhouses, Westlaw or Lexis, than to use three other specified commercial sites, Loislaw, VersusLaw, or Hein Online (see table 4).\(^{22}\)

---

\(^{19}\) Seventy-four of 109 (67.9%) chose this option, and several of the nine respondents who chose the “other” response and provided additional details also reported a significant reliance on commercial online sources. For additional information on this question, see tables 5 and 6 infra.

\(^{20}\) Respondents were asked, “Do you use free Web resources, such as the GPO access site?” One hundred ten respondents answered this question, with 65 (59.1%) answering “yes.”

\(^{21}\) As indicated by its dot-com URL, FindLaw.com is a commercial site. However, its information is available free. The site is owned by Thomson, the owner of Westlaw. In addition to providing free resources, the site provides links to Westlaw services such as KeyCite.

\(^{22}\) One hundred eleven respondents answered the following question: “Please indicate how frequently you use the following electronic resources.” The percentages in table 4 are based on the total responding for each of the various sources. Loislaw, a Wolters Kluwer company, provides subscribers with access to, inter alia, primary law, Aspen treatises, and public records. VersusLaw provides its subscribers access to a variety of primary sources. Hein Online provides access to federal primary sources and many law reviews and journals.
According to our survey, prior to receiving any available in-house research training, new attorneys are significantly more likely to be aware of helpful online sources than helpful print sources. Nearly two-thirds of our respondents replied affirmatively when asked about new attorneys’ familiarity with online sources. For the corresponding question regarding helpful print resources, only four in ten responded affirmatively. Respondents also viewed new attorneys as more likely to be able to use online rather than print sources efficiently. Only four in ten respondents positively evaluated the efficiency of new attorneys’ use of print resources, while over half opined that new attorneys use online sources efficiently.

<table>
<thead>
<tr>
<th></th>
<th>Every Day</th>
<th>Often</th>
<th>Sometimes</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>Westlaw</td>
<td>15 (15%)</td>
<td>26 (25%)</td>
<td>38 (37%)</td>
<td>24 (23%)</td>
</tr>
<tr>
<td>Lexis</td>
<td>20 (19%)</td>
<td>24 (23%)</td>
<td>26 (25%)</td>
<td>36 (34%)</td>
</tr>
<tr>
<td>Loislaw</td>
<td>1 (1%)</td>
<td>1 (1%)</td>
<td>0 (0%)</td>
<td>91 (98%)</td>
</tr>
<tr>
<td>VersusLaw</td>
<td>0 (0%)</td>
<td>2 (2%)</td>
<td>0 (0%)</td>
<td>92 (98%)</td>
</tr>
<tr>
<td>HeinOnline</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (1%)</td>
<td>92 (99%)</td>
</tr>
<tr>
<td>Other&lt;sup&gt;23&lt;/sup&gt;</td>
<td>5 (7%)</td>
<td>13 (19%)</td>
<td>17 (24%)</td>
<td>35 (50%)</td>
</tr>
</tbody>
</table>

23 Respondents who chose “other” were asked to identify the database(s) that they used. The thirty-eight responses to that inquiry identified a variety of commercial and non-commercial sources, ranging from BNA (Bureau of National Affairs), to CCH (Commerce Clearing House) and FindLaw to government websites to Google searches.

24 The question read, “Are most new attorneys aware of electronic resources helpful in their practice area(s) prior to any in-house training?” Seventy-two of 111 respondents (64.9%) responded affirmatively, 15 (13.5%) responded negatively, and 24 (21.6%) chose “not applicable.”

25 The question read, “Are most new attorneys aware of print resources helpful in their practice area(s) prior to any in-house training?” Forty-four of 112 respondents (39.3%) responded affirmatively, 41 (36.6%) responded negatively, and 27 (24.1%) chose “not applicable.”

26 The question read, “Are most new attorneys able to use such print resources efficiently prior to any in-house training?” Forty-three of 112 respondents (38.4%) responded affirmatively, 40 (35.7%) responded negatively, and 29 (25.9%) responded “not applicable.”
ciently. However, while the respondents viewed new attorneys as more likely to use online resources efficiently, a bigger gap existed between perceived awareness and efficient use of online resources (64.9%–52.7% = 12.2%) compared to print resources (39.3%–38.4% = 0.9%). As discussed more fully in the next section, a significant minority of the respondents remain dissatisfied with the online orientation of many novice legal researchers.

The dominance of online research also characterizes the research training that employers provide to new attorneys. Fifty-three of 123 (43.1%) respondents indicated that new attorneys receive some on-the-job research training. Vendor representatives frequently provide such training, which undoubtedly both reflects and reinforces the widespread use of commercial online sources. Research training is likely to cover how to use Westlaw or Lexis, how to research efficiently and cost effectively, and how to use other online sources.

There is no reason to think that the online onslaught will be reversed. Indeed, the growing availability of wireless Internet technology is likely to make online research even more attractive to law students and attorneys. When Westlaw and Lexis research could be done on any computer, rather than on dedicated computers, it freed many students from having to do research in the library and permitted many attorneys to conduct at least some of their research at home or on a laptop while on the road. With the advent of the wireless Internet—and the growing proliferation of online alternative sources other than Westlaw and Lexis—students and attorneys will have even greater flexibility in deciding where to conduct much of their research.

---

27 The question read, “Are most new attorneys able to use such electronic resources efficiently prior to any in-house training?” Fifty-nine of 112 respondents (52.7%) responded affirmatively, 25 (22.3%) responded negatively, and 28 (25%) responded “not applicable.”

28 The question read, “Are new attorneys trained by your firm, company, or government agency to do legal research?” Fifty-six (45.5%) replied “no,” and 14 (11.4%) replied “not applicable.”

29 Forty-three of 88 respondents (48.9%) indicated that vendor representatives provide at least some of the training if any in-house training is offered.

30 Respondents were asked, “If new attorneys receive in-house research training, which skills and/or resources are emphasized?” Forty-four respondents answered this question, and their answers were coded (1) Lexis and/or Westlaw (40.9%); (2) efficiency/cost-effectiveness (15.9%); (3) other/unspecified online (22.7%); (4) print/library sources (22.7%); and (5) miscellaneous (36.4%). More than one of the codes could be assigned to a given response.

31 Cf. Wu, supra n. 6, at 250–251 (“Those accustomed to conducting research at odd hours or searching across multiple databases with a single query find print resources constraining. . . . As social and economic factors have fostered transience, access independent of
I found that the electronic preparation was sufficient. I find that I was not prepared enough on print materials, which I now use often, and barely ever used in law school.

New attorneys are better equipped to use electronic resources, but we learn the importance of printed resources (i.e., treatises and other secondary sources) once we start practicing.

Despite the great and growing significance of online research, many of our respondents indicated that the ability to use print resources is still an important skill that law schools should teach new attorneys. Nearly one of seven respondents reported that they do most of their research in print sources, and more than one in five respondents who work in very small offices rely primarily on print sources. A number of our respondents observed that print research can be more economical than online research, as well as more effective for at least some tasks. Further, a substantial proportion of respondents who work for employers who provide location has become a necessity.

32 Again, our respondents’ views confirm the views of experts:

[T]he legal researcher of today lives in two worlds: paper and digital. . . . Today’s student cannot safely ignore this paper world. Much of the Westlaw and Lexis systems, as well as Internet sources, are built upon it. To understand the heart and soul of legal research you must comprehend how the tools work, how they are assembled, and much of that knowledge still lies in the paper sets. In addition, . . . traditional research is the only kind of research that some senior lawyers, judges and law professors accept as legitimate.

Berring & Edinger, supra n. 14, at 5–6; see also Kunz et al., supra n. 15, at 21 (advising students to “aim to be ambidextrous—equally adept at paper and electronic research”).

33 See infra this 5 & 6.

34 Determining whether print or commercial online research is more economical is beyond the scope of this Article. The answer likely varies depending on factors such as the size of the organization, the nature of the organization’s research needs, and the cost structure of available commercial online packages. Research costs are “both direct—materials cost a lot of money to buy and keep up to date—and indirect—print media cost a lot to house and computers require investment in collateral expenses like broadband internet access, upgrades, and non-income-generating support staff to maintain network systems.” Gallacher, supra n. 8, at 193; see also id. at 193–197 (estimating both print and commercial online research costs for a hypothetical firm); Wu, supra n. 6, at 244 (noting that due to decreased competition “in legal publishing, the prices of both print and online materials have skyrocketed”); id. at 252–253 (noting that electronic databases sometimes cost less than print sources to acquire and generally require less space to store); id. at 242–243 (noting that online sources often are licensed rather than sold outright, thus resulting in renewed cost for the same databases).
on-the-job research training reported that print sources and skills are two of the areas emphasized.\textsuperscript{35}

The strongest indication of the apparent persistence of print came in response to a question asking for advice to law schools regarding research training.\textsuperscript{36} More than one in four respondents advised law schools to pay more attention to print research, and one in six advised law schools to improve training in both print and online media or in the ability to combine those media effectively.\textsuperscript{37} Some of the advice (and comments in response to other questions) reflects the belief that print research is more economical than online research:

Focus on use of print resources. Unless the firm has a flat-fee arrangement, electronic resources are almost cost prohibitive and many clients are unwilling to pay or may require preapproval before allowing such charges.

Most new students [sic] are aware of online resources but have little to no knowledge of print materials, which are much less expensive means of conducting research.

I suspect that there will be a greater emphasis on print resources because the clients do not want to pay for [commercial online] research, and the firms are trying to cut costs.

Our respondents indicated that law schools do not necessarily do a good job of informing students about the economics of legal research:

\textsuperscript{35} See supra n. 30 (indicating that 22.7% of respondents who answered the question about in-house training listed print sources/skills). Of the 157 attorneys who answered a similar question on our 2007 survey, thirty-three (21%) indicated that print resources were part of the in-house training for new attorneys at their organization.

\textsuperscript{36} The question read, “If you could add any particular component to law schools’ legal research training programs, what would it be? E.g., more knowledge of electronic searching; more knowledge of print materials; more knowledge of a particular subject area?” Sixty-five respondents answered this question, and their responses were coded (1) better training regarding both print and online or ability to combine print and online (16.9%); (2) more/better online training (16.9%); (2a) training regarding online efficiency (15.4%); (3) more/better print training (26.2%); (4) more regarding specific subjects (27.7%); and (5) miscellaneous (16.9%). More than one of the codes could be assigned to a given response.

\textsuperscript{37} In the 2007 survey, 116 of our 204 respondents offered advice about legal research training in law schools. The three most frequent responses were to continue teaching print (20%); to focus more on free online sources (18%); and to focus on constructing better, more targeted searches (18%).
New associates typically do not understand the costs of computerized legal research.

In law school, there is no budgetary concern for online use. Major issue is the efficient use of on-line tools . . . .

Other respondents also observed that online research is not always an option, either because of excessive costs or for other reasons:

Definitely maintain knowledge of print materials if unable to access electronic searching due to no money or unable to access online.

Not everything is on-line . . . book research is more important than we were taught.

According to a number of our respondents, print research is not only more economical or a necessary evil when online research is impossible; it can also be more effective, either on its own or as preparation for more efficient online searching. For example, the same respondent who noted the “almost cost prohibitive” aspect of relying on online research added that “[p]rint resources are also great tools for learning the nuances of the law you are researching, plus discovering arguments for other and future cases.” Another respondent, who both practices law and teaches as an adjunct, indicated that his “[b]iggest focus” in his teaching is “departing from the computer terminal and walking into the library. Finding the treatises and exhorting the benefits of their floodlight view instead of the Lexis laser beam. Reviewing digests. Reviewing annotations.”

Today’s law students and new attorneys often resist the “traditionalist research paradigm” still endorsed by many “practitioners and teachers of legal research.” Gallacher, supra n. 8, at 161–163. Those trained in the traditionalist paradigm learned to use . . . secondary sources first in order to develop a broad understanding of an issue and to generate search terms that would drive their explo-

---

38 Berring and Edinger note that Lexis and Westlaw provide law schools access to their services at deeply discounted prices because they “are willing to underwrite the law students’ initial forays into electronic research in hope of gaining future users.” Only after leaving “the cocoon of legal education” do many users appreciate the high costs of such services. Berring & Edinger, supra n. 14, at 7.

39 See id. at 6–7 (noting the high cost of commercial on-line research and its unavailability at some workplaces); cf. Kunz et al., supra n. 15, at 21 (noting that “sometimes the medium you would prefer to use will be unavailable—books can be off the shelf, networks can be down—or cost too much for your client to pay”); Gallacher, supra n. 8, at 186–187 (noting the risks of interruptions in access to online sources due to problems such as denial-of-service attacks).

40 Today’s law students and new attorneys often resist the “traditionalist research paradigm” still endorsed by many “practitioners and teachers of legal research.” Gallacher, supra n. 8, at 161–163. Those trained in the traditionalist paradigm learned to use . . . secondary sources first in order to develop a broad understanding of an issue and to generate search terms that would drive their explo-
use of books,” noting an “[i]ncreasing lack of comprehension of the ‘macro’ picture through the use of electronic database research.” Other respondents noted the risks of relying exclusively on online sources, with several emphasizing that a sole reliance on online searching is likely to result in inefficient use of such resources:

I find it frustrating (and shocking) that law school graduates supposedly trained in how to conduct research so frequently fail to grasp that it is inefficient (and imposes needless costs on the firm or its clients) to begin electronic research without first having a clear understanding of the general contours of the law in a particular area through the use of treatises or looseleaf services.

My experience is that while most new attorneys are proficient with reporters, digests, and general treatises, they are less familiar with specific subject matter treatises and print resources. Again, in my experience, starting with such a print resource can often make subsequent electronic research more efficient.

I think that a better knowledge of print materials would be helpful because young lawyers do not always know what key terms they need to use to do electronic research. If they went to the print materials first, they might figure that out and save clients money.41

41 Cf. Molly Warner Lien, Technocentrism and the Soul of the Common Law Lawyer, 48 Am. U. L. Rev. 85, 100 (1998) (noting that “associates in law firms often use electronic research inefficiently”); Meyer, supra n. 8, at 21 (“Immediately jumping online has caused more than one uninitiated law clerk or associate to incur thousands of dollars of excess research costs because it took a lot of trial and error to find the material online.”).
There is a tendency to go to the computer or the digest before gaining a sufficient basic overview of the area, so the research results tend to be too narrow.\(^ {42} \)

In my experience, new attorneys are generally inefficient in their research and are unaware of any resources other than Lexis or Westlaw.

Sometimes print resources are much more efficient—when one needs a broad overlook or when one has a very specific question.

And one respondent pithily urged law schools to improve training in print materials because “[t]he new attorneys come out of school addicted to computer research.”

Our data suggest that such addiction makes attorneys who have recently graduated from law school less likely to use not only print sources but also free online alternatives to commercial sources. Compared to the subset of our respondents with the most experience, those with the least experience were only one-third as likely to list either print or non-commercial online sources as their primary research medium (see table 5).\(^ {43} \)

\(^ {42} \) One recent study tested whether topically arranged print digests are better for finding legal rules while online Boolean searches are better for finding factually similar cases. See Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?* 97 L. Libr. J. 661 (2005). The study involved a sample of twenty-eight law students who were trained in both research approaches and given a series of both rule-based and fact-based questions to answer. Id. at 668–669. The group actually did better at answering the rule-based questions using Boolean searching and slightly better at answering the fact-based questions using the print digest. Id. at 670. However, the “study did not examine what effect the use of a particular resource has on a researcher’s understanding of the law or the quality of [his] legal reasoning.” Id. at 675. Peoples argues that law students should be encouraged to use traditional print secondary sources to get a “big-picture overview of an area of law.” Id. at 678; see also Meyer, *supra* n. 8, at 20–21 (“If the researcher is unfamiliar with an area of law, the best strategy is to start by using the books where the enhanced ability to browse and cross-reference, and the availability of theory-based indexes and digests, should lead to a better understanding of the legal concepts involved.”).

\(^ {43} \) Our 2007 survey yielded similar results. Of the sixty-nine attorneys with sixteen or more years’ experience, 17.4% do most of their research using print media, and 17.4% do most of their research using free online resources. Only 1.4% of the seventy attorneys with zero to five years’ experience report a primary reliance on print resources, and only 2.9% report a primary reliance on free online resources.
RESPTS. DO MOST RESEARCH IN?

<table>
<thead>
<tr>
<th></th>
<th>% of All Respts. [No. of Respts. = 109]</th>
<th>% of Respts. w/ 0–5 Years’ Exp. [No. of Respts. = 38]</th>
<th>% of Respts. w/ 16 or More Years’ Exp. [No. of Respts. = 40]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Print Materials</td>
<td>13.8%</td>
<td>7.9%</td>
<td>25.0%</td>
</tr>
<tr>
<td>Com. Online Resources, such as Lexis or Westlaw</td>
<td>67.9%</td>
<td>81.6%</td>
<td>50.0%</td>
</tr>
<tr>
<td>Online Non-Com. Resources, such as Ct. &amp; Govt. Websites</td>
<td>10.1%</td>
<td>5.3%</td>
<td>15.0%</td>
</tr>
<tr>
<td>Other</td>
<td>8.3%</td>
<td>5.3%</td>
<td>10.0%</td>
</tr>
</tbody>
</table>

While more than eight out of ten relatively inexperienced attorneys listed commercial online as their primary medium, only half of the most experienced attorneys opted for that choice. The tendency to rely primarily on print resources also varies with the size of the office in which respondents work (see table 6, infra).
The 2007 survey yielded similar results, with solo practitioners and those in offices of two to six attorneys being somewhat more likely than big office attorneys to rely on print and significantly more likely to rely on non-commercial online resources as their primary research medium. Of the sixty-nine attorneys who work in offices with six or fewer attorneys, 10.1% do most of their research in print, and 24.6% do most of their research using free online sources. The corresponding percentages for the fifty-two attorneys who work in offices with 101 to 500 attorneys are 7.7% (print) and 3.8% (free online).

Our most experienced respondents were also significantly more likely than our least experienced respondents to report using free online sources at least sometimes (see table 7, infra). This data suggest that for at least some experienced attorneys, continued reliance on print resources is not the result of computer phobia.
DO RESP'TS. USE FREE WEB RESOURCES?

<table>
<thead>
<tr>
<th></th>
<th>% of All Respts. [No. of Respts. = 110]</th>
<th>% of Respts. w/ 0–5 Years’ Exp. [No. of Respts. = 38]</th>
<th>% of Respts. w/ 16 or More Years’ Exp. [No. of Respts. = 40]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>59.1%</td>
<td>55.3%</td>
<td>67.5%</td>
</tr>
<tr>
<td>No</td>
<td>35.5%</td>
<td>44.7%</td>
<td>25.0%</td>
</tr>
<tr>
<td>N/A / Other</td>
<td>5.4%</td>
<td>0%</td>
<td>7.5%</td>
</tr>
</tbody>
</table>

V. THE SOLUTION

Our respondents seem to paint two largely inconsistent pictures of the legal research landscape: first, print sources are becoming less common and perhaps eventually will be supplanted by online sources; but second, new attorneys are often inefficient because of an “addiction” to commercial online sources. A substantial minority of our respondents believe that curing that addiction requires a greater appreciation of the benefits of print resources, not just supplementing commercial online sources with free alternatives. At least two solutions may help resolve this contradiction and improve legal research training in law school: (1) continue to teach “print-oriented” skills while showing how they can be used in an online environment; and (2) increase students’ willingness to explore non-commercial online alternatives to Westlaw and Lexis while teaching students ways to evaluate the reliability of these alternatives.

A. Teaching “Print” Research Skills for an Online World

Abandoning the effort to train law students in print research skills is premature for at least two reasons. First, as both our survey participants and legal research experts suggest, the reliance
on print resources, especially in small firms, is still significant, even though online research is certainly increasingly important.\footnote{See supra nn. 32–43 and accompanying text.} Although we cannot be expected to train students to use every legal research source that they will ever encounter in practice, print sources are not yet so rare as to be dismissed from the curriculum as a mere antiquarian curiosity.\footnote{For example, in a 2004 article, Patrick Meyer estimated that only approximately 15% of print legal looseleaf treatises were then available online from Lexis or Westlaw. Meyer, supra n. 8, at 19, 19 n. 1. To bring this point home to print-resistant students, Meyer encouraged legal research instructors to design problems for which they “are reasonably certain the answer is contained in a looseleaf treatise that is not online . . . .” Id. at 19.} The second reason to urge a continued emphasis on print-oriented skills is likely to remain important even as the online onslaught gains an even greater dominance: these skills can be transferred to online research and can help make our students more efficient and more effective researchers. This second reason to keep teaching print skills is thus the focus of this section.

Teaching print-oriented skills while adapting them to the online world is a difficult challenge. The superficial ease with which online primary source databases can be searched tempts students and novice attorneys to under-utilize valuable skills that may seem to delay looking for on-point primary sources.\footnote{See Lien, supra n. 41, at 89 (noting that “the methodology of researching in and working with electronic texts encourages work habits that prioritize speed and all too easily enable lawyers to find a kernel of phraseology that may support their often incorrect pre-conceived notions”); Bast & Pyle, supra n. 14, at 298 (observing that online researchers “may even use the copy feature to copy portions of a case and paste them into a legal document without thoroughly examining their context or determining how they fit into broader legal concepts”); id. at 293 (noting that online researchers, “happy with retrieving a number of relevant documents, may . . . be falsely confident that the research results are satisfactory”); Suzanne Ehrenberg & Kari Aamot, Integrating Print and Online Research Training: A Guide for the Wary, 15 Persps. 119, 122–123 (2007) (“With online research, . . . students can often quickly find helpful primary authority through Boolean searching if they can identify the relevant database. Many students are tempted to stop researching at this point.”). Of course, when it occurs, “quickly finding helpful primary authority” is itself a good thing, provided that the student does not prematurely short-circuit the research quest. Ehrenberg & Aamot, supra n. 46, at 122; cf. Meyer, supra n. 8, at 21 (noting the risk that starting with an online Boolean approach may result in a great deal of inefficient, costly “trial and error”).} These skills involve tasks such as generating a useful research strategy, which often requires using secondary sources to learn about an unfamiliar area of the law before trying to find primary sources;\footnote{See e.g. Kunz et al., supra n. 15, at 37; Ehrenberg & Aamot, supra n. 46, at 122–123; Gallacher, supra n. 8, at 202.} determining what sources or databases are most likely to provide relevant information; and choosing search terms to use, whether in
a Boolean or natural language search of an entire database⁴⁸ or in a search initially limited to a finding tool such as a digest or table of contents.⁴⁹

Expressed at a high-enough level of abstraction, such skills probably lie at the heart of any process-oriented approach to legal research, whether the actual search is conducted in print or online or both.⁵⁰ But there are important differences as well. For example, many of the secondary sources and finding tools developed to facilitate legal research for cases in print media have been organized into topics, and can be searched using tables of contents, indexes, and digests, with the latter themselves accessible via such structured tools.⁵¹ To find relevant cases, one must begin with an appropriate topic, unless one already knows of a case on point. But one can conduct Boolean or natural language searches in an online case database such as those offered by Westlaw or Lexis without necessarily understanding how the database is organized.⁵² Such research is likely to be inefficient,⁵³ as some of our respondents’

⁴⁸ For a brief comparison of Boolean and natural language searching, see Bast & Pyle, supra n. 14, at 294–295.
⁴⁹ For examples of research methodologies, see Kunz et al., supra n. 15, at 24–25, and Oates & Enquist, supra n. 14, at 5–6.
⁵⁰ Even James Milles, who criticizes traditional legal research training as anachronistically starting with print sources, emphasizes that “[t]he key is to teach students how to do electronic research effectively” and urges that time be devoted “to teach a critical understanding of online research. A primary focus on online research would allow us more time to teach in-depth principles of research strategy, information literacy, and how to evaluate the authority and reliability of both online and print sources . . . .” Milles, supra n. 1, at 16.
⁵¹ For example, the three-volume Administrative Law Treatise by Richard J. Pierce, Jr. can be accessed using a summary table of contents, a detailed table of contents, and an index, along with a table of cases and a table of authorities. Richard J. Pierce, Administrative Law Treatise (4th ed., Aspen L. & Bus. 2002). West’s Federal Practice Digest 4th, which topically arranges West headnotes from federal court cases, includes an outline of the law, an alphabetical list of digest topics, and a descriptive word index in addition to a table of cases and an alphabetical index to judicially defined words and phrases. For a brief introduction to the West digest system, see Bast & Pyle, supra n. 14, at 289–291.
⁵² For those students whose online research experience before law school may have consisted only of using search engines such as Google, a sophisticated research strategy may be particularly unlikely: “Google . . . has taught us that it is no longer necessary to go through the effort of defining our information need. We just put a word or two into the search box and let a search engine disambiguate the query and provide an answer. We have learned to look through some possible results, and hope that we recognize the “right” site from within the first page or two of results.” Gallacher, supra n. 8, at 183 (quoting Mary Ellen Bates, EContent, Is That All? http://www.econtentmag.com/Articles/ArticlePrint.aspx?ArticleID=5579&ContextSubtypeID=13 (Oct. 27, 2003)).
⁵³ Of course, there is no guarantee that print research will be conducted efficiently. See supra n. 26 and accompanying text. Whatever resources attorneys use, their goal should be to find accurate answers in an efficient manner. Doing so both serves their clients’ interests and benefits their own careers: “An attorney who can conduct effective legal research in a time-efficient manner is substantially more valuable to a firm [or other legal employer]
2007] Preparing Students for Rapid Changes in Research 261

comments point out. Many such searches will not yield profitable gushers, but they will not all yield dry wells. Indeed, poorly designed online searches often drown the researcher in a sea of irrelevant results.54

However, more efficient research on Lexis and Westlaw is possible if one does understand the underlying structure and takes advantage of such organization rather than simply starting with fact-oriented Boolean searches.55 For example, one can now find online many of the initially print-only secondary sources that help novices familiarize themselves with a new area of legal research.56 And some of these sources can be accessed using a table of contents or other structured finding tool rather than using only a Boolean or natural language search.57 In other words, while some

than another attorney who obtains the same research results but spends substantially longer doing it.” Gallacher, supra n. 8, at 201.

54 The results of online Boolean searches can be measured in terms of recall (the proportion of relevant documents retrieved) and precision (the proportion of retrieved documents that are relevant). Id. at 184 (citing Christopher G. Wren & Jill Robinson Wren, Using Computers in Legal Research: A Guide to Lexis and Westlaw 767 (Adams & Ambrose Publg. 1994)). “[E]lectronic researchers should remember that when they retrieve a high number of relevant documents with a search, they will likely also have recovered many irrelevant documents . . . .” Id. at 185. Gallacher thus advises “the properly cautious first-year law student” to recognize “that a mix of computerized and print-based legal research strategies offers the best chance for a complete and accurate search result.” Id. at 186.

Patrick Meyer observes that some researchers respond to “output overload” by “arbitrarily adding keywords to the initial search query (or [by] using connectors that are too restrictive) so as to limit the number of retrieved documents they have to look through. The result is the retrieval of fewer relevant documents.” Meyer, supra n. 8, at 20. It is generally preferable to start with a broad search and then use one or more Locate (Westlaw) or Focus (Lexis) sub-searches to try to find the most relevant documents from those initially retrieved.

55 According to one law librarian and legal research instructor, “I don’t teach print first because it was developed first or because I learned it first. I teach it first because it makes the inherent structure of the information more evident than a searchable full-text database does.” Joan Shear, Elevating Form above Substance: A Reply to Jim Milles and His Assumptions about Approaches to Teaching Legal Research, 9 Spectrum (Am. Assn. L. Libs.) 10, 11 (June 2005). Although I agree with Shear that an appreciation of the structure of print sources remains important in an increasingly online world, I think that it is preferable to introduce print and online research simultaneously. See infra nn. 56, 68.

56 See Gallacher, supra n. 8, at 162 n. 51 (observing that Lexis and Westlaw now “have extensive secondary source databases that allow electronic researchers to conduct the same ‘secondary source first, primary source second’ research model as that advocated by paper researchers”). Gallacher urges legal research training programs to adapt this model “for use in both print and computer-assisted legal research, and teach the available secondary sources in both their print and computer-based versions simultaneously. Using this approach, students learn the benefits of both systems. Further, students learn why it is important to use the appropriate materials in the most accurate and efficient manner possible.” Id. at 202 (footnote omitted); see also Ehrenberg & Aamot, supra n. 46, at 119 (similarly recommending that print and online resources be introduced simultaneously, with an initial emphasis on secondary sources).

57 See Milles, supra n. 1, at 11 (“Online sources are increasingly incorporating all the
print media are being phased out, many are being offered both in print and online, and others are being replaced by online-only versions. And the differences between the ways to access the print versus online versions are often not as great as they were.

For example, it was common until rather recently to teach law students that they could conduct statutory research more efficiently in print than online. Boolean searches of statutory databases were likely to yield no “hits” or a barrage of mostly irrelevant materials, and it was difficult to consult related statutory sections in the way that a print version could be explored by browsing. The preferred approach was to use the index to a codified print version of the relevant statutory material. But today such material can be researched online using tables of contents and other structured finding tools. And once a relevant statutory section is located, the researcher can readily “browse” related sections, either by accessing the relevant portion of the entire code’s table of contents or by clicking on previous- or next-section links. These changes increase the similarity between the methodologies of print and online statutory research, and the latter retains the clear advantage of nearly instant updating.

Highlighting the partial convergence of print and online research may encourage students both to experiment more with print resources and to use a variety of ways to access online resources. Even students with little experience in using traditional print resources may have some online experience with using struc-

structural elements and search tools of print.

58 See Berring & Edinger, supra n. 14, at 142 (noting that “even professional researchers consider finding an unknown statute in an online database a difficult task. Statutory language is often of a tortured construction and difficult to predict.”); Meyer, supra n. 8, at 21 (observing that “it’s often easier to conduct statutory research in the books”).

59 On Westlaw, in addition to searching the entire United States Code Annotated database, one can explore online both the table of contents and the index to that resource. Lexis offers a table of contents alternative to full-text searching of the United States Code Service. Some free online sources also provide such tools. For example, Oregon provides a table of contents and an index for its online statutes. Or. St. Legis., Welcome to the Oregon State Legislature, Oregon Revised Statutes—2005 Edition, http://www.leg.state.or.us/ors/ (accessed Aug. 20, 2007).

60 Westlaw now provides similar links and online tables of contents to some secondary sources, such as McCarthy on Trademarks and Unfair Competition. “Electronic tables of contents facilitate document browsing and are particularly useful when trying to get a grasp on lengthy statutes or treatises in the online environment.” Peoples, supra n. 42, at 676.

61 See Berring & Edinger, supra n. 14, at 139 (noting that “online code databases are generally up to date within a few weeks or days”).
tured finding tools such as tables of contents and indexes. Many websites use expandable drop-down menus that function similarly to a print table of contents, and many have site maps that resemble a print index. Pointing out such similarities in class with on-screen examples will modestly contribute to demystifying print research and promoting more sophisticated approaches to online research. It is also potentially helpful to assign research exercises in which part of the class must use “a full-text online search while others perform the same problem using a print index or an online table of contents. Compare the time it takes both groups to find an adequate answer.”

The convergence of print and online researching is also illustrated by Westlaw’s ResultsPlus feature, but only students and attorneys trained to use originally print-only secondary sources are likely to use this feature effectively. When one accesses a known primary source by citation or conducts a Westlaw search of primary-source databases, ResultsPlus automatically generates and provides links to a list of potentially relevant secondary sources. “This [tool] helps researchers discover interpretive sources they otherwise would not have found.” For example, a fortunate researcher can easily jump from a single known case to an A.L.R. Annotation on one’s topic. But if attorneys have not been taught the uses and limitations of such secondary sources, they are likely either to ignore them completely or to use them indis-

\[62\] But see Milles, supra n. 1, at 11 (suggesting that today’s law students “find print aids, like tables of contents, less intuitive” than do their research teachers); Shear, supra n. 55, at 11 (observing that “the Google generation by and large doesn’t know about controlled vocabulary, hierarchy of information, or even the difference between a table of contents and an index”). While Milles makes his observation as part of a critique of print-first research training, Shear contends “that the ‘print aids’ that were necessary to organize print information and the research methods we had to learn in order to get any result using print research are still needed in the digital age. . . . If structuring information is ‘less intuitive’ to our students, then this concept cries out for more such instruction, not less.” Id.

\[63\] Meyer, supra n. 8, at 22. Meyer also notes that “[a] good way to make sure that your students become familiar with and fully utilize the online browsing functions is to assign a problem in a database that has a table of contents . . . and where the answer may be fairly intuitive to find in the table, but which is likely to be more difficult to find when performing a full-text search.” Id.

\[64\] For some primary authority, Lexis generates similar linked research leads listed under the Research Guide option of its Practitioner’s Toolbox.

\[65\] Peoples, supra n. 42, at 676. There is a serious risk, however, that such enhancements can confuse and distract researchers: “As Lexis and Westlaw get more bells and whistles and more super-search-enhancing functions, it becomes harder to teach students the basics. More and more time is spent trying to peel away some of the system enhancements and value-added features to get down to the basics of good search crafting.” Shear, supra n. 55, at 14.
criminately. Where researchers still have access to such sources in both print and online versions, they should be aware of the costs of pursuing leads in either format. Therefore, even as more and more secondary sources are readily accessible online, teachers of legal research still should strive to familiarize their students with such originally print-only sources.

Relatively novice researchers who have been introduced to legal encyclopedias, another originally print-only source, may also seek assistance in conducting effective online research by using features such as Lexis’s Search by Topic and Westlaw’s KeySearch. These services are topically structured systems for helping to narrow one’s search. Both offer researchers an access option that somewhat resembles use of a legal encyclopedia containing both a summary table of contents and a detailed table of contents. Such top-down topical organization permits the researcher to start with a very broad legal topic (e.g., family law) and then check the progressively narrower sub-topics into which the database has been organized. Once the researcher has identified the relevant sub-topic, KeySearch generates search queries that the user can run, either as is or with additional user-provided search terms. The searches themselves can be run in a case law database or a secondary source database. Search by Topic also provides the user options of running a predetermined search or creating one’s own search. For at least some topics, Search by Topic allows the user to search for statutes and regulations, administrative materials, and secondary sources in addition to cases.

Convincing law students to take print research lessons seriously is often challenging when they have the option of “free” online Westlaw and Lexis research. But many of our students

66 This service was formerly called Search Advisor.

67 One observer has characterized KeySearch as “West’s most overt attempt to integrate elements of the print-based digest system into the electronic world of Westlaw.” Peoples, supra n. 42, at 665. Peoples also notes, however, that “[c]ommentators have been critical of KeySearch.” Id. at 666. He quotes one author as “describing the introduction of KeySearch as ‘an example of advancing into the past.’” Id. (quoting F. Allan Hanson, From Key Numbers to Keywords: How Automation Has Transformed the Law, 94 L. Lib. J. 563, 578 (2002)).

68 A group of twenty-eight law students trained to use print digests, terms and connectors searching, and KeySearch reported that it took “the least amount of time [for them to feel confident and satisfied] when conducting a terms and connectors search” even though they actually performed best in using print digests in a controlled study of the three approaches. Id. at 672.

To combat the tendency of novice legal researchers to confuse apparent ease of a medium’s use with its effectiveness, Peoples urges law librarians—and presumably others responsible for teaching legal research—to “make students aware of the tendency of research-
expect to be lifelong learners, constantly acquiring information
as they need it. Because of the volume of information that bom-
bards them constantly, they know that no school can possibly
teach them all of the information they may someday need. In-
stead, they expect to learn in school the most efficient skills for
continuing to acquire information on the subjects that are rele-
vant to them.69

Thus, the more that we can convincingly show our students
that a “print” skill will be applicable in both print and online me-
dia and may even improve their efficient use of online media, the
more chance we have to give them an incentive to learn that skill.
We may be able to increase that incentive by quoting the survey
respondent who believes that “attorneys who can do print re-
search, as well as online research[,] are much more marketable.”

B. Encouraging Informed Experimentation
with Free Online Sources

The second major goal suggested by our survey, getting stu-
dents to experiment more with free online resources, may be easier
to accomplish than teaching them how print-oriented skills will
improve their online research. However, it is not enough simply to
convince students and young lawyers that some legal research
tasks can be done online without incurring fees. Any attempt to
encourage the use of free online alternatives should also include
efforts to help students evaluate the reliability of the sites that
they explore and the sources that they find.

69 Ehrenberg and Aamot offer similar
dvice to those who teach legal research in law schools. Ehrenberg & Aamot, supra n. 46, at
122–123. They also argue that one way to overcome the reluctance of students to take print
research skills seriously is to teach print and online research approaches simultaneously,
rather than in a print-first, online-second sequence. The integrated approach placed the
authors “in a much better position to explain the pros and cons of each technique. Moreover,
the students were in a better frame of mind to receive that comparative information be-
cause they did not suspect that a game of hide-the-ball was afoot.” Id. at 120.
Many of our students come to law school with considerable experience doing free research on the Internet. We should build on that experience by designing research exercises that require the use of free online resources. For example, one can divide a class and have some students use Westlaw or Lexis or both while others use free online sources to answer the same questions. One can also assign a research diary assignment that requires students to use both non-commercial and commercial online sources (as well as print).

Of course, such law school assignments cannot necessarily overcome the irony that newly minted lawyers are even less likely than experienced attorneys to use free online research sources. But even those new attorneys who are addicted to commercial online research because of its free availability in law school may learn to look for non-commercial online alternatives when faced with the combined reality of cancelled print subscriptions at their firms and the reluctance of clients and supervisors to approve costly online research. To the extent that we can sensitize students to such conflicting pressures before they actually enter the legal market, we may help them avoid an excessive reliance on commercial online research. One way to attempt to educate our students about the real costs of commercial online research is to provide estimates “of how much money each potentially billable task” in a course assignment would cost if conducted at a private firm. We can supplement such lessons by citing the real-world experience of practicing lawyers, such as these comments from respondents to our 2007 survey:

---

70 See Robert C. Berring, Legal Information and the Search for Cognitive Authority, 88 Cal. L. Rev. 1673, 1708 (2000) (observing that “students who are currently enrolled in law school are the most sophisticated users of information in history”); but see Peoples, supra n. 42, at 678 (observing that “many of today’s law students are information illiterate”).

71 See supra n. 43 and accompanying text.

72 See supra n. 6.

73 According to one of the respondents to our 2007 survey, “We frequently have to write off fee-based research costs because new lawyers don’t know how to use it efficiently.” See also Gallacher, supra n. 8, at 199 (noting that “[l]egal research is an area in which clients are likely to restrict an attorney’s billed time and challenge time billed in contravention of pre-established billing guidelines”).

74 Meyer, supra n. 8, at 23. Meyer reports that his “[s]tudents are aghast when I do this for the first time each semester.” Id. At the 2007 Back to the Future of Legal Research Symposium, Alison Julien and Kira Ziporski of Marquette University Law School described a detailed exercise that requires students to track “billable hours” and estimate the cost of online research. Alison Julien & Kira Ziporski, “Teaching Dollars and Sense: Incorporating Cost-Effective Research Techniques in the First-Year LWR Course, http://www.kentlaw.edu/academics/lrw/future/handouts/JulienZiporski-Handout.pdf (May 18, 2007).
Google has become a great resource especially since physical libraries barely exist (our office library is pretty much gone!). Also, there have been many additional free online resources that are available to people who know how to use them.

I have found that many associates do not normally use Google and other search engines as much as they could to achieve efficient, effective results.

Even though I am a recent graduate, our focus was Lexis and Westlaw. I would love more training on print resources, but more importantly learning how to navigate various free online resources.

Moreover, one vital lesson that we can try to teach our students is the importance of evaluating the authenticity and reliability of sources that they encounter online. As noted by the authors of a new research text, which emphasizes online research, “[w]hile most paper sources have been vetted and are reliable, the same cannot be said of all electronic sources. You can usually trust government, educational, and bar association websites and fee-based services... but you need to evaluate other free sources.” Although students who come to law school with extensive experience in gathering information online may have an intuitive skepticism about the reliability of many online sources, they are unlikely to have the knowledge and experience that would enable them to distinguish between reliable and unreliable legal sources. Providing such knowledge and experience is likely to become an increasingly large part of the role of legal research training in law schools.

---

75 See Berring, supra n. 70, at 1707 (noting his “concern” about “who will evaluate” evolving systems of accessing legal information online and “upon what criteria they will make judgments as to what the new cognitive authorities will be”). Professor Berring does not believe that legal research professors are particularly well equipped for this task because they tend to come “from the wrong side of the information generation gap.” Id. But we can at least strive to sensitize our students to ask the right questions.

76 Oates & Enquist, supra n. 14, at xx; see also id. at 383–385 (listing reliable sites); Lee F. Peoples, The Trials and Tribulations of Internet Research, 76 Okla. B.J. 2635, 2635–2636 (Nov. 19, 2005) (providing tips on assessing the reliability of online resources). For an online tutorial on how to evaluate the quality of online resources, see the following website: Genie Tyburski, The Virtual Chase, Evaluating the Quality of Information on the Internet, available at www.virtualchase.com/quality.

77 See McGaugh, supra n. 16, at 130 (“The Internet has only reinforced what Xers already believed about information: anyone can provide it. On the Internet, information is provided by experts and amateurs alike, with little guidance for most users in determining which is which.”).
Ultimately, whether trying to teach print-oriented skills or a sophisticated appreciation of the opportunities and risks of relying on free online research, legal research professors might profitably recall the observations of one of the respondents to our 2007 survey:

Legal research is a part of the larger issue of legal analysis and reasoning. . . . The use of print materials seems to better stress and underscore the need for analysis. In contrast, on-line research is many times more mechanical (i.e., putting together search terms) and many topics are missed. . . . Thus, the emphasis needs to be on the analytical approach to a problem and then on where the answers are to be found.
AVOIDING COMMON PROBLEMS IN USING TEACHING ASSISTANTS: HARD LESSONS LEARNED FROM PEER TEACHING THEORY AND EXPERIENCE*

Ted Becker**
Rachel Croskery-Roberts***

INTRODUCTION

A majority of American law schools rely on teaching assistants1 to help administer first-year legal writing, research, and analysis (LWRA) courses.2 Specifically, surveys jointly conducted by the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) consistently detail the extensive use many LWRA professors make of teaching assistants.3 Likewise, Julie Cheslik recognized in her article about her 1994 survey on the use of TAs in the typical LWRA course that “[o]ne of the most prevalent uses of peer teachers in the law school setting is the em-

* © 2007, Ted Becker and Rachel Croskery-Roberts. All rights reserved.
** Clinical Assistant Professor, University of Michigan Law School.
*** Clinical Assistant Professor, University of Michigan Law School. This Article is largely based on a presentation we gave at the 2006 LWI Biennial Conference in Atlanta. The Authors thank Grace Tonner, Phil Frost, and Thom Seymour for their helpful comments on earlier drafts of this Article. The Authors also thank Ken Chestek, Joel Schumm, Beth Honetschlager, Jill K. Hayford, Sharon Poock, and Wayne Scheiss for their invaluable help during the editing process. Equally importantly, the Authors thank the many teaching assistants we have been privileged to work closely with over the past several years. They have helped us in ways too extensive to measure, and we consider ourselves fortunate to have had the opportunity to work with them.
1 We define “teaching assistant” in the same way as the annual surveys of the Association of Legal Writing Directors and the Legal Writing Institute: “Teaching assistant means any upper-level student who participates in teaching research or writing, including student tutors.” ALWD & Leg. Writing Inst., 2006 Survey Results 1 (2006) (available at http://www.alwd.org/surveys/survey_results/2006_Survey_Results.pdf) [hereinafter 2006 Survey Results]. We will use “teaching assistant” and “TA” interchangeably throughout this Article.
3 See infra text accompanying nn. 11–18. LWI’s first survey of legal writing programs in 1990 provided some information about the use of student assistants, but without much supporting detail. See Jill J. Ramsfield, Legal Writing in the Twenty-First Century: The First Images: A Survey of Legal Research and Writing Programs, 1 Leg. Writing 123 (1991). Subsequent LWI surveys (now co-sponsored by ALWD) have proven more useful in this regard, although still not as comprehensive as we might like.
ployment of upper-level law students as teaching assistants in the first-year legal research and writing course." As one professor observed, "[w]e couldn’t do it without the TAs."

But the efficient use of teaching assistants is not, in our experience, something that is covered on Page One of a new LWRA professor’s "employee manual." Like so much else in LWRA, managing TAs is a learn-by-doing experience. That means, if our experience is any guide, that mistakes are made—lots of them—and by no means only by teaching assistants. To be sure, inexperienced TAs can go astray in their dealings with students, causing problems that we have sometimes been slow to catch. Often, however, those mistakes stemmed from earlier professorial errors in oversight and guidance—either too much or too little.

Although other legal scholars have identified some of the same problems we will address, they have done so only as part of broader work taking a larger view of TA use. For example, Julie Cheslik’s 1994 survey comprehensively looked at such points as the compensation and selection of teaching assistants, their specific uses, and the perceived costs and benefits of using TAs. Other, more anecdotal articles have described the use of teaching assistants at specific institutions, providing many helpful ideas about how those schools successfully use TAs. Conference presentations have also outlined TA training as part of larger writing-center projects or adjunct-staffed legal writing programs.

Our focus is narrower. We will discuss the crucial and often under-examined relationship between individual professors and their teaching assistants. Part One of this Article will set out a brief history of the evolving use of teaching assistants in LWRA

---

4 Cheslik, supra n. 2, at 394.
5 Id. at 412.
6 Indeed, problems with using student teachers in LWRA programs have been briefly noted in articles dating back almost half a century. See e.g. Stewart Macaulay & Henry G. Manne, A Low-Cost Legal Writing Program—The Wisconsin Experience, 11 J. Leg. Educ. 387, 401–402 (1959).
7 See Cheslik, supra n. 2.
8 E.g. Brooke J. Bowman, Our Extended Family (Using Teaching Assistants), 17 Second Draft (Bull. of Leg. Writing Inst.) 16 (July 2003); Paul Goldstein, Students as Teachers: An Experiment, 25 J. Leg. Educ. 485 (1971); Ruth C. Vance, The Use of Student Teaching Assistants in the Legal Writing Course, 1 Persps. 4 (1992); Carol Lynn Wallinger, Our Teaching Assistants Set Us Apart, 17 Second Draft (Bull. of Leg. Writing Inst.) 16 (July 2003).
courses offered by most accredited law schools in the United States, as reflected in the annual ALWD/LWI surveys. Next, we set up a framework for discussing problems (and proposed solutions to those problems) with the use of TAs. Although we generally take the benefits of TAs to be a given, Part Two provides a brief discussion of the benefits of peer teaching as recognized in the literature on the collaborative learning movement in higher education. Following this discussion of the pedagogical theory, we will narrow our focus to touch upon some of the key benefits TAs can offer the first-year course, focusing on those benefits noted by actual professors of LWRA courses at various schools. Part Three is the heart of the Article. There, we address the key ways in which both new and experienced professors can identify, anticipate, and avoid problems that might otherwise prevent the benefits of using TAs from being fully realized.

Finally, in addition to offering an overview of general categories of problems that professors have encountered when using teaching assistants, we will also discuss some specific issues that new LWRA professors might encounter while working with TAs. Moreover, we will describe the steps we have taken to deal with these problems, and we will note which responses were particularly effective. We anticipate that this presentation of typical problems and our proposed solutions will generate a continuing discussion of new ways to deal with such problems.¹⁰

---

**PART ONE: A BRIEF OVERVIEW OF ALWD/LWI SURVEYS ON THE EXTENT OF THE USE OF TEACHING ASSISTANTS IN LWRA COURSES**

ALWD/LWI’s annual surveys demonstrate that a majority of law schools rely on teaching assistants in some capacity as part of the required legal writing program, both in and out of the classroom. In 2006, 65% (115 of 177) of schools reported using TAs to

---

¹⁰ We have prepared a short set of Appendices that include examples of detailed planning materials for managing TAs. These Appendices are available at the LWI Journal web site, www.journallegalwritinginstitute.org. We hope that these materials will be useful to new and experienced professors alike, and that the materials will help spark new ideas for reaping the benefits of a well-run teaching assistant program. We provided a similar set of sample TA handouts in conjunction with our presentation at the LWI Conference in Atlanta. This set of handouts can be accessed on the LWI website: Ted Becker & Rachel Creskery-Roberts, Forewarned Is Forearmed: Avoiding Some Common Problems with Using Upper-Level Students as Teaching Assistants, http://www.lwionline.org/publications/bibliographies2006.asp#b (accessed Aug. 6, 2007).
provide at least some portion of classroom instruction, continuing a slow but generally steady increase since 1999.11 Nineteen schools use TAs for over one-half of classroom instruction, and an additional fifty-four schools require TAs to provide 25 to 49% of classroom instruction.12 Moreover, the vast majority of those schools that use teaching assistants—104 of 120 respondents—require TAs to hold office hours during which they are available to answer student questions.13

Schools that use teaching assistants in the LWRA program, whether in the classroom or not, allow the TAs to provide guidance to first-year law students in a variety of subjects. Not surprisingly, research and citation top the list, but a good number of schools also use TAs to provide general instruction in both objective and persuasive legal writing.14 Similarly, TAs are expected to answer questions during office hours about these subjects, as well as questions about specific class assignments and broader questions about the law school experience, such as exam-taking.15

Finally, the survey includes limited information about the training provided to TAs to help them most effectively fill their instructional role. On average, schools in the most recent survey offered 10.72 hours per term of training—the fewest number of hours reported in the past seven years.16 The range of training of-

---


12 2006 Survey Results, supra n. 1, at 62.

13 Id. at 63.

14 Id. at 62.

15 Id. at 63.

16 Id. at 64. In the preceding five years, the results had stayed relatively consistent, hovering around 12 hours, with a one-year rise to 13.32 hours in 2002. See 2003 Survey Results, supra n. 11, at 62. Earlier survey results showed higher numbers of hours. In 1999, the average amount of TA training was 14 hours, increasing to 16 in 2000. ALWD & Leg. Writing Inst., 2000 Survey Results 39 (2000) (available at http://www.alwd.org/surveys/surveys/2000.html). These figures are not dramatically lower than those reported in other disciplines. For example, a 2000 survey of psychology graduate TAs reported an average of 22 hours of training. Steven A. Meyers, Conceptualizing and Promoting Effective TA Training, in The Teaching Assistant Training Handbook: How to Prepare TAs for Their Responsibilities 3, 5 (Loreto R. Prieto & Steven A. Meyers eds., New Forums Press, Inc. 2001) [hereinafter TA Training Handbook]. To the extent the ALWD/LWI surveys have identified a slight decline in training, that decline might result from a broader positive development in legal writing. As law schools moved away from program designs that relied heavily (or exclusively) on student instructors or recent law graduates, the formal training provided to such
Avoiding Common Problems in Using TAs

fered varies from zero to sixty hours. However, the survey provides no additional information about what this training consists of, such as what subjects it covers, or whether it includes only formal, program-wide training as opposed to guidance provided by individual professors.

PART TWO: THEORETICAL AND OBSERVED EVIDENCE REGARDING THE BENEFITS OF PEER TEACHING IN THE LWRA CLASSROOM

Both theory and practice suggest that using teaching assistants benefits first-year students, the TAs themselves, and professors. First-year students acquire a firmer grasp of key LWRA concepts; TAs continue developing their understanding of the subject in preparing to teach it; and professors can use their time more efficiently. Although rigorous empirical evidence of these benefits has not yet been established, as noted below the reported benefits of using TAs are almost universally positive.

neophyte instructors could have been expected to decrease even for those schools that still retained student instructors in a more limited capacity. For example, our school used to rely exclusively on upper-level students to teach legal writing, under the supervision of a non-LWRA faculty member. Student instructors were required to take a seminar that met approximately ten times per semester and that was “devoted primarily to discussion of methods of instruction in, and evaluation of, research, writing, and advocacy.” Donald S. Cohen, Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers, 29 J. Leg. Educ. 593, 594 (1978) (describing Michigan’s first-year legal writing course). Full-time professors now teach LWRA at our school, and TAs are no longer required to attend mandatory program-wide training sessions. Instead, training is provided by the individual professors. We assume that Michigan’s experience is similar (although not necessarily identical) to that of many other schools that have transferred responsibility for teaching LWRA to experienced professional faculty rather than students.

2006 Survey Results, supra n. 1, at 64. As has been the case for the past several years, at least one (and possibly more) school reports that TAs receive no training. See id. We believe some minimal level of training for TAs is necessary, these survey responses are not out of line with other disciplines that also expect graduate TAs to perform effectively without any training. For example, a 1994 study reported that approximately 50% of graduate teaching assistants received no training before beginning their duties, and a similar figure reported receiving no or very limited supervision once their teaching duties began. Loreto R. Prieto, The Supervision of Teaching Assistants: Theory, Evidence, and Practice, in TA Training Handbook, supra n. 16, at 103, 103–104. No doubt, many TAs are able to perform adequately despite limited (or even no) training and supervision, but more of both would undoubtedly further enhance their performance.

See 2006 Survey Results, supra n. 1, at 64 (asking schools how many hours of training are provided per term for TAs). We encourage ALWD and LWI to consider asking for such information in future surveys.
A. Peer Teaching and the Collaborative Learning Movement in Higher Education

At our and other law schools, professors—and not only legal writing professors—rely on teaching assistants in numerous ways. In our LWRA courses, we have used TAs to perform various tasks, including (1) reviewing citation format; (2) conducting library tours; (3) holding office hours; (4) helping draft or proof assignments; (5) simulating client interviews or meetings with a senior attorney; (6) presiding over practice oral arguments; and (7) meeting individually with struggling students to provide additional guidance on legal writing and organization. Other legal writing professors report using TAs in similar ways. The list is driven both by the professor’s pedagogical goals for his or her class and by the resources available at a given institution. In our case and undoubtedly that of the many other professors who use TAs, the choice to use TAs is made consciously, under the assumption that using them will enable first-year students to more effectively acquire writing and analytical skills. As it turns out, that assumption dovetails nicely with the conclusions reached in broader theoretical assessments of the effectiveness of graduate teaching assistants.

Modern pedagogical theory recognizes the many benefits that teaching assistants can contribute to creating an effective learning environment. Various authors have discussed the uses and benefits of teaching assistants in the broader law school curriculum. See e.g. Jay M. Feinman, Teaching Assistants, 41 J. Leg. Educ. 269, 269 (1991) (discussing the use of teaching assistants in large first-year law school classes to “reinforce the usual forms of learning within the large class; to introduce a broadened range of materials, skills, and learning methods; or to transform the large class experience”); Leon E. Trakman, Law Student Teachers: An Untapped Resource, 30 J. Leg. Educ. 331 (1979). Because the use of teaching assistants in large law school lecture courses raises a number of issues not present in the smaller, more individualized LWRA course, we do not address this more generalized use.

For example, in 1992, Ruth C. Vance noted that, at Valparaiso University School of Law, TAs “function[ed] as assistants to the professors and as teachers and counselors to the students . . . [by] help[ing] create writing and research assignments[,] . . . troubleshoot[ing] those assignments, comment[ing] on student papers, and serv[ing] as judges for oral arguments.” Vance, supra n. 8, at 4; see also Bowman, supra n. 8, at 16 (TAs at Stetson review and comment on papers); Wallinger, supra n. 8, at 16 (TAs at Rutgers-Camden assist professors “in preparing materials for the students, and assist[ ] the students themselves.”).

Because the authors of this Article are fortunate enough to work in a program that offers extensive academic and course planning freedom, we are not required to, and do not use teaching assistants in the same ways. See infra n. 67. We address the various possible uses and benefits of teaching assistants based upon the assumption that some professors may choose to (or be obligated to) use TAs in different ways than professors at other institutions.
environment. Although the evidence is largely anecdotal, and we are unaware of any research studies specifically on the use of TAs in American law schools, the general consensus is clear: Peer teaching is considered a “subset of the collaborative learning movement in higher education.” Collaborative learning, in turn, “is a pedagogical style that emphasizes cooperative efforts among students, faculty, and administrators, [benefiting] participants by making them more active as learners and more interactive as teachers.” Specifically, effective peer teaching works on both a cognitive and affective level, for peer teacher and learner alike.

---

22 Much literature exists addressing the use and training of graduate teaching assistants in post-secondary institutions. We found the following four sources particularly helpful: Jody D. Nyquist & Donald H. Wulff, Working Effectively with Graduate Assistants (Sage Publications 1996); The Professional Development of Graduate Teaching Assistants (Michele Marincovich et al. eds., Anker Publg. Co. 1998) [hereinafter Professional Development]; TA Training Handbook, supra n. 16; and Neal A. Whiteman, Peer Teaching: To Teach Is to Learn Twice (Assn. for Study Higher Educ. 1988). Of course, numerous differences exist between teaching assistants in law school and other graduate schools. The most important of these is that graduate TAs shoulder a heavier teaching burden. Graduate TAs teach a large percentage of undergraduate courses, between 30 to 40% by some reckonings. Loreto R. Prieto & Steven A. Meyers, Introduction, in TA Training Handbook, supra n. 16, at vii. Moreover, graduate TAs frequently take on teaching responsibilities during their first semester in graduate school and have the opportunity to develop their teaching skills for several years during the course of a lengthy pursuit of a graduate degree. In contrast, law school TAs might have some teaching obligations for limited aspects of a legal writing course, but in general do not have responsibility for the entire course. See 2006 Survey Results, supra n. 1, at 62 (describing that four schools report that TAs are used “exclusively” in the required legal writing course, and an additional three schools use TAs for at least 75% of classroom teaching hours). Further, law school TAs usually serve for shorter periods, because they do not begin their duties until their second year of law school, and thus have no more than two years to devote to an assistantship. (We would love to have our TAs with us for longer periods, but to date none has declined the chance to graduate in favor of remaining a TA.) Still, we see no reason why the broader literature on graduate TAs is not applicable to law school TAs, as long as the occasional differences are kept in mind.

23 See Whitman, supra n. 22, at v.

24 Peer teaching is not a new concept, although it is often described as such. Id. at 1. One researcher traces the concept back to Aristotle. Id. (citing Lilya Wagner, Peer Teaching: Historical Perspectives 3 (Greenwood Press 1982)). In the United States, peer teaching techniques were popular in secondary schools in the early nineteenth century, but then fell from favor until the 1960s, at least when judged by references in educational literature. See id. at 1–2; see also Nancy Van Note Chism, Preparing Graduate Students to Teach: Past, Present, and Future, in Professional Development, supra n. 22, at 1, 2 (noting that the large-scale employment of graduate students as TAs in post-secondary education did not begin until after World War II).

25 Whitman, supra n. 22, at 4.


27 Technically, upper-level TAs in LWRA classes could also be described as “near-
First, less experienced students benefit from the guidance of their more experienced peers. “Peer teaching would not be feasible if there were no peer learning.” Although TAs are separated from first-year students by a year or two of additional law school experience, this gap is small enough that both sets of students generally regard themselves as peers. Peer teachers are believed to benefit fellow students in part precisely because they are peers. Moreover, peer learners benefit from the one-to-one instruction that often characterizes peer teaching, such as when teaching assistants hold office hours or other individual meetings with first-year students. Further, TAs’ limited mastery of the subjects they are called upon to teach may in fact allow them to

When a second- or third-year student acts as a teaching assistant for first-year legal research and writing courses, for example, it is difficult to characterize these teachers as peers of the first-year students in terms of experience or knowledge. The intense socialization and educational training that occurs in the first year (and in the summer after the first year if students enter clerkships) creates a qualitative difference in the experience levels between these students.

Yet in terms of the relationship between these students, there is much that is characteristic of peer relationships. The students are all part of the same educational process and may have the same faculty teaching their separate courses. The second-year student is much more likely to empathize with the first-year student’s learning experience than is a faculty member, an adjunct attorney, or a [law school] graduate. Likewise, the first-year student is more likely to relate to their upper class mentors as “recent survivors” than as junior faculty: that is, with less deference and correspondingly less distance. Because of these connections and the relatively small passage of time in the rank differences, the students are likely to function as peers in the process.

Barbara Glesner Fines, Peer Teaching: Roles, Relationships & Responsibilities, in UMKC Peer Teacher Manual, http://www.law.umkc.edu/faculty/profiles/glesnerfines/bgf-ed1.htm (accessed Aug. 30, 2007) (footnotes omitted); see also Whitman, supra n. 22, at 14 (describing TAs as near-peers “in the sense that these peer teachers may be more advanced than their students, but not so far advanced to no longer be considered peers”). To avoid needless hyphenation, we will describe TAs as peers throughout the remainder of this Article.

28 Whitman, supra n. 22, at 9.

29 See supra n. 27; see also Kenneth A. Bruffee, Two Related Issues in Peer Tutoring: Program Structure and Tutor Training, 31 College Composition & Commun. 76, 77 (1980) (noting that undergraduates tend to view graduate student tutors as surrogate teachers, but that “[u]ndergraduate peer tutors, being more or less equal in age and status with tutees, are more likely to be perceived as ‘something else’—not teachers exactly, but helpers, friends, at best intellectual companions”).

30 See Diana H.J.M. Dolmans et al., Trends in Research on the Tutor in Problem-Based Learning: Conclusions and Implications for Educational Practice and Research, 24 Med. Teacher 173, 176 (2002) (noting that student tutors can place themselves in their student tutees’ “way of thinking” and interact with the tutees “at, or right above the tutees’ level of knowledge[,] as contrasted with faculty tutors who are less able to ‘understand the nature of the cognitive problems students were faced with in attempting to master the subject matter’”); Whitman, supra n. 22, at 9.

31 See Whitman, supra n. 22, at 9.
transmit information more effectively to first-year students. Experienced professors sometimes are so familiar with a subject that they unconsciously omit information or procedural steps needed for complete understanding by less-experienced (or completely inexperienced) first-year students. Based on our experience, most TAs have not mastered legal writing and analytical skills to such an extent that they risk skipping explanatory steps, or at least as many steps as a more experienced professor might inadvertently omit.

So, too, do the teaching assistants benefit, by acquiring a more thorough understanding of the subject being taught. First, preparing to teach a subject triggers a series of cognitive processes. When LWRA professors ask a teaching assistant to provide supplemental instruction in subjects like research or citation, the TA must first review the material to be presented. Even when the teaching assistant is familiar with the subject from her first-year experience or summer internship, reviewing the material can help her understand it more thoroughly. Second, the TA must organize the information to be presented into a form best suited for the intended first-year audience, a challenging and time-consuming (but ultimately rewarding) task, even for well-seasoned professors. Third, the processes of reviewing and organizing material might even lead to a partial or complete reformulation of the subject, giving rise to new insights or a more thorough comprehension of the deep structure of the material.

Studies suggest that these cognitive processes result in more complete learning of the subject matter. One researcher has explained that "the process of teaching material... motivates... students [serving as peer instructors]. The result is more active mental engagement compared to learning aimed simply at passing

32 Marilla D. Svinicki, Creating a Foundation for Instructional Decisions, in Professional Development, supra n. 22, at 89, 93. A study of teaching skills for medical residents suggested that "unconsciously competent" medical faculty might have relatively more difficulty teaching a medical procedure to residents, while other residents who have recently learned the procedure could be more effective because "they are 'consciously competent,' that is, they still have to think through each step of the procedure, one step at a time." Whitman, supra n. 22, at 9 (quoting Thomas L. Schwenk & Neal Whitman, Residents as Teachers (U. Utah Sch. Med. 1984)).
33 Id. at 9.
34 See id. at 5.
35 See id.
36 See id.
37 See id.
38 See id. at 5–7.
If “the real test of academic excellence is communicating clearly about matters unknown to others, for example, to fellow students[,]” then TAs who are called upon to teach material to first-year students will have the opportunity to develop and demonstrate their abilities in this crucial area. This skill applies equally in law practice, where young lawyers will also be called upon to clearly convey information to other audiences with an interest but perhaps not much direct knowledge of the subject, such as supervising attorneys or clients.

Peer teaching can also benefit teaching assistants on an affective level. These benefits seem to accrue as a result of the helper therapy principle, which posits that people who provide help to others “profit[ ] [themselves] from their role as helper.” By assisting first-year students, TAs may enhance their own self-confidence as well as their tolerance of others. One review of the peer teaching literature suggests that “peer teaching increased [college] tutors’ motivation to learn and self-esteem.” Of course, measuring affective benefits via a peer teacher’s self-assessment is more subjective than measuring cognitive benefits as demonstrated by improved test scores. Still, it seems fairly clear that peer teaching improves not only a teacher’s understanding of the subject, but also enhances the teacher’s intellectual and emotional development.

In sum, the educational literature demonstrates many benefits from the collaborative learning inherent in peer teaching. Peer teachers and peer learners alike enhance their understanding of a subject when peer teaching is used, under supervision, as part of the professor’s overall pedagogical strategy. Although this Article is not intended to convince professors to make use or more use of

---

39 Id. at 6 (citing Carl A. Benware & Edward L. Deci, Quality of Learning with an Active Versus Passive Motivation Set, 21 Am. Educ. Research J. 755 (1984)).
40 Id. at 5 (citing Wagner, supra n. 24).
41 TAs might also obtain cognitive benefits from the actual process of teaching, as opposed to preparing to teach, although the evidence for this is less conclusive. See id. at 6–7.
42 Id. at 7.
43 See id.
44 Id. (citing Barbara Goldschmid & Marcel L. Goldschmid, Peer Teaching in Higher Education: A Review, 5 Higher Educ. 9 (1976)).
45 See id.
46 This is certainly consistent with the feedback we have received over the years from our TAs.
Avoiding Common Problems in Using TAs

Teaching assistants, the educational benefits for both TAs and first-year students strike us as a powerful impetus for doing so.

B. Experiential Advantages of Using Teaching Assistants in an LWRA Course

Experienced legal writing professors have reported many of the same benefits of using teaching assistants as those described in the theoretical literature. In highlighting the many law school-specific benefits of using teaching assistants, we rely in part on the list compiled in Julie Cheslik’s 1994 survey, supplemented with our own observations. As one commentator stated, “[p]ut simply, a teaching assistant’s cognitive role is to help students learn better what the teacher wants them to learn, including both substance and skills.” TAs can help fulfill this role in at least three ways.

---

47 Cheslik, supra n. 2, at 411–412. Like the broader teaching assistant literature, most published discussions of the pros and cons of TAs in law schools are largely anecdotal. In her 1994 article, Cheslik noted that “[a]ny proof of the TA’s benefit to students is scarce: no school has measured the effect of TAs on students’ skills, knowledge, or grades. Benefits reported are benefits observed or perceived by [LWRA] directors and faculty.” Id. at 411. Despite this observation, the vast majority of respondents to her survey who stated that they used teaching assistants “profess[ed] great satisfaction with the TAs and [s]aw many benefits.” Id.

One study of law students in the Netherlands presents some evidence against these observations. In that study, law students who had participated in small-group tutorials led by faculty members “scored significantly higher on a test designed to measure higher order cognitive skills than students guided by a student tutor.” J.H.C. Moust et al., Peer Teaching and Higher Level Cognitive Learning Outcomes in Problem-Based Learning, 18 Higher Educ. 737, 737 (1989); but see S. Moody & J. McCrae, Cross Year Peer Tutoring with Law Undergraduates, in Group and Interactive Learning 201, 201 (H.C. Foot et al. eds., Computational Mech. Publications 1994) (reporting favorable albeit anecdotal results of using peer tutors in undergraduate law program in Scotland). Other studies have reached contradictory results, showing no difference in student performance when guided by faculty or student tutors. Dolmans et al., supra n. 30, at 175. From our perspective, these studies do not actually address the use of TAs in the manner contemplated here: we do not encourage using TAs to substitute for professor-driven instruction, but instead to complement and supplement it. The point is not to contrast the respective pedagogical effectiveness of professor and TA, but instead to combine them.

48 While we similarly lack more than anecdotal evidence that teaching assistants offer benefits to the first-year student, that anecdotal evidence overwhelmingly indicates that first-year students also find TAs to be helpful. We believe the following comments from two of our students accurately represent the majority of student opinion about our teaching assistants: (1) “[The teaching assistant] was really helpful when I had a question about which cases were binding and which weren’t.” (2) From a student who struggled all year and made significant improvement through working one on one with a teaching assistant in addition to participating in all the regular class assignments and activities: “[Your teaching assistant] is always willing to meet with me and look over my work even late at night by e-mail [when you don’t have office hours].”

49 Feinman, supra n. 19, at 270.
First, teaching assistants can perform an important helper or mentor function.\textsuperscript{50} Importantly, if a teaching assistant is used more as a mentor than as a grader, the TA “is likely [to be] seen as the students’ assistant and ally,” and can “help[ ] the students improve their work in preparation for the ultimate grader.”\textsuperscript{51} In fact, some students may be afraid to speak directly to the professor (particularly when the student has a complaint), and a teaching assistant may provide the less formal mentoring function that allows a timid student to get the help he or she needs.\textsuperscript{52}

Second, the teaching assistant can also serve in an “intermediary” role that benefits both students and the professor.\textsuperscript{53} In that role, the teaching assistant can help the professor maintain a finger on the pulse of the class by “report[ing] to their faculty supervisor on student achievement [and progress], student understanding of the material, and student complaints.”\textsuperscript{54} When the professor knows what is truly troubling students, the professor can better tailor the course to meet student difficulty head-on. Third, “[t]he TAs . . . represent the faculty to the students.”\textsuperscript{55} Thus, the well-supervised and guided teaching assistant “may encourage a student to talk to a teacher, or may advise a student on what is likely to be a faculty viewpoint.”\textsuperscript{56}

\textsuperscript{50} Cheslik, supra n. 2, at 398.
\textsuperscript{51} Id.
\textsuperscript{52} One commentator explains first-year reluctance to consult professors as follows:

Simply, of the questions which occur to a first year student in undertaking his first research and writing efforts, many may appear to him too trivial to warrant inquiry of a faculty member; further, he may expect that if the faculty member also considers the question to be trivial his evaluation of the student will consequently be lowered.

In either case, essential questions are postponed or, more likely, never voiced at all. On these small but often critical matters earlier rapport with a second or third year student can be expected.

Goldstein, supra n. 8, at 469. Terrill Pollman has made a similar observation, noting that first-year students needing writing or research help might find it less intimidating to ask another student for help than to approach the professor. Terrill Pollman, A Writers’ Board and a Student-Run Writing Clinic: Making the Writing Community Visible at Law Schools, 3 Leg. Writing 277, 284 (1997). Of course, there is a counterpoint to this observation. As we have experienced (and Pollman has recognized), some students fail to take advantage of the help of teaching assistants because they fear that visiting a teaching assistant for extra help might demonstrate some sort of weakness on the part of the first-year student. \textit{Id.} at 285. We will briefly discuss suggested ways to help professors anticipate and alleviate the possible stigma of visiting with a teaching assistant for additional help in Section III(F).

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
These beneficial roles played by TAs have been recognized by other scholars and teachers as well. For example, Terrill Pollman has suggested creating a Writer’s Board and a student-run Writing Clinic as ways to “improve legal research and writing training . . . [and to] raise students’ confidence in the writing program and in themselves.” While the creation of such a clinic is outside the scope of this Article, Pollman discussed numerous benefits of using student teachers in some capacity and recognized that the training of students who would run such a clinic would likely be similar to training of teaching assistants. Thus, we briefly summarize Pollman’s list of the benefits of using student teachers. First, Pollman described the benefits for first-year students, observing that upper-division law “[s]tudents can be especially effective teachers,” because they “remember clearly which concepts or skills are likely to cause confusion and distress to first[-]year students.”

Second, Pollman noted some of the very real benefits to the teaching assistants themselves. As Pollman stated, “every teacher knows that one of the best ways to learn something is to teach . . .”

57 In a recent presentation, Deborah McIntosh, Laurie O’Neal, and Erik Ryberg recognized some of the pros and cons of using teaching assistants. Deborah McIntosh et al., Conf. Presentation & Handout, Teaching Assistants: Why You Can’t Live Without Them and How to Use Them Effectively (Tucson, Ariz., March 2006). Although the main focus of the presentation handout was a proposal for creating or enhancing a TA program and a sample list of substantive topics to teach the teaching assistants, id. at 5–9, the presenters did note some benefits to professors, like (1) an improved attitude of first-year students due to reinforcement of the professor’s pedagogical goals by teaching assistants; (2) the opportunity to assess what does and does not work through discussions with TAs who previously took the first-year course; and (3) the ability to hand minor assignments to teaching assistants to provide the professor with more time to do more substantive work. Id. at 1. The presenters also briefly noted benefits to first-year students and to the TAs themselves. Id. at 2.

58 Pollman, supra n. 52, at 277.
59 Id. at 284–285.
60 Id. at 285 n. 32.
61 Id. at 284 (citing Cheslik, supra n. 2).
62 Id. In commenting on the use of teaching assistants in the writing program at Valparaiso, Ruth C. Vance noted that “second-year students are often more effective TAs than third-year students because their own memories of the first year of law school and legal writing are fresh.” Vance, supra n. 8, at 4; see also Feinman, supra n. 19, at 277 (opining that second-year students might be more enthusiastic than third-years). In our experience, however, we have detected no “drop-off” in effectiveness between second-year and third-year teaching assistants. Nor do we subscribe to another common lament about third-year performance as graduation looms. Perhaps law students in general do lose focus and interest in their casebook classes as the end of law school approaches, but we have observed no boredom or lack of motivation in our third-year TAs. See Jack Achtenburg, Legal Writing and Research: The Neglected Orphan of the First Year, 29 U. Miami L. Rev. 218, 254 (1975) (suggesting that serving as TAs might affirmatively help 3Ls avoid “graduation syndrome”).

63 Pollman, supra n. 52, at 284.
This remark is consistent with our own observations. Teaching assistants get additional opportunities both to write their own materials (in programs where assignment creation is a part of the teaching assistant’s list of responsibilities) and to edit the work of others. Moreover, teaching assistants often get many more opportunities to work individually with a professor than most other law students do. Every year, our teaching assistants report that, in addition to helping first-year students, the TAs themselves feel that they have improved their own research, writing, and analysis skills through the process of teaching others. Teaching assistants have also reported to us that their citation skills improved dramatically, which is not surprising, as we both use TAs extensively to help with citation review.

Finally, in addition to the benefits to students recognized by Pollman, our experience has been that teaching assistants are also a valuable resource for LWRA professors. Using teaching assistants allows us to devote more of our time to achieving the core goals of the LWRA course—preparing our students to succeed in practice, wherever that might be.

In sum, numerous benefits accrue to first-year students from using upper-level teaching assistants, including (1) additional emotional support during the uncertain first year of law school; (2) increased retention of difficult material through reinforcement in one-to-one sessions with teaching assistants; (3) greater student success through individualized instruction and an enhanced understanding of where students are struggling; and (4) increased student satisfaction through the provision of mentors, role models, and individual attention. TAs also benefit, as do the professors themselves. The benefits noted by the respondents to Cheslik’s survey, as well as by other legal writing professors, are consistent with those we have observed in our classroom and in larger explorations of using teaching assistants in undergraduate institutions. These benefits might prove illusory, however, without effective control by the LWRA professor. This, of course, leads us to the main focus of this Article: developing an awareness of the harms

---

64 Id.; see also Goldstein, supra n. 8, at 468 (observing similar effects upon upper-level students who were required to select research topics for first-year students in an intellectual property seminar, and who were responsible for the substantive accuracy of the memo prepared by first-year students); Trakman, supra n. 19, at 340 (“Senior student interviewees repeatedly echoed an axiom: an ideal way to grow to appreciate the intricacies of legal reasoning is through educating others.”).

65 See Cheslik, supra n. 2, at 411.
that could arise when using teaching assistants and planning to alleviate or even eliminate at least some of the most pervasive and damaging problems.

PART THREE: PROBLEMS ASSOCIATED WITH USING TEACHING ASSISTANTS AND HOW TO AVOID THEM

We begin Part Three by identifying some of the major problems that might arise when using TAs in the first-year LWRA course. The remainder of this Article addresses several of the most difficult of such concerns, including problems associated with (1) selecting good TAs; (2) providing appropriate guidance to TAs; (3) defining the TAs’ role to both the assistants themselves and the first-year students they will be assisting; (4) addressing mistakes made by TAs; (5) finding time to supervise TAs; and (6) encouraging first-year students to use the TAs to enhance their experience in the course. We have encountered each of these problems when using teaching assistants, and our successes and failures in overcoming these difficulties are described below. As a caveat, we recognize that there is no single way to manage TAs. Indeed, our individual approaches differ significantly. However, we both share the goal of ensuring that teaching assistants provide maximum benefits to first-year students and to us.

In writing this Article, we are well aware that LWRA programs use TAs in different ways. We are fortunate that our school has sufficient resources to allow us to use many TAs (we regularly

60 According to Cheslik, some important potential difficulties include the possibility of TAs providing misinformation or inconsistent information, the likelihood of TA role conflict or confusion, and the possible dangers stemming from a lack of structure in how professors use teaching assistants (which in turn filters down to first-year students). Cheslik, supra n. 2, at 412–413; see also McIntosh et al., supra n. 57. Many of these issues can be subsumed under the more general category of problems stemming from the professor’s failure to provide sufficient supervision and guidance. This, in turn, suggests that with proper oversight, a professor can anticipate and avoid many common concerns and respond more effectively to those that do arise.

67 To briefly illustrate our different approaches, one of us tends to hold more regular group meetings with teaching assistants, while the other relies more on e-mail. Further, one of us prepares a “syllabus” for TAs at the beginning of each semester, setting out deadlines, office hour schedules, and other logistical matters so the TAs can plan their semesters. The other handles administrative matters on a more ad hoc basis via email, using saved messages from past years. Both of us, however, provide extensive written instruction and directions to the teaching assistants for their various assignments, such as citation reviews, practice oral arguments, and client interviews. Some of these materials are included in the Appendices available at the LWI Journal website. See supra n. 10.
use between four and six TAs a year), and that we are permitted the flexibility to use TAs in whatever ways we deem best to achieve our educational objectives. That said, we believe our observations in this Part apply regardless of the TA model used by a particular school. For example, in some programs a professor might be limited to (or choose to use) only a single TA. Alternatively, a school might require professors to use a collective pool of TAs. Either way, someone will have to select the TAs, provide guidance and supervision, deal with mistakes by TAs, and handle similar tasks.

Of course, some differences should be taken into account in a program using a much smaller number of TAs or in a program where professors share TAs. Providing guidance and supervision to one or two TAs is a less onerous task than managing a larger group. On the other hand, selecting TAs may be more difficult when the program uses a limited number of TAs, as the professor will need to look for one individual with numerous attributes rather than hiring a well-rounded group. However, we believe that any effective TA program will recognize that capable TAs (even when working solo) can serve in a variety of ways as mentioned in this Article. Therefore, while minor adjustments to our advice might be necessary for a given program, the following discussion should prove relevant for a wide variety of TA program models.

Variations on some of the problems we discuss below could arise in graded programs. At Michigan, LWRA is graded pass/fail, which for the most part frees us from having to worry about justifying in minute detail the grades we award. On the other hand, most LWRA programs award grades that count in students’ GPA, and professors at those schools must be more concerned about potential inequities in how much assistance TAs provide to individual first-year students, even if those inequities are more perceived than real. One preliminary remark is necessary regarding how a graded program might compel different thinking about the selection and supervision of TAs. Professors or Program Directors concerned with issues of fairness regarding perceived unequal (or incorrect) TA guidance to individual students may opt to drastically curtail the types of activities in which TAs can participate. Thus, in a program where TAs only perform tasks like cite checking and research for professors, our observations regarding the importance

---

68 One hundred and fifty-eight schools, to be precise. 2006 Survey Results, supra n. 1, at 9.
of selecting TAs who will be good mentors to first-year students are obviously less relevant. On the other hand, other observations may well apply equally in a graded program. Therefore, when appropriate, we discuss below how our suggestions might translate into a graded environment.

A. Problems and Solutions in the Selection of Teaching Assistants

While many problems can and will arise when using teaching assistants in the first-year course, many of the worst problems can be avoided by selecting a highly-qualified and properly-motivated group of teaching assistants. Choosing an ineffective or inappropriate teaching assistant can have lasting negative consequences. First, the first-year students suffer, particularly if the professor does not catch the problems caused by the teaching assistant early on. An ineffective teaching assistant may give confusing or incorrect advice, and it may take much effort to re-teach the misguided first-year students. Moreover, if the first-year students lose faith in one teaching assistant’s ability or motivation to do the job well, they may lose faith in all the TAs. Second, a problem TA requires additional supervision. As most in the LWRA field know, time is a precious commodity. It is particularly disquieting to find that time draining away on someone who has been selected to make the professor’s job easier. Finally, a teaching assistant who cannot do the work is “dead weight.” A professor who relies on more than one teaching assistant may find that the other TAs end up bogged down in the additional work of the nonfunctioning TA.

Because mistakes in the process of selecting teaching assistants may introduce intractable problems into the first-year course, avoiding selection errors in the hiring process is critical. In

---

69 Several professors have discussed considerations to keep in mind when hiring law school teaching assistants. See e.g. Feinman, supra n. 19, at 277–278; Vance, supra n. 8, at 4–5.

70 Most of the teaching assistants we have selected have been fantastic, and we have become better at learning how to identify them as we went along, but we have certainly found some TAs less helpful than others. An “ineffective” teaching assistant is one who either makes inadvertent mistakes or simply does not interact well with the professor or the students. The rarer “inappropriate” TA actually refuses to do work that the professor has requested (usually in passive ways like consistently missing deadlines) or deliberately undermines the professor’s authority or credibility when speaking with the students. This section will address how to avoid problem teaching assistants by weeding them out in the selection process. Section III(D) will address what to do when TAs who have already been selected make inadvertent or deliberate mistakes.
order to make the selection process effective, though, one must identify the necessary attributes to look for in selecting teaching assistants. Individual schools likely have different minimum GPA requirements and the like, but our focus assumes that any pertinent academic requirements have been satisfied. Moreover, in our experience, hiring an academically gifted student does not guarantee a successful professor-teaching assistant relationship; the role of teaching assistant requires more than a high GPA. While the following discussion of specific attributes to look for may benefit new professors the most, even experienced professors might not have thought all that much about how to select a teaching assistant. In our opinion, several considerations must be addressed when selecting teaching assistants, though each professor may decide to place more weight on a given consideration depending upon how that individual professor utilizes TAs. The key considerations are:

- What other activities does the prospective teaching assistant participate in?
- What is the prospective teaching assistant’s personality? Can she relate well to the first-year students?
- Should the prospective teaching assistant be one of the top writers in the class? Can eagerness make up for not being at the top of the LWRA course?
- Do grades in other courses matter?

First, an inherent problem in using student teachers is that students have other important duties beyond serving as our teaching assistants. Students may be serving on law journals, they may be planning to take a particularly heavy course load, or they may be signed up for a clinic. Furthermore, with the rising cost of a law...
gal education, more students may be accepting outside employment. Finally, some candidates are married or have children. It is important to identify those outside activities that might make the teaching assistant more effective as well as those that are likely to prevent the TA from realizing his or her full potential. For example, our experience has been that TAs who also participate in moot court or serve on a journal are often particularly effective. They can offer specific advice to students about these organizations, and they gain valuable experience in key skills through participation in these activities. Moot court participants can offer value-added service during the oral argument portion of the first-year course. Journal members are often master cite-checkers. Students who participate in clinics may be able to reinforce the professor’s message that practical skills are important. Finally, students who have learned to juggle school as well as family obligations may be able to provide key time management suggestions.

The nature of a student’s outside activities is often less important than the flexibility of the student’s schedule. For example, a student working a full-time, evening job may not be a particularly effective teaching assistant if the professor expects that TAs hold evening office hours. However, if that same student worked four days a week in the law school library, and was able to either shift her work schedule around or help students while she works in the library, she might serve as an additional (and readily available) resource for teaching research skills.

Finally, one of the easiest ways to assess how a student’s outside activities might affect his performance as a TA is simply to ask how the student plans to manage time. Often, participation in numerous law school activities is a sign that the student is truly engaged in the law school experience; this is an asset, not a hindrance. On the other hand, the student must understand that teaching assistant duties need to be high on the student’s list of priorities. If this is clear at the outset, a busy student need not and should not fall to the bottom of the list of candidates.\footnote{Of course, a professor should not ignore warning signs that a busy student will be unable to make the appropriate time commitment. For example, one of us once tried to schedule an interview with a prospective teaching assistant. The student rejected five suggested meeting times due to prior commitments before finally settling on a time. In that meeting, it became clear to both professor and student that she was unlikely to be able to perform at the level expected of her, due to her busy academic and social calendar.}

Another vital step in the selection process is to assess the candidate’s personality. When choosing from a group of former stu-
dents, a professor may already have a general sense of each student’s temperament. However, an interview can often reveal how the professor and student will interact when the student’s role changes to that of teaching assistant. We cannot stress enough how well a prospective TA’s temperament predicts that student’s likely success in conveying LWRA guidance to first-year students.\(^\text{73}\) If teaching assistants are to serve as mentors, they must possess an outgoing and approachable disposition. Unfortunately, stellar performance in LWRA classes does not necessarily correlate with either an outgoing nature or mentoring ability. Thus, we have sometimes had to pass up a top student for a slightly lower performer with the personal makeup necessary to win over and work with first-year students.\(^\text{74}\)

On the other hand, teaching assistants must have demonstrated proficiency in writing, analysis, research, and oral advocacy.\(^\text{75}\) To that end, we target the most proficient students who meet our personality requirements. When choosing students based upon performance in LWRA courses, a professor should consider two points. First, first-year students will likely benefit from a group of teaching assistants offering a range of skills. In our experience, it is rare to find one student who is the best at all aspects of LWRA. For example, students who are the best writers may not be the

\(^{73}\) Here, our experience and theory mesh nicely. Pedagogical theory predicts and recognizes the gains students accumulate when interacting with peer tutors. See supra text accompanying nn. 28–31. Unfortunately, these theoretical gains will be largely illusory if personality conflicts preclude the TA and first-year student from hitting it off.

\(^{74}\) Arguably, selecting TAs who are not at the top of the class might lead to increased benefits for both TAs and students in some situations: [The traditional assumption was that tutors should be the “best students” (i.e. those most like the professional teachers). However, very large differentials in ability can prove under-stimulating for the tutor. If tutors are students who are merely average (or even less), both tutor and tutee should find some cognitive challenge in their joint activities. Although tutee gain may not be so great, the aggregate gain of both combined may be greater.]

K.J. Topping, The Effectiveness of Peer Tutoring in Further and Higher Education; A Typology and Review of the Literature, 32 Higher Educ. 321, 323 (1996) (citations omitted). Moreover, to the extent that using TAs to meet with first-year students produces benefits simply by increasing interaction between students and encouraging them to discuss LWRA subjects, it matters little whether a particular TA received the highest grade in the LWRA course. What matters more is that the first-year students with whom that TA meets have the chance to continue developing their familiarity with LWRA concepts. See Scott G. McNall, Peer Teaching: A Description and Evaluation, 2 Teaching Sociology 133, 138 (1975).

\(^{75}\) Again, our recommendations here are supported by more theoretical considerations. As noted, TAs may be more effective than professors in transmitting certain concepts because they tend not to unconsciously omit key steps. See supra text accompanying n. 32. This obviously assumes, however, that the TAs have a base level of competence and comprehension of the ideas to be conveyed.
best oral advocates. If a professor is fortunate enough to be able to select more than one TA, we recommend choosing students who collectively exhibit all the traits the professor values, which could mean selecting one of the best oral advocates even if he has slightly less impressive writing skills. Second, in our view, while individual candidates need not be the very best writers or oral advocates in their class, they each must demonstrate proficiency in citation form, given first-year students’ extensive reliance upon TAs for citation review.

Finally, each professor will find different attributes more important than others depending upon the duties assigned to the teaching assistant. For example, if a professor uses TAs to research and draft writing assignments, then creativity, initiative, and the ability to work without constant supervision might factor into a hiring decision. If a professor expects the TAs to prepare and present mini-lectures on citation or other discrete topics, public speaking ability becomes a higher priority. To avoid selection errors, the professor should identify and rank those desired attributes before attempting to choose teaching assistants.

Having identified the most important attributes, the professor can begin selecting TAs. Here, new professors will be at a bit of an initial disadvantage, because they do not have a group of previous students from whom to choose teaching assistants. Therefore, for new professors, an interview is essential, preferably in person but by telephone if necessary. Of course, new professors should review legal writing samples and resumes to get a sense of the candidate’s ability, as well as solicit recommendations from a candidate’s LWRA professors. But only a meeting with the candidate will really provide a sense of her personality and interest in the position. Experienced professors, of course, will presumably already have obtained a good sense of most of this from observing the student’s performance in their course. Even so, returning professors proba-

---

70 Some professors might wish to factor such attributes as race, ethnicity, sex, or other characteristics into the balance. We take no position on that subject here, and the larger questions it raises are beyond the scope of this Article. On the narrower question of whether choosing TAs for such distinctive qualities might alter the mix of benefits that TAs provide, readers might be interested in a recent study of political science undergraduates. That study supports the claim that “women teaching assistants effectively motivate women students[,]” but also concludes that “the gender match between a teaching assistant and a student appears largely irrelevant for student performance.” Daniel M. Butler & Ray Christensen, Mixing and Matching: The Effect on Student Performance of Teaching Assistants of the Same Gender, 36 PS: Political Sci. & Pol. 781, 781 (2003). We are unaware of any similar studies measuring the potential effects of TAs selected for other characteristics.
bly have not had occasion to screen prospective teaching assistants as part of ordinary class interactions, and might benefit from a more limited interview.

For either new or experienced professors, the initial interview should cover at least two issues: (1) the professor’s expectations; and (2) the student’s interest in the position and ability to commit the necessary time to the job. First, a prospective candidate cannot assess whether he even wants the job without knowing what the job entails. We both ask a great deal of our TAs. Making that clear in the interview process allows inappropriate candidates to weed themselves out. Moreover, those teaching assistants we ultimately choose have been properly warned at the outset that they will be held to high standards. Second, asking the candidates why they want to be a TA allows the professor to assess whether each candidate truly has an interest in the position as well as whether the candidate actually understands what the job entails. Addressing these issues at the outset can help avoid problems and solidify the relationship between the professor and the teaching assistants.

B. Providing Appropriate Guidance—How Much Is Too Much? Too Little?

After selecting teaching assistants comes the more difficult task of effectively managing and supervising them. The TA/professor relationship works only with sufficient guidance. In this section, we address how and when professors can best supervise TAs as well as how much direction TAs need.

1. What Kind of Guidance Is Necessary at the Beginning of the School Year?

Once TAs have been selected, the task of molding them into effective resources for first-year students (and the professor) begins. We sometimes liken the task of supervising TAs to herding cats, a metaphor with surprising applicability to teaching assistants who each have independent educational and professional objectives, some of which might not always be perfectly correlated with the professor’s goals. The professor must bear the ultimate responsibility for directing the teaching assistants, and walks a fine line when doing so. On one hand, the professor must guide TAs without being too overbearing; over-supervision is likely to create a group of teaching assistants that lack initiative. On the
other hand, under-supervision has its own set of dangers, particularly because, at least in our experience, TAs have had little prior teaching history and thus cannot fall back on their own experience if questions arise about a task or if problems emerge with a student. Thus, if anything, TAs crave rather than resent professorial guidance.  

We have never heard TAs complain that we gave them too many instructions about how to accomplish a specific task—but we have occasionally heard the reverse. In the end, our position is to err on the side of providing more rather than less direction to TAs.

When supervising TAs, professors take on a variety of roles, including those of manager, educational model, and mentor. The managerial role includes “personnel duties. You will have to require TAs . . . to meet certain standards of excellence; you will appoint, motivate, coordinate, monitor, and, hopefully infrequently, dismiss your TAs.” As an educational model, a professor’s behavior can influence TAs and help them develop their own abilities to convey information to first-year students. Finally, professors can also serve as mentors for TAs. Most of the advice we provide in this section falls within the professor’s managerial role.

As mentioned, a professor should discuss overall expectations with prospective teaching assistants when interviewing them for the position. However, once TAs have been selected, the professor can and should provide a more extensive explanation. The best time to define professor expectations and curricular goals is at the beginning of each semester, with reinforcement as necessary.

77 Our experience is consistent with findings reported in graduate TA literature. See Meyers, supra n. 16, at 10 (describing the results of a cross-disciplinary survey that concluded that TAs associated their most positive teaching experiences with “authoritative instructors” who, among other things, discussed expectations with TAs and offered direction for the TAs’ activities); Prieto, supra n. 17, at 118–119 (reporting survey results that “novice GTAs [graduate TAs] desired greater amounts of structure and direction in their supervision than those GTAs with greater amounts of teaching experience[,]” and concluding that “the research to date suggests that novice GTAs have less confidence in their abilities . . . thus necessitating a more task-oriented approach when supervising beginning GTAs”).
78 Nyquist & Wulff, supra n. 22, at 6. For a general survey of several graduate TA supervision models, see Prieto, supra n. 17, at 104–106.
79 Nyquist & Wulff, supra n. 22, at 6.
80 Id. at 11–13.
81 See id. at 13–14.
82 See id. at 7 (“Good managers are explicit about what they expect from their employees.”). We do not think of TAs as employees per se, as our program offers course credit rather than compensation for TAs, but the analogy is apt here.
83 Numerous commentators agree that the earlier a professor meets with TAs at the beginning of the school year, the better. See Feinman, supra n. 19, at 278; Nyquist & Wulff,
throughout the year. At a minimum, we recommend guidance to every TA during those meetings in the following areas:

- Overall expectations for the class as a whole;
- The TAs’ role as a vital component of the course (again, both as a whole and for individual assignments);
- The goals to be achieved by individual course assignments; and
- Any subjects on which the professor wants to provide a unified message.

Before describing the TAs’ role in the professor’s “big picture” approach to the LWRA class, the professor needs to identify what that big picture is. This is, of course, a highly subjective question, and we do not presume to tell other professors how they should answer it. We have found it helpful to ask ourselves the following non-exhaustive list of questions: What am I ultimately trying to accomplish in my class? What overall approach to LWRA do I want my first-year students to carry away from the course? What skills do I most want the first-year students to acquire? What other subjects do I want the first-year students to have at least some exposure to? How can I best use my TAs to accomplish these goals? What abilities do the TAs collectively or individually possess that I can put to good use in helping first-year students develop their understanding of LWRA?84

After asking these and other questions, and at least tentatively answering them, the professor can then incorporate the responses into the initial discussions with the TAs. For example, discussing the role(s) that TAs are expected to play in the class lets the TAs know where they fit within the big picture. The mentor’s role is most important in our eyes, and we explain to the TAs that they will act in this capacity throughout the year. As role models, TAs serve as examples to first-year students that, yes, it is possible (and vital) to learn how to write the discussion section of a

84 We freely admit that when we were new professors, we would have been hard-pressed even to formulate these questions, much less answer them with any specificity or certainty. Nor have our answers to these questions remained fixed. Every year of teaching brings new lessons, and every legal writing publication we read or conference we attend provides new ideas. And so, every summer when the new school year approaches, we find that our answers to these questions have changed from the prior year, sometimes subtly, sometimes more extensively.
Avoiding Common Problems in Using TAs

As mentors, TAs are also available to first-year students as a sounding board for broader questions about law school life, and perhaps even life in general. As mem-
memo, find a key legal authority in the library or online, or stand in front of a judge and present a persuasive argument. As me-
tors, TAs are also available to first-year students as a sounding
board for broader questions about law school life, and perhaps
even life in general.

Many professors will (as we do) ask TAs to take on multiple
roles, which can vary from assignment to assignment. Although
TAs will never really remove their mentor hats, on occasion they
might effectively act as surrogate professors by leading library
tours, conducting research classes, or helping students with cita-
tion or writing questions. In this role, they supplement the profes-
sor, serving as a separate source of information, guidance, and in-
struction. In other situations, they might be asked to critique or
actually grade first-year work product (subject to review), includ-
ing citation and research assignments, preliminary oral argu-
ments, or simulated presentations to a senior partner.

Another subject to discuss with TAs at the initial meeting
each semester is the purpose underlying each assignment. Once
the TAs understand that there is in fact a “method to the mad-

85 Here, a professor might need to do a bit of confidence boosting. Some teaching assis-
tants might be insecure about their ability to adequately instruct first-year students about
subjects that they themselves knew nothing about only a year before. Other TAs might be
worried that they will not be able to provide first-year students with all the guidance the
first-year students might want or expect, or be embarrassed that they are not experts in
subjects that they have supposedly performed well in. See Jay M. Feinman & Marc Feld-
man, Achieving Excellence: Mastery Learning in Legal Education, 35 J. Leg. Educ. 529, 541
n. 30 (1985); Prieto, supra n. 17, at 104 (noting that graduate TAs are often “teach[ing] at
the limit of their knowledge as they attempt to disseminate a body of information to their
students which they are often just developing themselves”). Reassuring the TAs about their
proper role can go a long way towards alleviating such anxiety. After all, the TA is “neither
student nor teacher. It is up to the [professor] to convince [TAs] that they do not need to
know all the answers; and that what insights they give to first[-]year law students in both
legal training and in relationship to ‘learning law school’ are highly valuable.” Achtenbe-
g, supra n. 62, at 255.

86 See Vance, supra n. 8, at 4 (describing TAs’ “counselor” role as going “beyond helping
students with legal writing and benefit[ing] both the students and the law school by
serving as role models and by helping students adjust to law school”). We are fortunate
that, to our knowledge, none of our TAs has ever taken advantage of that position to sexu-
ally harass or otherwise inappropriately interact with first-year students encountered in the
scope of TA duties. The possibility that something along these lines might occur cannot be
dismissed out of hand, however. Although a detailed discussion of sexual harassment in
education is outside the scope of this Article, professors should clearly establish their expec-
tations in this area early in the semester and convey to the TAs that professional distance is
mandatory when working with first-year students.

87 See Nyquist & Wulff, supra n. 22, at 8 (“If you have particular needs or managerial
idiosyncrasies that you want TAs . . . to be aware of, those can also be made explicit. It is
usually helpful to provide a brief rationale, giving reasons why you choose to manage as you
do.”).
ness,” it becomes easier for them to see where they fit in—and sometimes to suggest improvements to make it easier to achieve the goals the assignments are designed to meet. TA feedback at these initial meetings (as well as meetings throughout the rest of the year) has proven very useful to us in tweaking assignments (or, on some occasions, making larger revisions to them). TAs have not been shy in describing what worked and what did not in the previous year. This has obvious benefits in improving the professor’s teaching of the newest crop of first-year students, and soliciting TA feedback also helps the TAs develop a feeling of “team spirit” from the beginning of the first semester. Equally important, providing TAs with this sort of initial guidance about the professor’s approach to the course helps orient them to how they will be used, and gets them thinking about how they can interact with, and best fulfill, their mentoring role for first-year students.

Finally, teaching assistants need up-front guidance in some areas about what to say and what not to say to students. This is a subject we approach with some trepidation. In selecting TAs, one of the things to look for, as mentioned above, is the ability to work independently. TAs generally possess impressive backgrounds, and have proven their ability in the classroom the previous year. We assume most professors have no wish to muzzle them or to tell them exactly what to say to the current group of first-year stu-

---

88 As discussed below, we, of course, provide TAs with more specific guidance about individual assignments as those assignments come up over the course of the year. Discussing each assignment at the initial meeting, however, provides a chance during the fairly quiet first few weeks of the semester to think about and possibly incorporate any suggestions the TAs might make at that point, when the professor still has the time and opportunity to do so.

89 For example, when a TA responds to a discussion of individual assignments during the initial meeting with something along the lines of “Oh, that’s why you asked us to do X when we were 1Ls,” that sort of feedback is a powerful hint that a professor needs to do a better job explaining that assignment to the first-year students in the upcoming year.

90 In this way, supervising teaching assistants is no different in kind from a professor’s approach to teaching first-year students, when viewed through the prism of the Classroom Assessment movement. See Gerald F. Hess, Student Involvement in Improving Law Teaching and Learning, 67 UMKC L. Rev. 343, 344–346 (1998). The Classroom Assessment approach can be broadly defined as “encourag[ing] teachers to gather frequent feedback from their students and to use that information to refocus teaching methods and make learning more effective.” Id. at 343–344. From the TAs’ perspective, a professor’s willingness to consider different perspectives about the professor’s own teaching style helps encourage the TAs’ confidence in their own abilities and points of view. See Nyquist & Wulff, supra n. 22, at 14. A professor encouraging TA collaboration in this way is acting more as a mentor than a manager. See id.

91 See Feinman, supra n. 19, at 279 (observing that early training sessions can promote camaraderie among TAs and the professor).
Avoiding Common Problems in Using TAs

2007

students about the class or individual subjects. On a small number of matters, however, experience suggests that it might become necessary to impose a party line. For example, we expect TAs to support our position that there is value in learning how to conduct book research, and that citation actually matters in practice. TAs need not blindly ape what the professor says on these or other subjects, of course. If a TA worked for an employer that for whatever reason did not emphasize correct citation form, she should certainly feel free to tell students about her experience. Similarly, a TA could tell first-year students that he never went to a library during a summer internship and did most of his research on Westlaw, LexisNexis, or government websites. But TAs should also faithfully report the professor’s view on such subjects to the first-year students, and if the situation warrants, remind first-year students that the professor’s view controls for purposes of complying with class requirements.

2. What Kind of Guidance Is Appropriate throughout the School Year?

As the school year progresses, professors will call upon teaching assistants to perform numerous tasks. For each of these tasks, specific instructions are a must. As mentioned, the initial meeting at the beginning of each semester provides an opportunity to tell the TAs about the overall goals of each assignment. However, the
initial meeting is not the best time to give specific details regarding what the TAs need to do to get each individual assignment done. Instead, assignment-specific topics are better addressed as they arise during the year. For example, TAs can receive guidance on holding office hours when the time for those office hours approaches in late September. Similarly, a professor need not instruct TAs about reviewing and critiquing student drafts until the due date for those drafts is close at hand. This way, the professor’s guidance is fresh in the TAs’ minds when they meet with students or sit down to review citations in a stack of student papers.

Although the specifics obviously differ from assignment to assignment (and from professor to professor), a few common, closely related themes track across all TA tasks. First, teaching assistants need to know what type of work product they should generate. If they are reviewing citation, are they expected to correct each mistake, or only the first occurrence of a mistake? If judging preliminary oral arguments, are they expected to comment on the advocates’ performances at the end, or simply ask questions during the argument? Second, TAs should be told how much time to commit to the task. Telling TAs how long a task will likely take gives them a sense of whether they are devoting too much or little time to completing it. Further, an accurate estimate of time commitment will allow TAs to plan their schedules. Third, TAs must know the level of quality expected for each assignment. Giving TAs examples of acceptable TA product fends off confusion about what the professor expects from TAs’ written work.94

Professors can mix and match any number of options to help ensure that TAs know what the professor expects. One of the most important is simply meeting with teaching assistants, whether regularly or more occasionally, as opposed to communicating solely via e-mail. Meetings can be handled in any number of ways. For example, a professor could schedule weekly meetings at the begin-

---

94 For example, we give the teaching assistants a copy of a particularly thorough TA-prepared citation review from a previous year, so the current TAs can see the type of citation comments we expect on student papers. TAs might vaguely recall the sorts of comments they received on their papers as first-year students, but they need not rely on memory if they have an example of a high-quality citation review.

25, 26–27; Michele Marincovich, Teaching Teaching: The Importance of Courses on Teaching in TA Training Programs, in Professional Development, supra n. 22, at 145, 152. Our school does not provide program-wide TA training, and in any event, department-wide training would still need to be supplemented by individual professors to accommodate their specific practices, assignments, and teaching philosophies. See Shirley A. Ronkowski, The Disciplinary/Departmental Context of TA Training, in Professional Development, supra n. 22, at 41, 42.
ning of the semester, and then cancel them as needed (or, more accurately, as not needed). Alternatively, meetings could be held when necessary throughout the semester rather than scheduled on a weekly, monthly, or other basis. Whichever method a professor adopts, face-to-face meetings are an effective way to keep the TAs “on track,” to respond to any questions they might have without the delays and occasional uncertainties inherent in e-mail, and to ensure that each TA receives the same amount of guidance. These meetings also provide an opportunity to discuss how the first-year students are doing, in general or on specific matters. Finally—and this is by no means a trivial consideration—in our experience meeting with teaching assistants is generally a pleasant interlude in the work day, and TAs enjoy the opportunity to meet with professors and their peers.

Detailed written instructions for specific assignments are a necessary complement to face-to-face meetings. The amount of detail needed depends on the type of assignment and what tasks the TAs are asked to perform. Some types of assignments merit extremely specific guidance, while others are more fluid. As a general rule, those matters that are particularly key to TAs’ role, such as citation reviews or critiques, require more specific guidance.\(^5\) On matters that go to the heart of the TAs’ role in the course, it is best to have a united front, where all TAs are providing similar instruction to the first-year students. Doing so also potentially alleviates student concerns about some students receiving unfair advantages, of particular importance in graded programs. Moreover, specific guidance is especially critical when a TA’s review of student work factors into (or is the sole determinant of) the grade the student receives for that assignment.

\(^5\) See, for example, the sample instructions we give our TAs for citation reviews in the Appendices at the LWI Journal website. See supra n. 10. Readers seeking more formal TA training materials have many options. To some extent, guidance for new LWRA professors can be transferred to TAs, whether on such subjects as effective conferencing and editing, suggesting revisions without rewriting, establishing boundaries between teacher and student, and so on. See e.g. James B. Levy, Legal Research and Writing Pedagogy—What Every New Teacher Needs to Know, 8 Persp. 103 (2000); Kathleen Elliott Vinson, New LR&W Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching, 6 Persp. 6 (1997). Of course, other LWRA resources might prove equally beneficial to TAs, though not directed specifically to new professors. We make no attempt here to try to compile a representative sample of useful materials from the large (and ever-growing) universe of helpful LWRA articles. Alternatively, many TA training materials are available on the Internet, although these are usually not law-school focused. A very helpful starting point for law school TAs is the “peer teacher manual” prepared by Barbara Glesner Fines at the University of Missouri-Kansas City School of Law. See supra n. 27.
These goals are more easily accomplished if the professor has provided the teaching assistants with explicit instructions about how to handle commonly occurring situations. Further, the time it takes to prepare detailed instructions is particularly well spent if the TAs will be performing the task all year and in subsequent years.\(^\text{96}\)

On other matters, however, less specific guidance is needed. For example, when teaching assistants play the role of clients in client interviews, we give them limited background details, and encourage them to make up personal information and other material needed to flesh out the client’s story. Similarly, when asking TAs to participate in classes about exams or summer employment, the professor could provide some general guidance about subjects they might want to discuss, but otherwise leave the TAs’ presentation up to them.

A professor should resist the temptation to micro-manage, a suggestion perhaps easier made than followed. Too much guidance can bury the TAs in irrelevant detail, and can keep the TAs from knowing what is really important about an assignment and what is less so.\(^\text{97}\) Moreover, given that TAs are selected in part for their individual initiative, they will likely lose any incentive to act independently if the professor is constantly looking over their shoulders. Indeed, the TAs might perceive over-management as a lack of respect or trust, which in turn might become a self-fulfilling

\(^{96}\) By contrast, spending an excessive amount of time creating extensive instructional materials or otherwise providing detailed guidance for a “one shot” type of assignment—especially one that the professor suspects she will not be repeating in the future—might not be the best use of the professor’s time, especially in the middle of conference season or with a stack of pretrial briefs on the professor’s desk. There is certainly room for difference of opinion on this subject, however. For example, one of us expects teaching assistants to become familiar with the substantive details of research and writing assignments and meets extensively with the TAs to answer any questions they might have about those assignments so that the TAs are fully prepared to respond to first-year students’ questions during office hours. The other of us has concluded that the TAs will never be as familiar with the substance of the assignment as the professor, and thus gives them only a brief overview of the underlying substantive law, with instructions to “punt” any substantive questions they might receive from first-year students to the professor.

\(^{97}\) A common example of this, at least in our experience, is citation reviewing or critiquing. We each provide our TAs with lists of common citation errors to use as a “cheat sheet” when conducting citation reviews. Such a cheat sheet can have the tendency to grow in length from year to year, as different problems pop up, until what was intended as a one- or two-page guide metamorphoses into something nearly as long as the citation manual itself. In such a situation, TAs might no longer be sure what to focus on: big problems, like failing to include pinpoint cites or forgetting to identify the court or year of an opinion, or more esoteric minutiae, such as whether the period in id. should be italicized. Ruthless editing of the cheat sheet is the order of the day at that point.
Avoiding Common Problems in Using TAs

prophecy, or might lead the TAs to discourage first-year students from serving as TAs in the next year. Finally, professors are already busy enough with class preparation, grading, student conferences, and scholarship. Adding to that workload by preparing excessive written instructions for everything TAs are asked to do, covering every possible contingency or first-year question no matter how unlikely, is not something we recommend.

C. Defining Teaching Assistants’ Roles to the Students They Help

Another problem associated with use of teaching assistants arises when first-year students do not know the role that TAs play in the professor’s approach toward the class. Are the teaching assistants just glorified cite checkers? Are they independent sources of information and guidance, or are they a mouthpiece for the professor’s party line? Just as TAs’ performance improves when they know what the professor expects of them, so, too, do first-year students benefit when the professor does not “hide the ball,” whether concerning TA usage or any other aspect of the class. As pertinent here, when first-year students know the professor’s expectations for the TAs, the students are less inclined to use TAs in quantitative or qualitative ways unintended by the professor. Thus, we advise letting first-year students know very early in the first semester that TAs play an important role in the course, and that students should take every opportunity to go to them with questions. As we tell our students, the teaching assistants have been through a year of LWRA, and have done well at it. The TAs are familiar with us; they know our general approach and course objectives as well as our preferences and pet peeves. They are not, however, experts in LWRA or the substantive law of a particular writing assignment. Thus, first-year students are made aware that the teaching assistants can provide them with valuable guidance and direction, and the teaching assistants help us achieve our goals for the first-year students by keeping them informed and on

98 See Cohen, supra n. 16, at 596 (“The less initiative one permits instructors to exercise in developing their programs and specific assignments the less likely it is that the program will continue in the future to attract instructors with creative minds and ideas.”).
99 See supra nn. 77–81 and accompanying text.
track—but students also know not to expect more from the teaching assistants than we do ourselves.\textsuperscript{100}

For example, if a professor believes that he should be the exclusive (or at least the best) source of information about an issue, tell first-year students explicitly. First-year students could be advised that substantive questions about how to analyze a specific case for purposes of a memo or brief assignment are best directed to the professor, not the TAs, even if the professor also requires the TAs to be familiar with the substantive legal questions presented by the assignment.\textsuperscript{101} On other matters, students should be told that reasonable minds might well disagree. For example, experienced attorneys know that citation manuals do not answer all questions and are not always models of clarity. Students do not know this, however, and might be surprised if one TA offers citation guidance on an unclear issue that differs from another TA’s suggestions, or the professor’s, or the students’ own interpretation of the manual. We tell the students to expect such occasional differences of opinion and emphasize that such disputes will be par for the course in everyday legal practice.

Finally, it might prove advisable to establish some boundaries between first-year students and TAs. Sometimes, getting students to use TAs as a resource can be like pulling teeth,\textsuperscript{102} but on other occasions students might go too far in the other direction. One benefit of TAs is that they will likely be accessible to students during the evening or weekend when the professor is less likely to be available. Such access might come via formal office hours, random encounters in the hallway or library, or e-mail. This does not mean, however, that students should come to view TAs as a twenty-four-hour convenience store of legal insight; that TAs should review multiple drafts of a memo or find time to flyspeck a brief shortly before the 5:00 p.m. submission deadline; or that TAs should put aside their own academic or other obligations to respond immediately to every student question. Leaving aside the

\textsuperscript{100}This was put very nicely in Feinman & Feldman, supra n. 85, at 541 n. 30; see also Pollman, supra n. 52, at 285 (noting that student teachers “must gather, analyze, and organize their own experiences”). A professor who explains why and how TAs are used might also preempt possible student misapprehension that the professor is shirking responsibility by delegating important instructional duties to the TAs.

\textsuperscript{101}At any rate, TAs are unlikely to recognize the validity of a nuanced and novel argument not covered by the professor’s instructions. Therefore, even if TAs do provide substantive guidance about specific assignments, they should still be instructed about when consulting the professor is necessary.

\textsuperscript{102}See infra sec. III(F).
demands this makes on TAs, over-eager students who take advantage of a TA's desire to help might also raise questions of fairness, particularly in graded LWRA courses, if others believe that the student is receiving improper assistance on assignments. Discussing the limits students should observe when dealing with TAs will likely help lessen the likelihood of such problems arising, and in any event provide advance warning of the expectations first-year students will be required to satisfy.

D. When Teaching Assistants Make Mistakes (Or—Gasp!—The Professor Makes the Mistake)

Even with careful planning, not all problems can be anticipated. Three examples come immediately to mind from our experience:

• A TA, certain she knows the citation rules, “corrects” something on a batch of papers, when the first-year students were correct to begin with. What’s worse, the TA also attaches written (and somewhat snippy) comments at the end of the papers that the first-year students should never have made such a basic mistake. Upon reviewing the TA’s comments, the professor notices the error.

• Late one night, a professor thankfully finishes grading the last open memo, having promised the first-year students to return the papers the next day. Checking e-mail reveals a message from a TA that due to unexpected commitments, he will not be able to return his batch of cite reviews to the first-year students at the agreed-upon time. The TA has had difficulties meeting deadlines on other occasions as well.

• A TA suggests during guided library tours that learning book research is nothing but a “hazing ritual,” and that nobody uses books in the real world. Confused first-year students later ask the professor why they are required to find cases and statutes in books if they will never be asked to do so in practice.

The question that arises once a problem comes to the professor’s attention is how best to resolve it. Following Harry Truman’s
credos that “The Buck Stops Here,” professors are ultimately responsible for the smooth and efficient operation of their classes. If mistakes happen (whether the professor causes the mistakes or not), the professor must take responsibility for them. When problems do arise—and they will—the professor should be concerned both with alleviating potential first-year confusion and correcting the problem so that it does not occur again. The way the professor goes about addressing these issues in turn affects the professor’s credibility.

1. Good Faith Mistakes

Even the best teaching assistants will occasionally simply get something wrong. When a TA’s guidance is incorrect, the primary concern becomes fixing that mistake without shattering the students’ faith in that TA, or maybe all teaching assistants—or even the professor. In doing so, the professor must clarify the incorrect advice while not confusing the first-year students still further. Several options are available in such situations. The first is simply discussing the matter with the affected student(s) and providing the correct advice along with any necessary additional explanation. Another option is to have the TA contact the students to clarify the mistake. If the problem is more widespread or merits broader attention, a professor might decide to address it via an e-mail to the entire class, or perhaps even discuss the matter during

103 See e.g. Alan Axelrod, When the Buck Stops with You: Harry S Truman on Leadership xv (Portfolio 2004).
104 Of course, mistakes are a bigger problem in a graded program where flawed advice could conceivably harm a student’s grade. As previously mentioned, one way to handle this concern is to seriously curtail the type of advice the professor allows TAs to give. A second protective measure is to make the limitations on TA advice clear at the outset. This measure can prevent TAs from providing too much guidance (or bad guidance) that might or might not dovetail with the advice the professor would have given. Another important way to decrease the likelihood that TAs will disseminate bad advice is to provide “answer keys” of sorts for assignments graded by TAs (these are also quite effective in non-graded programs). For example, a professor can create a list of common citation problems and corrections for all major assignments. If all TAs are working from the same list, unfair or incorrect advice is much less likely to reach the first-year students. When all else fails, though, a professor might have to revisit a score on an assignment if that score reflects the use of bad TA advice. This situation is much less likely to occur, however, if the appropriate steps are taken to train and supervise TAs.
105 TAs sometimes do this on their own (or offer to do so). We have both received unsolicited e-mails from TAs confessing that they inadvertently told students something during office hours that was incorrect and that they had already e-mailed the students involved to give them the proper advice.
class. Of course, in doing so, aspersions should not be cast on the individual TA. Instead, a professor could say something like “some questions have been raised about Issue X,” without naming any names. Or, although we do not often do this, a professor might decide to let the matter slide, ignoring the problem if it is sufficiently minor and limited to a single student or small group.

A professor confronted with a TA’s mistake also wants to ensure that the problem does not arise again. Sometimes, the problem is of the professor’s own making, a result of giving the TA insufficient guidance. Other times, however, the problem is purely on the TA’s end. Meeting privately and non-accusatorily with the TA to discuss the matter is the best way of discovering why expectations have not been met. Once the problem has been diagnosed, the professor should clarify the instructions to the affected TA, providing additional guidance or re-training if necessary. The professor might also take the opportunity to meet with other TAs to clarify expectations, particularly if the issue is likely to arise again. Equally important, the professor should take note of the issue for future assignments and future years. Perhaps revisions to the instructions for that task are in order to clarify what the TAs are expected to do for that assignment.

Sometimes, TAs make mistakes that do not confuse first-year students but that still can affect the professor’s credibility. The “late papers” scenario mentioned above is a case in point. Another problem we have encountered is a TA forgetting to attend office hours or an oral argument where he was scheduled to serve as timekeeper. In both situations, it might appear to the first-year students that the professor has lost control of the TAs or is not organized enough to manage them efficiently. The appropriate response should depend on whether first-year students know about the issue. If the TA confesses missing office hours, but no first-year student has complained, there is no reason to call the first-year students’ attention to the matter. Handle the matter internally.

Every professor will have a different threshold of questions minor enough to ignore. One example that comes to mind is a TA’s insistence during cite reviews of the first draft of the closed memo that some students had erroneously underlined the space in see e.g. (using Bluebook format). With all due respect to the TA’s zealotry, at that stage in the first semester most LWRA professors will likely be pleased to see any evidence, no matter how slight, that first-year students have actually opened the citation manual, much less applied it correctly to minor points. Thus, although the TA’s guidance to this individual student was indisputably wrong, a professor might well decide to hold off on correcting it until later in the semester, and then only if the problem arises again.

Similarly, if a TA-timekeeper missed an oral argument, a professor could simply
If first-year students have noticed the problem—such as the students who undoubtedly noticed that they did not receive their cite reviews with their graded papers—the best response is to acknowledge the delay without further explanation. For example, in the late-papers scenario, a professor could send an e-mail to affected students (not to the entire class), explaining that the cite reviews are delayed and telling them when to expect them. In the interim, the professor could contact the TA with a stern message and a new deadline. Should the TA fail to meet that new deadline, further steps are obviously necessary; these steps should be clear to the TA from the outset.

2. The Rare and Unfortunate Deliberate Mistake, or Recurring Problems

Thankfully, we have seldom encountered situations where a TA intentionally represents an approach to a topic that is very different from, or even diametrically opposed to, ours. It has happened to us upon occasion; however, the “library tour gone bad” scenario above is no figment of our imagination. A professor’s credibility as teacher and role model is particularly at risk in this situation. By intentionally taking a position that undercuts the professor, the TA calls into question the professor’s teaching not only on that topic, but on other topics as well. First-year students might legitimately wonder, “On what other subjects are we not learning how the real world works?” Obviously, in this type of situation, it is vital to repair the professor’s credibility so that the professor can continue to effectively guide the first-year students through the difficult task of mastering fundamental LWRA skills.

Thus, while it is usually key to maintain the credibility of teaching assistants with the first-year students, the professor’s
credibility is more important. When a TA purposefully (even if without malice\textsuperscript{110}) contradicts the professor, the need to maintain the TA’s credibility fades away. In such circumstances, a frank conversation with both the first-year class and the offending TA is likely to solve the problem. First, the professor should meet with the TA to discuss the situation. At such a meeting, the professor might choose to (1) explain the facts as he or she knows them, and why the professor has concluded the TA’s behavior was unacceptable; (2) ask the TA for an explanation of the behavior; and (3) advise the TA that the misinformation provided to the first-year students will need to be corrected.\textsuperscript{111}

Once that information is on the table, the professor can then set out the TA’s options. Here, it might be helpful to engage the TA in a brainstorming session to help determine additional tasks to perform; the TA is likely to find the punishment more palatable if he has a say in the outcome. In fact, the TA might learn something from the experience. For example, a TA providing misinformation about the prevalence of book research might well believe what she says. In such a situation, discussion with the TA or the assignment of targeted research projects requiring the use of books could help change the TA’s views on book research. If the professor’s trust in the TA has been damaged enough, it might prove necessary, as it did in this case, to strip the TA of all duties involving contact with first-year students, instead assigning additional tasks like research and cite-checking. Other options include advising the TA that he or she would not be permitted to return the next semester or year as a TA. In extreme situations, a professor could explain that any additional improper behavior (however minor) would result in a failing grade or dismissal from the TA program.

Moreover, when a serious bit of misinformation has been passed along to the first-year students, class time will likely prove

\textsuperscript{110} In all fairness to the TA who prompted this example, she thought she was doing the first-year students a favor based upon her limited summer internship experience. As previously mentioned, we encourage our TAs to give first-year students the benefit of their (admittedly limited) experience and opinions about all matters connected with the course. See supra nn. 91–92 and accompanying text. Sometimes, however—and this was definitely one of those times—encouraging TAs to speak their minds without some professorial guidance leads to undesirable results. This incident led directly to our emphasis on ensuring that TAs know at the very beginning of the relationship that we expect them to adhere to a party line on some subjects, and what those subjects are. See id.

\textsuperscript{111} It is possible, of course, that a TA might attempt to deny that the accusations were true. If so, and assuming that this denial is not credible, the professor has no choice but to explain that the truth is the only way to avoid whatever the professor believes is the most serious sanction available.
to be the best forum for righting the ship. For example, in addressing the case of the bad library tour, the class could be advised (without naming names) that although some students might believe that book research was not useful, the professor does not share that view. This presents the students with a choice: (1) follow the advice of a fellow student with only a summer internship as legal experience; or (2) follow the advice of a former practicing attorney and current law professor. Moreover, mentioning this incident in class will allow the professor to reiterate earlier discussions about the benefits and drawbacks of computer research versus book research, and perhaps even provide (as it did in our case) a useful way of reinforcing points about effective legal research.

In sum, regardless of how well TAs are trained and supervised, problems will occur. How those problems are handled will determine the way the first-year students and TAs view the professor and the LWRA course.

E. Finding Time to Supervise

The successful use of TAs is an often neglected part of the class preparation process, but this neglect is understandable. If new LWRA professors are anything like we were when we began teaching, they will likely find they have more than enough tasks to fill a work week just trying to get a handle on class preparation and teaching LWRA for the first time. A new professor might well rationally decide to devote limited summer time to preparing assignments or lecture notes for the upcoming year. However, once the semester starts, the whirlwind schedule of grading and conferences often precludes any opportunity to take the time to (1) adequately keep teaching assistants informed of the professor’s expectations; or (2) assign appropriate amounts of work to each TA. When this happens, a teaching assistant program can languish as an unused or improperly used resource. Therefore, particularly in the early stages of a professor’s career, thinking about these matters (and providing the necessary guidance and instruction to TAs) is essential to avoiding problems in the future.112

112 Of course, a professor could rationally decide that the demands of supervising TAs are simply too high, given the many other obligations that busy LWRA professors have to satisfy, and so choose to not use TAs at all or to use them only in a very limited capacity. We would disagree with such a decision, but can understand how a professor might reach it. We certainly do not mean to downplay the costs to a professor’s time of setting up or super-
In fact, while we certainly do not need to tell experienced professors in our field that this is a very time-consuming profession, our experience has been that, even for more seasoned professors, attention to the issue of using teaching assistants most effectively often slips far down on the priority list. We have learned the hard way that preparing TAs is not, in fact, less important than preparing assignments and developing a syllabus. Therefore, we have developed techniques that have allowed us to effectively manage a large group of teaching assistants while still creating a curriculum that provides our first-year students with the constant attention they need to develop necessary skills.

One of the most important suggestions is to begin preparing teaching assistant materials during the summer, when free time is most likely to be available. While new teachers may be quite busy even during the summer, this is without a doubt the time when both new and experienced teachers are most likely to be able to develop materials without interruption. Based on our experience, this pays large dividends down the road, because the instructions prepared for TAs can generally be reused with few modifications in subsequent years. Another suggestion (in schools where this is allowed) is to save the task of developing individual problems and assignments from scratch until the second or third year of teaching. If a new LWRA professor can use or modify problems created by more experienced professors, the new professor will have more time to devote to creating and maintaining a successful teaching assistant program for that professor’s individual class.

Another time-saving technique is to identify in advance what role the teaching assistants will be expected to play in administering each assignment, and then consider whether materials need to be prepared to adequately prepare the TAs to play their part. For an assignment in which TAs will merely serve as cite checkers, the professor might prepare grading checklists in advance to avoid revising a TA program as a whole, or for an individual class. The goal, however, is that any increase in short-term demands on a professor’s time and resources will be set off against reduced costs in the long term and more than compensated for by increased pedagogical effectiveness. See Topping, supra n. 74, at 325.

Importantly, our experience is that mismanaged teaching assistants actually take much more time to work with in the long run. Mismanaged teaching assistants make more mistakes, and fixing those mistakes is a time-consuming and often embarrassing process. Both of us regularly select up to six teaching assistants each year to help with a class of forty-five to fifty students. We recognize that in some law schools, LWRA professors are called upon to teach year-round, and thus will not have as much “downtime” available to prepare for upcoming semesters.
having to do so during the semester. On the other hand, if teaching assistants will be holding office hours to provide substantive guidance on a particular assignment, it will likely be necessary to meet with the TAs in person to discuss the substantive analysis of the problem the TAs will be helping the first-year students with. We recommend reviewing the syllabus as soon as a rough draft is ready and penciling in those times when meetings with TAs will be necessary, as well as times in which it is impossible to do so (during conference periods, for example). Other matters that can be considered in advance include when TAs should be available to visit class, meet with students, grade assignments, or hold office hours. In the middle of a busy semester, it is difficult to juggle everything. It is easy to forget to e-mail TAs about a given task unless the professor has prepared a schedule of sorts in advance. If teaching assistants are not asked until the last minute to meet to find out about the professor's expectations for a particular assignment, the professor might well discover that he does not really have the time to devote to providing proper guidance, or that the TAs are unavailable.

Finally, one of the most difficult aspects of supervising TAs is the fact that the professor is not simply dealing with her own busy schedule. Rather, each teaching assistant is likely to have a host of other responsibilities (courses, journal work, job interviews, and the like) around which the professor will have to plan. We suggest developing a master schedule that includes the following information: (1) the first-year students' class schedules; (2) the professor's office hours; and (3) the TAs' class schedules. If all this material is included on a weekly schedule, the professor can quickly see which TAs are available at any given time. This is invaluable information, particularly when an unexpected need for the help of a teaching assistant arises.

In sum, our most important advice is to start planning all aspects of the course as early as possible and to place the managing of teaching assistants in a higher position on the list of priorities. Nothing is more disheartening to a professor or to the teaching assistants than a program that makes such ineffective use of TAs that it was not really worth hiring them in the first place.

**F. Getting Students to Use Teaching Assistants**

One final problem associated with the use of teaching assistants in the first-year class is simply getting the first-year stu-
Avoiding Common Problems in Using TAs

2007]

students to use the resource. Of course, this is not an issue if TAs are primarily used for checking citations or doing research. However, some professors might choose (as we do) to use TAs more broadly and allow them to serve as effective mentors for the first-year students, thus tracking the lessons of educational theory discussed earlier. TAs help achieve this goal by reinforcing the skills taught in class through (1) answering questions about specific skills or assignments; and (2) meeting individually with students who are struggling in one area or another. These potential benefits will come to nothing, however, if students who could be helped by TAs fail to take advantage of their availability.

As the literature suggests, some first-year students are more inclined to ask questions of a teaching assistant than a professor. But sometimes first-year students are hesitant to ask anybody for help, even TAs. In our experience, first-year students hesitate to use the services of the teaching assistants for two reasons. First, students who are generally doing well in the LWRA class may believe that they have no use for additional help. Second, students (both those who are struggling and those who are not) may be afraid that meeting with a TA will send a message to their fellow students that they cannot perform the work without such help. In the competitive environment of most law schools, this is a stigma most students strongly wish to avoid. Both obstacles can be overcome, however, by directly confronting the concerns of first-year students when explaining the TAs’ role.

First, we recommend setting aside a short amount of time in the beginning of the semester and inviting the TAs to come to class. As discussed above, the professor can then explain in very clear terms the role that teaching assistants play in the overall course structure. To encourage the first-year students to look on TAs as a valuable resource, the professor might discuss anecdotal evidence of positive student experiences with teaching assistants from prior years. It is particularly helpful to tell first-year students that both accomplished students and struggling students have found TAs to be good mentors and reinforcers of basic skills.

---

116 See Goldstein, supra n. 8, at 469; Topping, supra n. 74, at 325 (reporting results of a study that concluded “students felt peer tutors were better than staff tutors at understanding their problems, were more interested in their lives and personalities, and were less authoritarian, yet more focused on assessment”).

117 Of course, a professor could make it mandatory to meet with TAs. Even then, students will likely benefit more if the professor is able to persuade students that teaching assistants are a vital component to the learning process, as discussed below. See infra n. 121 and accompanying text.
The professor could also highlight the availability of teaching assistants at odd hours (late evenings by e-mail, for example). Our experience has been that simply telling the students that teaching assistants can be beneficial dramatically increases their use. Moreover, feedback from prior students confirms that the initial introduction to the TAs makes it less daunting for the students to contact them, as the students do not feel they are contacting a "stranger."

Unfortunately, the students who are struggling are less likely to voluntarily visit a teaching assistant for additional help, as those students may fear that extra individualized attention will signal to fellow students that the struggling student is not as capable as his or her classmates. This problem is often best addressed during a conference with the student. Depending on the type of problem a student is having, we have suggested or even required the student to work with a TA on skills such as small-scale organization, targeted research skills deficiencies, or citation problems. During the meeting with the student, the professor can remind the student that there are advantages to working with a TA, that many students have worked individually with a teaching assistant, and that most have found the experience quite beneficial. If the professor has more than one TA, the first-year student can be asked which TA he would prefer to work with, and whether he would like to have the TA e-mail him to set up an appointment.

118 As mentioned in Section III(C), the professor should ensure that students are aware of the limits on TA availability.

119 Requiring students to meet with TAs is not cost-free. First, the professor must consider whether some sort of penalty will be imposed if the student does not attend a TA meeting, and what that penalty should be. We have never had a student refuse to meet with a TA, but certainly such a situation could arise. This could be especially problematic in pass/fail LWRA courses (like ours), where students' incentives to perform to the limits of their ability can conflict with the demands on their time raised by graded casebook classes. To us, threatening to fail a student simply for failing to meet with a TA is excessive, and, in any event, is not particularly credible. Moreover, deducting a point or two from a student's assignment or class participation grade might not effectively motivate a student whose work is already not living up to expectations or who has made the choice to "punt" LWRA in order to devote more time to graded casebook courses.

Second, the student/TA dynamic changes when the student is forced to meet with a TA. The student might well only attend such a meeting reluctantly, which in turn will likely reduce the meeting's effectiveness. Further, students may view the TA less as a peer or mentor, and more as a surrogate for the authoritarian professor who required the meeting in the first place. See Bruffee, supra n. 29, at 76 ("In required tutoring, the tutor's relationship with tutees is almost exactly the same as a teacher's. Required tutoring is not an alternative to classroom learning. Required tutoring is an extension of classroom learning."). These considerations do not deter us from requiring students to meet with TAs when necessary, but they do counsel some caution before deciding to do so.
Our experience is that a first-year student is much more likely to follow through and use the help offered by a TA if the TA makes the initial contact. Finally, if it becomes necessary to require a student to work with a TA, follow-up will be essential. After making sure the student actually met with a TA, the professor can then ask whether the student found the experience helpful, and if not, why. If necessary, the professor could encourage or require a second meeting with a TA, or assign the student a new TA.

One final way to ensure the use of TAs by all students is to constantly remind the first-year students of the TAs’ existence. For example, any time TAs have office hours, the professor should remind students in class and by e-mail. Whether speaking to the class as a whole or to individual students, the professor’s goal is to encourage first-year students to find a TA that they can work well with and to develop a relationship with that TA.

In sum, the easiest way to get first-year students to use TAs is to encourage them to do so. Letting them know it is common practice takes away any possible stigma. When students see the TAs as a normal, integral part of the first-year LWRA class, many students will happily use the resource.

CONCLUSION

We trust that our reasons for writing this Article have not been misinterpreted. By discussing the problems that can sometimes occur when using teaching assistants, we do not mean to suggest that the relationship between professor and TA is little more than trouble waiting to happen. Our relationship with our TAs is one of the most rewarding aspects of our jobs. Our teaching assistants bring a refreshing blend of zeal, idealism, intelligence, and youth, all of which help us immeasurably in fulfilling the raison d’être of our profession: teaching first-year law students how to succeed in practice. The literature on pedagogical theory surveyed in this Article confirms what we already knew from experience: First-year students learn more, and more efficiently and effectively, when TAs serve as a bridge between professor and first-year student. Thus, we heartily affirm the quote that leads off this Article: We “couldn’t do it without” our TAs.

120 See supra pt. II.
121 See supra n. 5 and accompanying text.
But as practicing attorneys and law professors know all too well, nothing ever works perfectly. Glitches are inevitable, some minor, some more important. Preparation goes a long way toward ensuring that any issues that do arise with TAs fall within the former category. Based on our experience, the potential concerns we have identified in this Article can be minimized with a little extra advance effort by the professor. By explaining to the teaching assistants exactly what the professor wants them to accomplish, providing them with sufficient instruction to allow them to carry out their duties, and being available to answer questions or otherwise solicit feedback about whether the TAs are achieving the desired goals, professors can best ensure that the TAs live up to expectations. Professors have any number of ways to provide suitable guidance to TAs, whether through extensive written instructions or e-mail exchanges; regular meetings to discuss assignments, expectations, and TA questions; occasional group meetings for important assignments; or any combination thereof. On occasion, of course, problems will arise, and the professor’s credibility might be on the line as a result. Such a situation demands a quick response that both alleviates potential first-year confusion and clarifies how the TAs are expected to perform. Doing so will help maintain a smooth relationship between professor, first-year students, and TAs. Our hope is that this Article has provided a roadmap to effective realization of the numerous benefits TAs can offer the LWRA curriculum—those benefits recognized in theory and borne out in practice.
CCIISR: THE PERFECT WAY TO TEACH LEGAL WRITING

The Keynote Address at the 20th Anniversary Legal Writing Institute Conference, Seattle, Washington, July 2004

George D. Gopen*

I remember the moment vividly. I was six years old, in the first grade. My teacher was saying something that she thought of some import to us. I was not paying attention. I was daydreaming. “George!,” she said, impatiently. “George Gopen!” I snapped to attention. “You weren’t listening to me.” “I’m sorry, Miss Daly, I was thinking about what I want to do when I grow up.” “Well, please share that with the class, George. What do you want to do when you grow up?” And I replied, “I want to teach legal writing.”

Well, maybe it didn’t happen quite like that. I cannot imagine that any of us at this Legal Writing Institute conference dreamed of doing what we do when we were youngsters. I would wager there are precious few people who wish to teach legal writing other than those of us who actually do the job. How strange it is to do something -- and to enjoy and appreciate doing it -- that we could never have imagined ourselves doing in our youth.

On my own road to the profession, long as it was, I never saw a single road sign that pointed me in that direction. While pursuing a law degree at Harvard, I decided I really wanted to be an English professor. I worked on the two degrees simultaneously and landed a three-year Visiting Assistant Professorship in the English Department of the University of Utah. The year was 1975. When I arrived there, the new Director of Writing Programs, John Muller, saw my two degrees and gave me some funds to create a course in advanced composition for pre-law students. I wrote half of the law schools in the country, asking what they did to train students in legal writing and what their university did in prepara-

* © 2007, George D. Gopen. All rights reserved. Professor of the Practice of Rhetoric at Duke University.
tion for that at the undergraduate level. All but six of the eighty schools wrote back: Seventy-two of those seventy-four were intensely curious. A few already had legal writing courses; none reported any action on the undergraduate level. I chose the four most interesting responses and invited the writers to a mini-conference on fashioning a pre-law writing course. We created a skeletal plan; I fleshed it out and taught the course; I wrote an article about the course; I wrote another article about what I had learned about law school writing programs; I got a contract from West Publishing Company to create a textbook; and when I went back into the job market, I discovered I had credentialed myself as a writing expert.

I was then hired as Director of Writing Programs at Loyola University of Chicago. Within a few weeks of arriving there, I was hired by the uncle-of-my-next-door-neighbor as a writing consultant to his law firm. Before I knew it, I was a teacher of legal writing.

From that followed a collaboration with Joseph Williams, Greg Colomb, and Frank Kinahan in our legal writing partnership we called Clearlines. Two more books and 130 clients later, here I am.

Let me share with you a few excerpts from those letters I received in 1976 from law school deans and professors to indicate what the world of legal writing instruction looked like back then.

From the University of Puget Sound: “For the past four years I have been directing a tutorial English program for first-year students. This is not the ideal situation because by the time students reach that level they are too busy to have time to study English.”

From the dean at the University of Arizona: “I have no specific thoughts on writing programs for undergraduates or law students. I believe them vital, but beyond urging students to take every opportunity to write under supervision, I have been unable to offer more advice. Perhaps your experience will enable me to be more helpful.”

From the University of Wyoming: “My own conclusions are usually pessimistic: People speak and write well only if they grew up hearing and reading literate English, and most of today’s students have not done that; it is next to impossible to teach anyone over twenty-one to write unless he is very strongly motivated; the only way to learn to write is to be forced to write a lot; the only way to teach writing is to confer with each student individually about what he has written. For the last two methods the law
school curriculum has no time, and I have tried everything I can think of to motivate students without great success.”

From the George Washington University: “Frankly, it seems to me unlikely that writing courses per se will become commonplace in law schools. The quantity and variety of substantive and procedural law which must be covered and made available to the students militates against it. Moreover, there has been and continues to be, I believe, a rather strong feeling that students should have mastered appropriate and effective use of the language before arriving at law school. Despite some evidence to the contrary, I believe that feeling is likely to persist.”

And from the dean at the University of Chicago: “I confess it does seem astonishing to me that a special course on, in effect, remedial writing should have to be given at the college junior and senior levels.”

There seems to have been a tendency to pass the blame backward: Law schools blamed the colleges; colleges blamed the high schools; and high schools blamed the middle schools. Fortunately, we have come a long way since 1976.

Writing has always been difficult to teach. It is nobody’s “fault.” Writing is taught to the very young. In trying to accomplish that task, teachers are faced with a number of disabling artificialities, of which three are especially difficult to overcome:

(1) The best way to teach children is binary -- right/wrong, yes/no, allowed/forbidden. We do this in part because children do not yet have the intellectual ability to understand more complex problem-solving; we do this in part because it is the best way to control their behavior. Let us say your child has now become old enough to cross the street alone. You need to teach them how to do that safely. You are with them in the middle of a city block. You show them the right way to do it: “We walk to the intersection; we wait for the light to turn the appropriate color; we look left and right and then left again; and then -- and only then -- we cross the street. Always. 100% of the time. Don’t ever let me catch you doing it any other way.”

But on the next day you find yourself in the middle of that same block, already a few minutes late for a business appointment directly across the street. There are no cars around and no police in sight. Do you walk to the intersection, wait for the light to change, look three ways, cross the street, and then walk a half block back to the building in
question? No. You zip right across the street in the middle of the block. Why? Because you know that the reasons for the “rules” are to prevent an accident or a jay-walking ticket. Since there are no cars and no cops, the reasons disappear, and across the street you go. But you do not trust your child to undertake the intellectual process that you as an adult feel you have the competence to undergo. If the kid tries that and makes only one mistake -- no more kid.

(2) What is the nature of the writing tasks these children are assigned? Over and over again in their composition classes they are asked to do something they may never be asked to do as a functioning adult -- to produce a piece of writing exclusively for the purpose of being evaluated on how well they can produce a piece of writing. In most adult or professional writing tasks, something other than that is "at stake": A client or a colleague must be informed; a court or a foundation must be persuaded; a friend or a foe must be humored; a community or a government must be challenged.

Separating a technique from the normal purpose it serves will often lead to self-conscious, awkward, and (ironically) inefficient performances. Consider, for example, the following way of ruining a fine dining experience. You have looked forward for weeks to trying a new restaurant that has been receiving rave reviews. When the evening finally arrives, and you are exploring with great delight the endlessly attractive menu, a rather stuffy looking gentleman, formally dressed, approaches your table, stands imposingly at attention, clears his throat, and addresses you: “I am from the State Board of Regents for Table Manners. I have come to observe you dine. Please commence.” And with that he sits down. Throughout the meal you find yourself consciously and cautiously deciding when to shift the fork from one hand to the other, or how far down the head can go to meet the rising soup spoon. In short, you “dine” differently because you were giving to the technical support process the attention you should have been paying to the substance of the meal. You behave in an awkward, self-conscious manner in a nervous attempt to please the imposing authority figure. The same holds true far too often when students produce writing for writing teachers. (And
that, by the way, is the main reason their writing is far worse in a formal paper than it is in an informal note they write you on an important matter.)

(3) For whom do our students think they are writing? For that most dreaded of all audiences, the “Big Red Pen in the Sky.” They often view their writing teacher as someone who is paid to act as an unreasonable reader. Unlike anyone else, this tyrant reads not for substance, but for error -- not for communication, but for form. Students are convinced that a “real” reader would have no problem in extracting from that prose its “real” substance and intent. When they receive a paper back from an English teacher with a marginal comment by the fourth paragraph that says, “I don’t see what you are getting at here,” they might think: “Oh sure. My History teacher would have understood. My roommate would have understood. You’re just ‘pretending’ not to understand because you are primarily concerned with the rules of writing.” English teachers appear to the public as people paid to be unreasonable readers.

Writing as a student is an entirely different rhetorical task than writing as a professional in the working world. When a professional writes, he or she is the expert, writing for the purpose of informing others. We have a technical term for this rhetorical act: We call it “communication.” But it is a lie or a fantasy to say that students are primarily involved in communication when they write for a teacher. They do not think that, having spent two days in the library, they are now the “experts” in this subject, and that their task is now to fill full the empty vial of the teacher with the milk of knowledge. In fact, they usually wander too far in the opposite direction: They think that the teacher knows 100% of what could be known on the subject. Their task, therefore, is not one of communication but rather the duller, more limited, more burdensome rhetorical

\[\text{For a dramatic exposition of this point, see Joseph M. Williams,} \] \(\text{The Phenomenology of Error,}\) 32 College Composition & Commun. 152 (May 1981). In that essay, Professor Williams explores the subject at some length, during which most readers note that he commits four or five obvious grammatical errors. At the article’s end, he confidently announces “If by this point you have not seen the game, I rest my case.” His essay contains “about 100 errors.”
task of demonstration. They write to demonstrate to the teacher that they now control 4.7% or 5.2% of the 100% that the teacher knows.

This act of demonstration is rendered burdensome and anti-productive by at least two major problems: (1) Since there is no real purpose in the writing other than to fulfill an academic obligation and achieve “credit,” the act is often joyless and pointless, producing just the kind of lifeless prose and academic posturing we see all too often in student papers. (2) To achieve success, students merely need to fill the required number of pages, sticking to the required topic and depositing somewhere on those pages a number of critical terms, names, dates, facts, and theories. The teacher, they know full well, will be able to put all that together. And if this effort shows improvement over their last one, they will do well.

The job of a professional, however, involves more than this. A professional is someone who is paid to make the appropriate connections. Those cannot be left up to the reader. In a legal brief, both sides may refer to all the same facts and cases and statutes. The winner will be the lawyer who best demonstrates how the facts, cases, and statutes go together to bolster that lawyer’s side of the argument.

As a student, trying hard and improving since last time together spell success. In the real world, no one cares how hard the writer tried nor how much he or she has recently improved.

Can you imagine a judge looking at a brief and saying, “This is a prolix piece of junk, but it’s so much better than the last one you submitted; you win the case.” It doesn’t happen.

Now consider how many of these school-related problems still exist on the law school level. Surely, law school being well beyond the intellectual level of the years in which we were first taught to write -- and just moments away from the “real” professional world -- must not the rhetorical task be wending its way from the act of demonstration towards the act of communication? I’m afraid not. In fact, the law school writing classroom is the most demonstration-laden of them all. Most of us initially assign “canned” problems for our students. The issues are always narrow and well-defined. The relevant cases are often already supplied. As a result,
students know we are clearly looking for them to come up with the “right answers” in their mock briefs and fantasy memos. We put ourselves forward as knowing 100% of the material; the students, in turn, try to demonstrate what percentage of it they have now mastered.

We as a group have become the “State Board of Regents for Legal Table Manners.” We have come to observe them dine. We grade students on how much they have learned about etiquette and the style with which they offer themselves to our artificially enclosed world.

Do you have separate comment sheets for “what they said” and “how they said it”? Is it possible NOT to separate these? Is it possible TO separate these? And to evaluate the “substance,” do you have a list of points or terms of art or concepts or case references for which the students get “credit” if they have brought them somewhere to the page? Are we not back to “right answers”?

We are inculcating students into a new mystery. We are the priests; they are our acolytes. As a result, once more they are required merely to get certain information down onto the page. It matters more that the information be there than where or how it appears. We tend to assume that if the right bits are down there, more or less in an intellectual neighborhood, the writer must understand how to synthesize all these pieces of information into ideas. We assume that because we know how to do it. We are wrong.

Can the students use what we teach them in one of our assignments to succeed better the next time they have to perform a similar legal thinking and writing task? Are we teaching them how to think on paper like lawyers? Or rather are we merely teaching them how to do the given assignment?

I fear it is only the third of these questions to which we can answer “yes.” We concern ourselves too much -- overwhelmingly -- with the expected content and format of the different kinds of legal documents the students will be called upon to produce as lawyers. But that is such a small gain, is it not? If your students were never taught what must appear in a legal memo, they would learn it (as generations of lawyers used to learn it) from the disapproving response of the more senior person who rejects their first professional attempt to write one. Put ten first-week law students in a closed room for two hours with three memos, three briefs, three contracts, three letters, and three judicial opinions -- collated in a random order. Give them the names for the five categories of doc-
uments. Ask them to separate the fifteen documents into those five categories. Ask them to articulate the descriptive parameters for each category. Nine of your ten students will probably do a good job of it and may learn a great deal more than they would have by listening to us lecture about the distinctions for class after class. These things are important, but they should by no means be our primary concern.

Instead, our primary concern should be to teach them how good writing and legal thinking must interact to produce good legal work. Writing is thinking; thinking is writing. If you can get better at one, you can get better at the other. In order to get better at one, you must get better at the other. And it doesn’t matter with which you begin.

When we at Duke were hiring an Assistant Director for the University Writing Program a number of years ago, I asked all thirteen semi-finalist candidates the same question:

If I were your student, and I had handed in to you a paper on the third page of which was a paragraph that contained all the different ways in which I wrote badly, how could you use that paragraph to show me not how I could have written that paragraph better, but rather how I could do a better job the next time I wrote something else?

Four of the thirteen gave me fuzzy, unfocused answers about heuristics, free-writing, and making outlines. The other nine all said, “It can’t be done.” All were Ph.D.s or about to receive their Ph.D. in Composition Studies. Such despair, common though it may be, is not necessary. We can do a great deal that is more helpful than what most of us have been doing. We can help the students make the move from demonstration to communication. We can do that by getting them to look at writing not from the perspective of a student trying to please, and not even from the perspective of a teacher who already knows it all, but rather from the perspective of the only person in the real world who counts where writing is concerned. That person is the reader. We should be teaching our students how readers read.

Here is my bold new suggestion: Our students can control the reader’s interpretation process by my new method of Color Coding for the Interpretation of Syntactic and Substantive Relationships: CCISSR. (That is pronounced “kisser.”)

On the sentence level, there are five essential questions a reader must be able to answer in order to understand not simply
“what information was in the sentence,” but rather how to forge
that information into the thought that the writer wished to com-
municate. Here are the five questions:

(1) What is going on?
(2) Whose story is this?
(3) How does this sentence link backward to the one that
   I’ve just finished reading?
(4) How does the sentence lean forward to what might
   come next? And, most importantly;
(5) What in the sentence is most deserving of my readerly
   emphasis?

If almost all readers of a particular sentence agreed on the an-
swers to these questions -- and those answers are the ones the
writer wanted them to perceive -- then we would have to agree this
particular sentence “was well written.” The bottom line question
where quality is concerned is simply this: Did the reader receive
what the writer was trying to send? If the answer is yes, the sen-
tence was good enough; if the answer is no, the sentence was not
good enough. And it matters not in passing how impressive or da-
zling or sexy the sentence did or did not appear to be.

Now if we adopt my color-coding approach of CCISSR, as I
would urge were I to be made this nation’s “Czar of Writing,” think
how clear all thought would become. Take the fifth question first.
What if we all were to print the most important word or words in
our sentences in red? No one (except the color-blind) would ever
again mistake our intended emphases. As readers, whenever we
would begin a new sentence, our eyes would instantly spot the
words printed in red. We would increase our sense of emphasis as
we read the red and decrease it thereafter. The sentence you have
just finished reading would have benefitted from such a color
scheme:

We would increase our sense of emphasis as we read the
red and decrease it thereafter.

If “sense of” had been pink, and “emphasis as we read the red” had
been red and “and decrease” had been pink, with all the rest being
black, your eye would have seen the crescendo–decrescendo with-
out your mind having to construct it from the sentence’s substance. It would have been easier to read.

Sound good? Just extend CCISSR to its logical conclusion and colorfully indicate to your reader all the answers to those five essential questions:

- What is going on in this sentence? Print it in brown. No one will ever mistake which nominalization you intended as the sentence’s main action.

- Whose story is it? From whose perspective are we to consider this sentence? Print that in green. The green will tell us that this is the plaintiff’s tale, not the court’s nor the defendant’s nor that of clause 3B(ii) of the contract.

- How does this sentence link backwards to the previous sentence? Print that in orange. People will learn to look at those words first.

- How does it lean forward? Print that in yellow.

Assign a color to every recurrent intellectual function, and no non-color-blind reader -- once the reader has gotten this system RIGHT -- will ever again misperceive your intentions. Getting this system RIGHT is of course the difficult part. It will take work. If they get it WRONG, continue teaching until they get it RIGHT. At the end of such a writing course, we could award diplomas that certify which students have gotten it RIGHT. We could even delay credit for the course until the student gets that certificate that shows they are RIGHT IN THE CCISSR.

I am a realist. I realize that my chances of getting CCISSR accepted on a national scale are well below my chances of winning the World Series of Poker. So I have an alternative suggestion. I’ve been studying the language for quite some time now and have discovered that we already have a system that does what CCISSR would do. It is not as visually flashy, but it seems to work every bit as well, and perhaps even better. Readers already get their answers to these five questions from writers, but not by color coding.

---

2 I feel compelled to note that when I delivered this address to the Legal Writing Institute Conference in July 2004, I used a different comparison at this point. At that time I said, “I realize that my chances of getting CCISSR accepted on a national scale are well below the chances of my Red Sox ever beating the Yankees in a game that really counts.” I am ever so pleased now to have to edit this remark, given the miraculous progress of history.
They get them from the structural location of information. The big news: Readers get most of their interpretive clues in a sentence not from word choice but from structural location. To say that differently, where a word appears in the sentence has a great deal to do with what a reader is likely to do with it.

Here is an example of concern #1 ("What is going on?"). Compare these two sentences:

(1a) What would be the employee reception accorded the introduction of such a proposal?

(1b) How would the employees receive such a proposal?

I ask a class of twenty students to underline the word or words in (1a) that indicate actions taking place in the sentence. Some underline no words, some one, some two, some three, some four, and some five. Given the variations of which two words the two people chose and which set of three words the three people chose, I wind up with at least fifteen different answers to my question. In other words, that reading community cannot agree in the least as to what is supposed to be going on in that sentence.

Then I ask them to do the same underlining for (1b). Fifteen to eighteen of them will underline one and only one word -- "receive." Why such an agreement for (1b) and no agreement whatever for (1a)? In English, we expect the action of the sentence to be articulated by the verb. We lean forward to the verb in the expectation that it will announce to us the action. You can hear the flow of the sentence towards "receive." For most people (not all), "receive" makes sense as the action. But in (1a), there is no such communal sense of flow. Some readers lean forward to "would be," some to "reception," some to "accorded," some to "introduction," and some to "proposal." The permutations and combinations of these, while not infinite, are sufficiently overwhelming.

Is (1b) therefore a "better" sentence than (1a)? It turns out not to be. I produced the revision of (1b) for the author of (1a). She informed me I had missed her meaning altogether, because I had selected "reception" as the sole action. She had intended both "reception" and "introduction" to be actions. I was puzzled. I realized that I now knew that I did not know what her sentence was intended to mean. Yet, as her teacher, I could still tell her how to write it better. If "reception" and "introduction," both nominalizations (nouns made from verbs) were her actions, she should make them verbs. She could then summon to the sides of those verbs as
subjects the doers of those actions; and then I would know what she meant to tell me. In no time she produced (1c):

(1c)  How would the employees receive such a proposal if the executive board were to introduce it at this time?

Once you know (1c) is what she meant, you can “find” it in (1a). You cannot find it in (1b). If CCISSR were the law of the land, then printing “reception” and “introduction” in brown would have done the trick. Since that happy state has not yet come, we should stick to what our readers already know. Articulate actions in verbs. Most readers will find them.

Here is a simple example to illustrate the answer to question #2, “Whose story is this?”

(2a)  Jack loves Jill.

(2b)  Jill is loved by Jack.

Most writing teachers will tell you that (2a) is superior as a sentence to (2b). They are wrong. They will argue that (2a) is better both because it is shorter and, more importantly, because it employs the active mode. (2b) is passive, and therefore bad, incompetent, and almost immoral. Utter nonsense. We could not write high quality English without the skillful use of the passive. It rearranges the sentence’s furniture. Jill moves up front, and Jack slides to the rear. This makes a significant -- and signifying -- difference.

Whose story is (2a)? Most people will say it is Jack’s story. Whose story is (2b)? Most people will say it is Jill’s story. If you want to tell Jill’s story, (2b) is the better sentence. Tell me all about Jill, I ask. You respond, “Jack loves . . .” but I interrupt. No, tell me about Jill. “OK, I will. Be patient. Jack loves . . .” No!, I say, tell me about Jill. “OK. OK. Jill is loved by Jack.” Thank you.

I have not the time or space here to expand on how vital it is to every English sentence that the “whose story?” question be answered by that person/thing/idea appearing up front, in the main clause as the grammatical subject, but that is what readers of English tend to expect. Would that we could print all the “whose story?” people/things/ideas in green, but we can’t. If, however, every clause is indeed the story of the subject of the verb, our readers will be just as well off.
For those who wish to see these principles explained in the full detail they really require, please see the book I have written for teachers of writing: *Expectations: Teaching Writing from the Reader's Perspective* (Pearson Longman 2004). If you like what you find there and wish to assign a textbook for your students, take a look at my other book, *The Sense of Structure: Writing from the Reader's Perspective* (also Pearson Longman 2004).

I have time for only one additional example, which suggests the locational answer to the important question #5, “What in the sentence is most deserving of my readerly emphasis?” Which word or words in (3a) below do you think the writer intended us to emphasize?

(3a) As used in the foundry industry, turn-key means responsibility for the satisfactory performance of a piece of equipment in addition to the design, manufacture, and installation of that equipment. P et al. agree that this definition of turn-key is commonly understood in the foundry industry.

I teach my students that readers of English tend to give extra emphasis to anything located in what Joe Williams and I call a “stress position.” I define a “stress position” as any moment of full syntactic closure. Whenever the grammatical structure of an English sentence comes to a full halt, most readers experience a sense of emphasis. In English that is accomplished by the proper use of a colon, semi-colon, or period. It can never be created by a comma. (The comma is the only mark of punctuation in English that does not announce its function at the moment of its arrival. You always have to go beyond a comma to determine what kind of a comma it is trying to be. It therefore cannot produce a stress position.)

It takes a good deal of time to demonstrate the persuasiveness of this far-reaching statement about the existence and function of the stress position. Again I would refer you to *Expectations*, chapters 4 and 5.

I ask my students, once they have studied the efficacy of the stress position, to rewrite example (3a), basing their revisionary choices exclusively on their perception of which words they think deserve the greatest emphasis. I ask them first to circle those words and then to restructure example (3a) so that everything circled will be located in a stress position. Conversely, every stress position should be occupied by something they deem stress-worthy.
About a third of them decide to combine the two sentences into one, because they choose to circle no words whatever in the second sentence: They have heard about “turn-key” before; they have heard about “the foundry industry” before; and they deem P et al.’s agreement of no great significance. This is neither right nor wrong, but the result of an interpretive decision. If P et al. are merely a footnote to this author, then they did not deserve a stress position, unless that sentence was located in a footnote. If, on the other hand, the most important concept in these two sentences was that -- mirabile dictu! P et al. agreed (!!), then this agreement did indeed deserve a stress position.

In the first sentence of (3a), what do my students circle as being stress-worthy? Almost everything. Some students (and consulting clients) circle “foundry industry,” some “turn-key,” some “responsibility,” some “satisfactory performance,” some “design, manufacture, and installation,” and many circle a dizzying variety of combinations of these. Usually no one circles “a piece of equipment”; and yet look what occupies the stress position of the fist sentence of (3a) -- that “piece of equipment.” The sole stress position is occupied by the only term that most people agree is not worthy of stress. No wonder no two students produce exactly the same revision.

I asked the author (a practicing lawyer) what he intended us to emphasize. He said “satisfactory performance.” (Do not feel bad if you did not get it “right.” That was his fault, not yours.) If CCISSR had already been in place nationally when he wrote this, he simply would have printed “satisfactory performance” in red, and we all would have gravitated to it with ease and emphasized it in our mind when we encountered it. Lacking that, we can do only what we can do -- and should do, if communicating with our readers is our aim: We should put “satisfactory performance” into the sole stress position. Would that really signal most readers that it, and it alone, deserved our reading it with extra force? I think so. Try it for yourself:

(3b) As P et al. agree, the foundry industry uses the term turn-key to signify responsibility not only for the design, manufacture, and installation of a piece of equipment, but also for its satisfactory performance.

And what do we expect to hear more about in the following sentence? Satisfactory performance. Such a hullabaloo was made of it
in this sentence, without yet explaining for us why it was so important. That, we expect, will be the topic of the next moment of the text.

So perhaps we do not need CCISSR after all. We already have reader expectations. We all know these expectations, intuitively, as readers. My effort has been to make us consciously aware of them as writers. Note how such knowledge can give us a reader's eye view of our own prose: We look at one of our sentences and ask, "Is the most important piece of information located in the stress position?" That is a question, most of the time, we as authors can answer. If we find it is not so located, then we know that a high proportion of our readers will disagree as to what we want them to emphasize. The act of moving that to the stress position will be no mere mechanical nor cosmetic act; to do it, we have to re-descend into the thinking process, deciding what really is and was meant to be "important."

Just imagine requiring our students to print the important thing in each sentence in red. Think how easy it would be to see what was really on their minds. Give it a try. (Perhaps bold would be easier to affect than red.) Then get them to restructure each sentence so that the red or bolded words resided just before a properly used colon, semi-colon, or period. I guarantee you their prose will be transformed. This is, however, not as easy a task as it might sound. That is why chapters 4 and 5 of Expectations needed to be so long.

If you would like to see this approach applied to the text of the UCC, see my article, Let the Buyer in Ordinary Course of Business Beware: Suggestions for Revising the Language of the Uniform Commercial Code, 54 University of Chicago Law Review 1178 (1987). The misuse of the stress position, by the way, is the number one problem in all professional writing. It is suffered (I have observed) by at least 75% of all practicing lawyers.

If the day ever comes when I am elected Czar of Writing and can install my CCISSR approach as main control of communicative writing, I will make one additional requirement: Not only would everything to be considered most stress-worthy be printed in red, but all words occupying stress positions would be printed in blue. Given that, one could immediately see that perfect prose would be purple prose. When red words were printed in the blue positions, they would turn purple. In the best of prose, no red word would exist except in a blue position, and no blue position would be filled by anything other than red words. The result would be purple
prose. So I urge you to make your students consciously aware as writers of that which they are already intuitively aware of as readers:

- What is going on here? Whatever the verb says is going on here.
- Whose story is it? Whoever shows up as the subject in the main clause.
- How does this sentence link backwards to the last sentence? By whatever piece of information from the last sentence is alluded to at the beginning of the new sentence.
- How does this sentence lean forward to the next one? (That is too complicated for a one-clause description.)
- What is most important in this sentence? That which resides in the stress position.

May all your students understand better how their readers will be likely to read their prose; and may all their prose be purple.