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EDITOR'S NOTE

I am delighted to welcome you to the sixteenth Volume of Legal Writing: The Journal of the Legal Writing Institute, the nation’s premier journal about legal writing and communication and the official journal of the Legal Writing Institute.

In this Volume, the Journal’s Editorial Board is pleased to present a wide variety of articles about rhetoric, storytelling, persuasion, assessment, and expertise, as well as a series of articles flowing from the Journal’s first Symposium, which reflect on the past, present, and future of the profession of legal writing. The “heft” of this Volume should indicate the depth of scholarship as well as the editorial board’s excitement in bringing it to you.

The Volume begins with Professor Linda Berger’s insightful article on teaching Law and Rhetoric. She is followed by Professor Bret Rappaport’s intriguing examination of evolution, music, and persuasive writing. The articles next turn to the current hot-topic of storytelling as Professors Stefan Krieger and Serge Martinez analyze their experiences with on-the-ground legal storytelling in the context of the 2008 Presidential Election, and Professor Jeanne Kaiser examines what happens “When Truth and Stories Collide.” The next two articles report results of two fascinating surveys. First, Texas Lawyer Sean Flammer shares the results of his survey of judges and their views of what makes writing persuasive. Next, Professors Miriam Felsenburg and Laura Graham share their insights into first-year legal writers and why the journey from novice to proficiency is so difficult. We then turn to another hot-topic in legal education: assessment. Professor Victoria Van Zandt provides a primer on assessment and shares advice for creating assessment plans for first-year legal research and writing courses. Finally, Professor Erika Abner and Shelley Kierstead examine how expert performance theory can enlighten legal writing. Each of these articles provides food for thought for legal academics, practicing lawyers, and members of the judiciary.

The second half of this Volume includes articles stemming from the Journal’s first symposium, which was held in November 2010. As part of the ongoing celebration of the Legal Writing Institute’s 25th anniversary, the Editors of the Legal Writing Journal and the Mercer Law Review organized a day-long symposium to reflect on the history and look toward the future of both LWI and the discipline of legal writing. This invigorating and insight-
ful symposium brought together national leaders in the legal writing profession spanning the past twenty-five years.¹

The Symposium began with a panel reflecting on the history of LWI and the professionalization of legal writing. Professors Laurel Oates, Jill Ramsfield, and Mary Beth Beazley provided attendees with glimpses of the vision that has blossomed into the dynamic and inventive field of legal writing pedagogy. Professor Oates told the “fairy tale” story of the beginning of the LWI as a place for those who love legal writing and value its place in the profession. Professor Ramsfield built on that history and highlighted the importance of empirical surveys to assess legal writing teaching in United States law schools, which has become an important contribution of both LWI and its sister organization, the Association of Legal Writing Directors. Finally, Professor Beazley spoke about how LWI and legal writing faculty have been able to help overcome common misconceptions that writing cannot be taught, that there is no need or possibility for the development of expertise in legal writing and therefore no need for scholarship or a legal writing profession.

Building on the history and vision for the future, the second panel of the day focused on effective teaching. The three panelists, Professors Marilyn Walter, Sam Jacobson, and Carol Parker, are all renowned teachers, and each shared exciting information that helped participants expand their concepts of what an “excellent teacher” is. Professor Marilyn Walter encouraged legal writing professors to use peer review as a way to teach students how to act professionally in collegial relationships and to be good editors of their own work by editing the work of others. Professor Sam Jacobson, an expert on learning theory and its application to law teaching, spoke next, giving attendees a fascinating look at our abilities to pay attention and focus in a multi-media world. Bringing in brain science and other research, she focused on the challenges raised for both students and teachers. Finally, Professor Carol Parker took the challenge posed by the Carnegie Foundation Report on Legal Education² and defined a “signature pedagogy” for legal writing.

¹ Transcripts of these panels are published in Symposium, The Legal Writing Institute: Celebrating 25 Years of Teaching & Scholarship, 61 Mercer L. Rev. 705 (2010). We hope you will read them.
² William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of
The Symposium’s Luncheon Speaker was Professor J. Christopher Rideout, a founder of LWI and the Journal’s first Editor. Professor Jill Ramsfield introduced Professor Rideout and gave the audience a glimpse into his career and work with the legal writing profession. Professor Rideout’s address, “Individuals and Community, Discipline Building, and Disciplinary Values: The First Twenty-five Years of the Legal Writing Institute,” was an engaging journey through concepts of community and professionalism and left the audience eager to think about and discuss the ideas he presented. Following his remarks, Professor Rideout was named the first recipient of the Mary S. Lawrence Award.

The afternoon began with a panel on the scholarship of legal writing featuring three of the most prolific and influential scholars in the legal writing academy: Professors Linda Berger, Linda Edwards, and Terrill Pollman. Professor Berger spoke about the role of rhetoric in legal writing scholarship. She began with an analysis of why we write and why legal writing faculty should be engaged in scholarly “conversations” with one another about the substance of legal writing. After a discussion of the history of legal writing scholarship, Professor Berger challenged the audience to focus scholarship on legal rhetoric. Professor Edwards focused her remarks on the concept of voice in legal writing scholarship. She shared her thoughts on the purposes of legal writing scholarship and how legal writing faculty might think about scholarship as a shared enterprise—a scholarly conversation. Finally, Professor Pollman reflected on the audiences for legal writing scholarship, focusing on both the “inside” and “outside” audiences.

The day concluded with a panel focusing on the development of legal writing as a profession within the legal academy. Professors Suzanne Rowe, Susan Duncan, and Eric Easton shared informative and insightful comments on issues of professionalism, status, and standards. First, Professor Suzanne Rowe gave the audience an overview of the vast empirical surveys that have been performed by LWI and ALWD to assess the teaching of legal writing in American law schools. She challenged the organizations to revise future surveys to address key challenges in the academy. Next, Professor Susan Duncan summarized key developments in the standards governing American law schools focus-

Law (Jossey-Bass 2007) (a comprehensive study conducted for the Carnegie Foundation for the Advancement of Teaching).
ing on those that directly impact the teaching of legal writing. Finally, Professor Eric Easton helped participants to think “outside the box” about program design and teaching models.

Many of these speakers came home from the Symposium and developed their ideas into articles for publication in this Volume. We hope that as you read the articles that follow, you will feel the excitement present in Macon on that beautiful November day. We hope that you will catch the vision of legal writing—its teaching, scholarship, and professionalism—and in whatever way you can, build on the energy and intellectual rigor that we were all able to experience together.

The Volume also includes a series of tributes to Professor Emerita Mary Lawrence. Professor Lawrence, who serves as Senior Editor of this Journal, was and is a superstar in the legal writing academy. Her quiet grace, exceptional teaching, and insightful scholarship are models for all of us to follow. As we announce the creation of the Mary S. Lawrence Award, we feel it fitting to share tributes to Professor Lawrence written by many of her friends and colleagues.

We are committed to providing our readers with broad coverage of interesting and important issues related to legal writing, research, analysis, and pedagogy, and we sincerely appreciate the continued support of contributors and readers alike. If you have feedback about this issue, or would like to submit an article for publication, please contact the Journal at http://www.journallegalwritinginstitute.org/, gerdyk@law.byu.edu, or 801-422-9022.

Kristin B. Gerdy
Editor in Chief
STUDYING AND TEACHING “LAW AS RHETORIC”:

A PLACE TO STAND

Linda L. Berger*

The first of these [attacks on rhetoric], the attack from above, argues for a politics of reason whose indisputable truths can only be obscured by the rhetorician’s passionate appeals. This is the position that Socrates defends. The second, the attack from below, insists that the rhetorician’s invocation of truth and justice is a sham, a technique for gaining power whose success requires that its practitioners either fail to understand what they are doing or deliberately conceal it. This is the line of attack forcefully pressed by Callicles, . . . . Gorgias stands between these two, between Socrates and Callicles, and the question is, does he have any ground on which to stand? Does the craft of rhetoric have a separate and legitimate place in human life, in between pure reason and pure power?1

INTRODUCTION

As they begin law study, students “undergo a linguistic rupture, a change in how they view and use language.”2 The change affects not only their understanding of language use, but also their ideas about how the law works and its place for them.3 Their ideas are influenced by pervasive legal conversations re-

* © 2010, Linda L. Berger. All rights reserved. Professor, Mercer University School of Law. Special thanks to Amy Sloan for sharing her materials; to Tom Cobb, Michael Frost, Jay Mootz, Terry Pollman, Jack Sammons, Jessica Slavin, and Karen Sneddon for being “good readers”; to Kevin Hembree for research assistance; and to Thomas Jefferson School of Law and Mercer University School of Law for supporting the development of the course and the writing of the Article. Most of all, thank you to my students.


3. Id. (“As in other forms of language socialization, new conceptions of morality and personhood are subtly intertwined with this shift to new uses of language.”).
reflecting the positions of Socrates and Callicles: the law is all rules or all power. Against these versions of the legal conversation, I propose in this Article to offer law students a rhetorical place to stand, between reason and power.4

There are two grounds for this proposal: first, introducing students to rhetoric makes it possible for them to envision their role as lawyers as constructive, effective, and imaginative while grounded in law, language, and persuasive rationality.5 Second, rhetoric, dealing with the “effects of texts,”6 allows law professors to integrate their own scholarship and teaching as well as to develop a more nuanced understanding of the law school classroom as a rhetorical community.

For law students, rhetoric provides a strong counter to the constrained view of the life of lawyers offered by popular depictions of formalism or realism.7 In the typical description, prop-

4. The Carnegie Foundation, in a recent publication setting out an agenda for higher education generally, recommended “the old humanistic discipline of rhetoric” as a discipline for guiding the inquiry into context. According to the report, rhetoric can provide an often-missing intellectual connection from analysis of abstract concepts “to engagement with others in responsible relationships.” William M. Sullivan & Matthew S. Rosin, A New Agenda for Higher Education: Shaping a Life of the Mind for Practice 118 (Jossey-Bass 2008).
7. Although these depictions have been criticized by legal scholars, lawyers, and judges, they live on in the language of judicial opinions and in public debates, especially those surrounding confirmation hearings for Justices of the United States Supreme Court. See Nomination of Sonia Sotomayor to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 111th Cong. (July 13, 2009) (opening statement of Sen. Jeff Sessions, “[O]ur legal process is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.”) (available at http://www.npr.org/templates/story/story.php?storyId=106540813); Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary, 109th Cong. 56 (Sept. 2005) (statement of John G. Roberts) (comparing the judge’s role to that of a baseball umpire, merely applying the rules to call “balls” and “strikes”) (available at http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf).

Judge Richard Posner has defined nine theories of judicial behavior, including the one he favors, which he calls pragmatism rather than realism. Richard A. Posner, How Judges Think 13 (Harv. U. Press 2008). Judge Posner defines pragmatism as “basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule.” Id. at 40; see David F. Levi, Autocrat of the Armchair: Reviewing Richard A. Posner, How Judges Think, 58 Duke L.J. 1791, 1796 (2009) (“There are a number of problems with Judge Posner’s descriptions and prescriptions. Most fundamentally, much of what he asserts about how judges think is just assertion, lacking any factual support in empirical study or even anecdote.”); Gerald
nents of legalism or formalism are said to believe that the meaning of legal rules can be “found,” the true version of facts can be established, and logic can be applied to yield certain results. Contrasting their theory with this version of formalism, political realists argue that even though meaning is often indeterminate and facts are frequently ambiguous, judges must still decide. To do so, realists claim, judges will necessarily turn to their personal, political, or ideological beliefs.8

Set next to these depictions, rhetoric looks at how the law works by exploring a meaning-making process, one in which the law is “constituted” as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues.9 Studying and teaching “law as rhetoric”

B. Wetlaufer, Systems of Belief in Modern American Law: A View from Century’s End, 49 Am. U. L. Rev. 1 (1999) (describing six different “operating systems” that he says are currently functioning in legal discourse—formalism, realism, legal process, law and economics, positivist, and contemporary critical theory). According to Professor Wetlaufer, the great divide is between the Grand Alliance of the Faithful (formalism, legal process, law and economics, and legal positivists) and the League of Skeptics (legal realists and contemporary critical theorists). Wetlaufer, supra n. 7, at 4, 59–77.

8. For both sides of the current debate about the “new legal realism,” that is, the extent to which politics and ideology affect judicial decisions, see Posner, supra n. 7; Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 Duke L.J. 1895 (2009) (raising issues about the selection and coding of data in empirical studies of judicial decisions); Dan M. Kahan, “Ideology in” or “Cultural Cognition of” Judging: What Difference Does It Make? 92 Marq. L. Rev. 413, 413 (2009) (distinguishing between “values as a self-conscious motive for decisionmaking and values as a subconscious influence on cognition”); Thomas J. Miles & Cass R. Sunstein, The New Legal Realism, 75 U. Chi. L. Rev. 831 (2008) (setting forth the ideological or political thesis); Brian Z. Tamanaha, The Distorting Slant in Quantitative Studies of Judging, 50 B.C. L. Rev. 685, 686 (2009) (arguing that a determination to prove that judging is political “pervades the work of judicial politics scholars” and that instead of revealing something new, the results of quantitative studies “basically confirm what judges have been saying about judging for many decades”).

9. On the concept of “law as rhetoric” generally, see James Boyd White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684, 695 (1985) [hereinafter White, Law as Rhetoric] (“Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials.”). For discussion of the “rhetorical turn” in legal scholarship, for example, see Stanley Fish, Rhetoric, in Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies 471, 485–494 (Duke U. Press 1989) (discussing disciplines in which rhetoric has been “on the upswing”); Francis J. Mootz III, Rhetorical Knowledge in Legal Practice and Theory, 6 S. Cal. Interdisc. L.J. 491, 572 (1998) (“Legal practice is rhetoric all the way down, with rhetorical engagements layered upon rhetorical engagements in a dynamic and challenging confluence that cannot be constrained by pretenses of analytical certainty.”); Richard K. Sherwin, The Narrative Construction of Legal
treats rhetoric not as tool or technique, nor even as the art or craft of persuasion, but instead as an interactive process of persuasion and argumentation that is used to resolve uncertain questions in this setting and for the time being. Such treatment rescues rhetoric from being viewed as a grab bag of literary devices, language tricks that put a gloss on legal reasoning but add little of substance. Instead, it focuses on the rhetorical process as being central to perception, understanding, and expression.

For law professors, rhetoric offers a way to bring together the objects of their study (the variety of legal “texts” that are the “ob-


Elsewhere in the legal academy, the discussion of law and rhetoric centers on the difference between “mere” rhetoric and something the Author contends is “reality.” A search of Westlaw’s Texts and Periodicals database using the search terms “rhetoric” w/3 “reality” generated 2,871 results on February 2, 2010.


Others have proposed placing more emphasis on rhetorical teaching throughout the law school curriculum, see Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 Clev. St. L. Rev. 387 (1992) (arguing that the traditional focus on appellate cases and authority underscores the hidden message that specific facts, contexts, and people are nearly irrelevant); Elizabeth C. Britt et al., *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. Bus. & Tech. Comm. 213 (1996) (proposing a new conception of rhetoric’s role in the law school curriculum); Leigh Hunt Greenhaw, “To Say What the Law Is”: Learning the Practice of Legal Rhetoric, 29 Val. U. L. Rev. 861, 895–896 (1995) (suggesting that legal writing is “not something distinct from what is taught in other law classes” but instead that both doctrinal and legal writing courses “can and do teach the practice of legal rhetoric”).
jects of interpretive attention”11) with the subject matter of their teaching and the composition of their scholarship. For example, the professor who uses a rhetorical approach to analyze a judicial opinion will be better able to teach students how to interpret and construct legal arguments because the professor has taken apart the structure of an argument and evaluated the effectiveness of an author’s rhetorical choices. Similarly, the law professor may directly apply rhetorical theory to the classroom conversation, treating the semester’s work as a series of rhetorical transactions between student and teacher, reader and writer, inherited texts and current arguments, individuals and social contexts.12 Viewing the classroom as a rhetorical community enables the teacher to tap into ongoing transactions in more effective ways.

Because of rhetoric’s complexity and fragmentation,13 I found it impossible to frame a single rhetorical approach that would be most effective in a law school class. Instead, my upper-level elective course in Law & Rhetoric14 surveys a number of classical and contemporary rhetorical theories that seem particularly appropriate for interpreting and composing legal arguments. In developing the learning objectives of the course, I envisioned “rhetoric” as a study (of the effects of texts), a process (for composing texts), and a perspective (for invention in the classical rhetorical sense).15 While rhetorical study has much in common with literary criticism and interpretation, the course in Law & Rhetoric

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11. Mailloux, supra n. 6, at 40.
12. See e.g. Linda L. Berger, A Reflective, Rhetorical Model: The Legal Writing Teacher as Reader and Writer, 6 Leg. Writing 57 (2000).
14. The examples in this Article are drawn primarily from the 2007 and 2009 versions of the class. The Article’s description of assignments and topics conflates the two years, and so it encompasses much more than any one-semester course should include. I taught the class in 2003, 2005, and 2007 at Thomas Jefferson School of Law; in 2009 and 2010, I taught the class at Mercer University School of Law. At Thomas Jefferson, my students were a mix of second- and third-year students enrolled in a three-unit elective. At Mercer, my students were sixth-semester students enrolled in a two-unit elective. I failed to appropriately adjust the reading assignments for a two-unit course, and so, in the words of one student evaluator, “there was an insane amount of reading.”
15. See Anthony G. Amsterdam & Jerome Bruner, Minding the Law 14 (Harv. U. Press 2002) (Rhetoric encompasses “ways of winning others over to our views, and of justifying those views to ourselves as well as others, when the question of how things in the world ought to work is contested or contestable.” (Emphasis in original)); Wetlaufer, Rhetoric and Its Denial, supra n. 9, at 1546 (“By ‘rhetoric,’ I mean the discipline . . . in which the objects of formal study are the conventions of discourse and argument.”); White, Law as Rhetoric, supra n. 9, at 684 (rhetoric establishes, maintains, and transforms the community and the culture).
approaches “rhetoric” not only as a “stance for interpreting,” but also as a “guide for composing” and inventing.\textsuperscript{16}

Part I of the Article explores the argument that the study of rhetoric is important to legal education. Part II provides the framework of the Law & Rhetoric course by describing the reading, writing, and oral presentation assignments; this part includes examples of student work. Part III explains the various rhetorical theories and approaches; it also illustrates how these are used by my students to interpret, compose, and invent. Part IV concludes with students’ thoughts about the course.

Most students say that the course is theoretically challenging but practically worthwhile: they have become better rhetoricians because they are more aware and adept legal readers and writers, and they believe that better rhetoricians become better lawyers. I think their conclusion that better rhetoricians become better lawyers carries within it an important realization: rhetoric recognizes students’ power and ability to affect outcomes in their rhetorical communities, both now, while they are law students, and later, when they are practicing lawyers. In their traditional guises, formalism and realism appear to doom lawyers to lives of “quiet desperation”\textsuperscript{17}: if “rules” or “politics” compel outcomes, the work of lawyers will have little effect. Rhetoric recognizes a constructive role for law students and lawyers by acknowledging that the law is often being interpreted and that interpretations are often contestable. From the rhetorical point of view, law students, law teachers, and lawyers are human actors whose work makes a difference because they are the readers, writers, and members of interpretive and compositional communities who together “constitute” the law.\textsuperscript{18}

\textsuperscript{16} Mailloux, supra n. 6, at 40 (“A production or performance model of rhetoric gives advice to rhetors concerning probable effects on their intended audiences. . . . [A] hermeneutic or reception model provides tools for interpreting the rhetorical effects of past or present discourses and other practices and products.”).

\textsuperscript{17} See Charles A. Bird & Webster Burke Kinnaird, Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court, 4 J. App. Prac. & Process 141, 149 (2002) (“The . . . lawyer’s life would be one of quiet desperation if the work consisted merely of delivering a list of issues and a record to a court that would decide cases without regard to the quality of advocacy.”).

\textsuperscript{18} Discussing law and its differing interpretations is the way we constitute community: rhetoric is “the central art by which community and culture are established, maintained, and transformed.” White, Law as Rhetoric, supra n. 9, at 684; see also Richard Rorty, Consequences of Pragmatism (Essays: 1970–1980) 166 (U. Minn. Press 1982) (“Our identification with our community—our society, our political tradition, our intellectual
But their power is not unrestrained. Unlike political realists, rhetoricians suggest that there are reasonable constraints on what lawyers argue and how judges decide and that the constraints come from the rhetorical process itself. These constraints emerge from language, history, and culture, and, in particular, from the norms and customs of judging and of law practice. Although rhetoric does not promise certain answers, it can promise results that are, in Karl Llewellyn’s term, reckonable—they are certain enough that lawyers can make judgments about their likelihood and appellate lawyers can feel comfortable charging clients for their work.

Finally, rhetoric may help prepare law students to move more effectively between the law and life, between the legal language of abstraction and their future clients’ words describing individual human conflicts and dilemmas. If law school pedagogy carries the message that the “law’s key task is effective translation of the ‘human world’ using legal categories,” law students may find themselves poorly prepared for the realities of legal practice. The language of law school may even distance law students from individual voices they will need to be able to hear.

To sum up, studying the “law as rhetoric” allows students to take part in the many-voiced and open-ended rhetorical process through which the law is made. When students study the law as rhetoric, they are encouraged to bring in pluralistic and complicating forces, including their own experiences, values, and senses of themselves. Studying legal arguments as rhetorical performances helps law students become more aware of the effects of language and symbol use and meaning frames. This growing awareness makes them more rhetorically effective speakers and

heritage—is heightened when we see this community as ours rather than nature’s, shaped rather than found, one among many which men have made.” (Emphasis in original)); Austin Sarat, Crossing Boundaries: Teaching Law in the Liberal Arts, in Teaching What We Do: Essays by Amherst College Faculty 61 (Amherst College Press 1991) (“When the indeterminacy of legal language is . . . exposed, students confront law as something more than a system of rules. They see it as a system of human choices and moral or political judgments shaped, constrained by, and constructed out of social institutions and practices.”).

19. See Jack L. Sammons, The Radical Ethics of Legal Rhetoricians, 32 Val. U. L. Rev. 93, 99 (1997) (“Legal rhetoric is not unbridled because this particular form of rhetoric is located . . . within a particular rhetorical community with a particular rhetorical culture.”).


writers. Beyond improving their skills, engaging in law as rhetoric may help conjure and channel students’ natural ability to imagine and invent, and it may enable them to better listen to alternative views and to speak in their own voices.  

I. WHAT’S THE PLACE OF RHETORIC IN LEGAL EDUCATION? 

The answer to this question appears obvious: “Simply put, lawyers are rhetors. They make arguments to convince other people. They deal in persuasion.” Proposing “that the law is a branch of rhetoric,” James Boyd White wrote, “Who, you may ask, could ever have thought it was anything else?” Others give the equally obvious, contrary answer: simply put, rhetoric is not reality; it is based on emotion, not reason; on word tricks, not logic.

Why should legal educators see and teach the law “as” rhetoric? That is, why should we engage students in learning not only the art or craft of persuasion, but also “the art of thought called for where scientific or mathematical forms of thought won’t work, where we live in necessary uncertainty?” First, we should do so because rhetoric reminds us that in “hard cases,” the legal language rarely “fits” and the legal rules rarely compel the result. Moreover, it may be the advocate’s role to make a case seem “hard” to avoid having it be categorized as falling within a well-settled legal principle. To read and to argue hard cases, students need to interpret, and interpretation is complex: “[l]ike all human language, legal language is embedded in a particular setting, shaped by the social contexts and institutions surrounding it. It does not convey abstract meaning in a legally-created [sic]
vacuum, and thus cannot be understood without systematic study of the contextual molding that gives it foundation in particular cultures and societies." Studying the law as rhetoric is essential to begin the complex task of legal interpretation.

Rhetoric also is essential for legal composition, perhaps even more naturally so because rhetoric is the historical site of the tools and implements of persuasion and argumentation. Moreover, the outcome of a legal argument is inherently rhetorical. That is, it is rhetorical because any agreement with the conclusion rests upon the ability of one proponent to persuade another, or to persuade an authoritative decision maker, to read a document or to understand a situation in a certain way.

Finally, studying the law as rhetoric immerses students in an imaginative human endeavor that may be capable of bringing about change. The rhetorical approach to imagining how things would look in different lights and from different angles offers the opportunity to effect change when "reality" favors the status quo. Looking into how reality is constructed makes it possible for the lawyer to shape arguments about individual circumstances that depart from the accepted narratives and existing frameworks. Recognizing that the law is constructed by human beings as they interpret, compose, and interact makes it possible for the law student to imagine a voice and a place to fit within the legal rhetorical community.

What would it mean to study and teach the law "as" rhetoric? I will mention a few general principles here; my version of the answer to the broader question is in the description and evaluation of the Law & Rhetoric course in Parts II and III. Rhetorical theorists agree that rather than being engaged in a search for "truth," in the sense of a universal principle, rhetoric’s goal is the meaning that emerges from a contingent interaction among the reader and the writer, the speaker and the audience, the language and the context. From the rhetorical standpoint, words

28. Mertz, supra n. 21, at 513.
29. For example, Richard Rorty differentiates between two ways of thinking: "The first [what Stanley Fish labels as foundationalist] . . . thinks of truth as a vertical relationship between representations and what is represented." Rorty, supra n. 18, at 92. The second is the rhetorical view, which "thinks of truth horizontally—as the culminating reinterpretation of our predecessors' reinterpretation of their predecessors' reinterpretation. . . . [I]t is the difference between regarding truth, goodness, and beauty as eternal objects which we try to locate and reveal, and regarding them as artifacts whose fundamental design we often have to alter." Id.
do not “fit” nor do they “represent” the world: instead, they are ways of interacting with it. Further affecting their stance toward persuasion and argumentation, rhetorical theorists also agree that law is not science, a discipline that assumes the ability to prove that a result is compelled by a reasoning process, either by logical demonstration or because of empirical data. Even though lawyers and judges claim otherwise in legal briefs and opinions, rhetoricians assume that the result of a lawsuit is not “compelled” by the application of the rules and that what advocates mean, and what they are understood to mean, is not fully revealed by the words they choose. If we recognize that legal conclusions are not compelled by law, logic, or language alone, we are free as interpreters to consider historical, cultural, and social factors and to substitute the web of context for the ladder of the rules. As a result, rhetoric is able to accommodate diversity and imagine change, based in human experience, sensitive to middle grounds, and in opposition to all-or-nothing judgments.

II. FRAMING A COURSE IN LAW & RHETORIC

In the classical sense, rhetoric is the practical art for lawyers: it helps advocates discern and use techniques and methods for persuading audiences with different backgrounds and levels of education and experience. Beginning with Aristotle’s definition of rhetoric as “the faculty of observing in any given case the avail-

30. Winter, supra n. 25, at 88–89.
31. Science, many argue, is not science either, at least not in the sense of perfect knowledge and absolute certainty. See White, Law as Rhetoric, supra n. 9, at 687–688; see also Winter, supra n. 25, at 9.
32. Amsterdam and Bruner describe this idea as follows:
Our objective, then, has been to increase awareness, to intensify consciousness, about what people are doing when they “do law.” We have emphasized that the framing and adjudication of legal issues necessarily rest upon interpretation. Results cannot be arrived at entirely by deductive, analytic reasoning or by the rules of induction. . . . There always remains the “wild card” of all interpretation—the consideration of context, that ineradicable element in meaning making. And the deepest, most impenetrable feature of context lies in the minds and culture of those involved in fashioning an interpretation.
33. For the authors of the classic rhetoric text, “[r]hetoric is the art or the discipline that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience.” Edward P. J. Corbett & Robert J. Connors, Classical Rhetoric for the Modern Student 1 (4th ed., Oxford U. Press 1999).
able means of persuasion,” the emphasis is on exploring and testing all the available means of persuasion. Early recognition of the close relationship between rhetoric and law came from Gorgias, the most famous of the Sophists. Rhetoric, he said, was “the art of persuading the people about matters of justice and injustice in the public places of the state.” Contemporary rhetoric’s definition is broader: “the human use of symbols to communicate.”

Because symbols and signs filter and focus, as do metaphors and narratives, contemporary rhetoric sheds light on the inherently persuasive act of choosing the symbols and stories that affect our perceptions, actions, and reactions.

Despite their long and close relationship, one of the most remarkable features of the rhetoric of law is the law’s continuing denial that it is rhetoric. Based on their reading of Professor Gerald Wetlaufer’s description of the discipline-specific rhetoric of law, I ask my students during the first class of the semester to consider whether the rhetoric of closure and certainty is the most appropriate choice for lawyers:

34. Aristotle, *The Rhetoric of Aristotle* 224, bk I, ch. I, 1355b, line 26 (Lane Cooper trans., D. Appleton & Co. 1932). The Rhetoric continues: It is clear, then, that rhetoric is not bound up with a single definite class of subjects, but is as universal as dialectic; it is clear, also, that it is useful. It is clear, further, that its function is not simply to succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow. In this it resembles all other arts. For example, it is not the function of medicine simply to make a man quite healthy, but to put him as far as may be on the road to health; it is possible to give excellent treatment even to those who can never enjoy sound health. Furthermore, it is plain that it is the function of one and the same art to discern the real and the apparent means of persuasion, just as it is the function of dialectic to discern the real and the apparent syllogism. What makes a man a “sophist” is not his faculty, but his moral purpose. Id. at 23-24, bk. 1 ch. 1, 1355b, lines 7-21.

35. See White, *Law as Rhetoric*, supra n. 9, at 684 (quoting Plato’s dialogue of the same name).


37. A symbol “stands for or represents something else by virtue of relationship, association, or convention.” Id. at 2. It is not the thing itself, but merely a symbol that stands for it. Symbols are distinguished from signs by the degree of connection between the thing and its representation. Id. at 2–3. A sign has a direct relationship: “Smoke is a sign that fire is present,” while a kitchen is a symbol for a place where food is prepared. Id.

38. Id. at 2.


40. Id. at 1550–1552.
Should the rhetoric of law always be “clear, orderly, linear, and paraphrasable”?\textsuperscript{41} Students say, “Yes, I should be able to easily determine what the author wants me to know.”

Should the author speak in an impersonal voice, in “objective and authoritative tones”?\textsuperscript{42} Now the response is more mixed; for some, a personal voice is more interesting, true objectivity seems unlikely, and authoritativeness forecloses response.

Should the arguments rely heavily on authority, speak as if texts have one true meaning, and use a highly rational style?\textsuperscript{43} At the beginning of the semester, most students cannot imagine any other way to construct a legal argument.

When stories are told, should they be told in a manner that makes it appear they simply reveal the objective truth?\textsuperscript{44} This concept bothers students; when you tell a story, students say that you should acknowledge that it is “just a story.”

Should the truth be subordinated to effectiveness?\textsuperscript{45} Here, we have a difference of opinion. Some students argue that the judicial system is a search for truth and so the advocate has an independent obligation to find and speak the truth; others argue that the judicial system is an arena from which the truth (or at least the better argument) will emerge from a competition among effective lawyers.

When we return to these questions late in the semester, they have become broader: if a lawyer acknowledges in a legal argument that what a specific legal text means is up for grabs and that the legal interpretation he is arguing for is contestable, can he still be effective? If a lawyer explicitly pursues the values of openness, diversity, and truth in writing to or speaking before the court, can she be as effective as the lawyer who argues that there is only one right answer, the one that benefits her client? How can we reconcile the lawyer’s rhetorical claim that there is one right answer with the rhetorician’s position that instead of

\textsuperscript{41} Id. at 1558.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 1559.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
providing right answers, we are developing arguments that are designed to gain more adherents among audience members.\textsuperscript{46}

A. Rhetorical Reading

Law & Rhetoric meets twice each week; the first class introduces the weekly topic while the second class encourages hands-on engagement with the assigned readings through concrete examples (often audio or video clips), demonstrations, and collaborative or individual exercises. For most of the semester, beginning the third or fourth week, students teach the second class of each week.

The first challenge for students is to adapt to rhetorical analysis. By their second or third year of law school, many students have learned legal analysis so well that they automatically narrow their vision to what they regard as the only relevant questions: What’s the rule? What facts are relevant under the rule? Given the rule and the facts, what arguments could you make? What’s the right answer? In contrast, rhetorical analysis asks them to take into account questions that might be considered wholly irrelevant in legal analysis: What is the historical and cultural context of this argument? What language did the author inherit? How did the author work with and change the inherited language? How do the author’s language choices work in this argument at this time? What is going on in the minds of the author and the audience as they write and read this argument? Some students adjust to rhetorical analysis quickly; more are able to make the change over the course of the semester; a few find it almost impossible to abandon “legal” analysis and its emphasis on clear and certain answers.

To help students make the shift, I frame the course with “model” rhetorical analyses from \textit{Minding the Law} by Anthony Amsterdam and Jerome Bruner.\textsuperscript{47} Amsterdam and Bruner apply different rhetorical lenses with a goal of “making the already familiar strange,”\textsuperscript{48} thus revealing new interpretations and compositions. Their rhetorical analyses—examining the effects of particular language uses and meaning frames such as categories and stories—provide scripts that help my students read and analyze

\textsuperscript{46} See Wetlaufer, \textit{Rhetoric and Its Denial}, supra n. 9, at 1554–1555.

\textsuperscript{47} Amsterdam & Bruner, supra n. 15, at 113–114.

\textsuperscript{48} Id. at 1 and throughout the text.
judicial opinions in unfamiliar ways. At the end of the course, we return to Minding the Law, using the text’s discussion of the interplay of culture, ethics, and rhetoric to tie the semester’s themes together.

In the middle of the course, students read explanations and analyses based on classical and contemporary rhetoric from a variety of sources. First, students read several law review articles about the relationship between law and rhetorical analysis. To introduce students to classical rhetoric, I assign substantial excerpts from the definitive text, Classical Rhetoric for the Modern Student by Edward P. J. Corbett and Robert J. Connors. To introduce students to contemporary rhetoric, I assign substantial

49. Amsterdam and Bruner rely on cognitive, linguistic, and narrative analysis of controversial opinions; the authors are consciously transparent in their own use of rhetorical moves, and they provide thought- and discussion-provoking models of the reading and writing of rhetorical analysis. In the early chapters, Amsterdam and Bruner apply theories of categorization to Justice William Rehnquist’s opinion in Missouri v. Jenkins, 515 U.S. 70 (1995), a school desegregation case, and then analyze, through category and narrative perspectives, Justice Antonin Scalia’s opinion in Michael H. v. Gerald D., 491 U.S. 110 (1989) (concluding that the relationship between a natural father and his child is not a protected liberty interest when the child is born during the marriage of his mother to another man). Amsterdam & Bruner, supra n. 15, at 19–109. The narrative analysis continues through comparison of Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding that Congress has exclusive power to regulate rendition of runaway slaves and striking down Pennsylvania’s law punishing abduction into slavery), and Freeman v. Pitts, 503 U.S. 467 (1992) (holding that federal judges should no longer supervise pupil assignment in school systems where racial imbalance results from demographic shifts rather than official state policy). Id. at 110–164.

50. In the final chapters, Amsterdam and Bruner explicitly discuss “rhetorics” (from my point of view, the entire book is about rhetoric, but Amsterdam and Bruner view rhetoric as more narrowly confined to specific language uses) in the context of “the various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest, or that a speaker suspects . . . may become contested.” Id. at 165. In light of these rhetorical processes, the authors then analyze McCleskey v. Kemp, 481 U.S. 279 (1987), in which the Supreme Court rejected claims that the death penalty constituted cruel and unusual punishment because it was imposed pursuant to a pattern of racially discriminatory capital sentencing in the State of Georgia. Id. at 165–216. The book ends with analysis of race and culture as affecting Supreme Court decisions from Plessy v. Ferguson, 163 U.S. 537 (1896), through Brown v. Board of Education, 347 U.S. 483 (1954), to Freeman v. Pitts, 503 U.S. 467 (1992), and Missouri v. Jenkins, 515 U.S. 70 (1995). Amsterdam & Bruner, supra n. 15, at 217–291.

51. These might include one or more of the following: Wetlaufer, Rhetoric and Its Denial, supra n. 9; White, Law as Rhetoric, supra n. 9; James Boyd White, Reading Law and Reading Literature: Law as Language, in Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law (U. Wis. Press 1985) [hereinafter White, Reading Law and Reading Literature]; Francis J. Mootz, III, Rhetorical Knowledge in Legal Practice and Theory, 6 S. Cal. Interdisc. L.J. 491, 572 (1998); Kronman, supra n. 1; Kate O’Neill, Rhetoric Counts: What We Should Teach When We Teach Posner, 39 Seton Hall L. Rev. 507 (2009).

52. Corbett & Connors, supra n. 33.
portions of a collection describing contemporary rhetoricians and their contributions to rhetorical theory and practice, *Contemporary Perspectives on Rhetoric.* Finally, I assign articles that demonstrate rhetorical analysis or that explain, propose, or apply specific rhetorical approaches.

**B. Rhetorical Writing**

Students practice rhetorical analysis, interpretation, and criticism throughout the course by reading arguments and discussing them in class. To help them practice rhetorical composition, I assign several papers. In the most recent versions of the course, I

53. Foss et al., *supra* n. 36. I followed the advice of Amy Sloan in assigning these texts rather than primary sources; she correctly predicted that they would be more accessible and readable for most law students.

54. I have in the past selected a handful of specific articles each semester, choosing from among the following, but many other choices are possible.

- Lloyd F. Bitzer, *The Rhetorical Situation*, 1 Phil. & Rhetoric 1 (1968) (proposing that rhetoric is a response to a rhetorical situation).

For other choices, see Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129 (2006). Because students sometimes want to explore particular rhetoricians or rhetorical approaches in more depth, I also post a bibliography containing a number of additional sources, legal and non-legal.
have assigned as practice two short rhetorical analyses of arguments that I select, followed by a final paper containing a rhetorical analysis of an argument that the student chooses. The objective of the short papers is to acquaint students with the approach and technique of rhetorical analysis and to require them to practice some specific techniques; only a final version is turned in for evaluation, and the comments are designed primarily to suggest ways to improve the next written analysis. For the final paper, students report their progress at each step in their own rhetorical process of composition, including a topic proposal and a series of drafts accompanied by writer’s memos. We discuss and agree upon a grading checklist before each assignment is turned in; we also discuss and agree on page limits and deadlines.

Because writing a rhetorical analysis is so different from writing a legal analysis, we also spend one, and sometimes two, classes walking through the process in preparation for the practice writing assignments. For this walkthrough, I usually ask students to read Frank v. Mangum, focusing on Justice Holmes’s dissent to the majority’s conclusion that due process had been provided during the trial of Leo Frank, the Jewish manager of an

55. Together with the class presentation, the first two papers account for between 20 and 25 percent of the grade. The remainder of the grade is based on the final paper.
56. Students receive feedback at each stage, but only the final draft is graded. In the writer’s memos, students are asked to reflect on their own progress and ask questions.
57. The checklist emerges from a “start from scratch” discussion with each class, but has so far contained similar concepts. A typical checklist follows:

Reasoning (50%)
- Is the analysis rhetorical?
- Is the analysis properly framed?
- Does the author demonstrate understanding of the language uses and rhetorical strategies being analyzed?
- Is the author creative in developing the analysis?
- As a whole, is the analysis effectively supported?
- As a whole, is the analysis effective?
- As a whole, is the analysis credible?
- As a whole, is the analysis sufficiently in-depth?

Organization (15%)
- Is the analysis easy to follow?
- Is the analysis presented in an understandable order?
- Is the organization appropriate for this analysis?

Writing (35%)
- Is the writing free of grammatical and typographical errors?
- Are the style, word choice, and tone appropriate to this analysis?
- Are proper citations included?
- Does the paper meet technical requirements?

Atlanta pencil factory who was convicted in 1913 of the murder of a 13-year-old girl. After sentencing and imprisonment, Frank was kidnapped by a mob, taken from the state prison, and hanged.

The words of the majority opinion, which found that Frank had no due process claim, describe one view of the process:

[Leo] Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the state; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts.

As a result, the majority concluded, “he has been convicted, and is now held in custody, under ‘due process of law’ within the meaning of the Constitution.”

This concluding section of the majority opinion reflects the rhetorical choice of describing only the abstract form of the process being challenged. No facts gleaned from the defendant’s actual process through trial and conviction are now allowed to intrude on the majority’s depiction that the appropriate forms had been observed: the court had jurisdiction, the jury was lawfully constituted, the trial was public, the defendant had the benefit of counsel, and so on.

59. Id. at 311–312, 345.
62. Id. at 345.
A much different process of law is described by Justice Holmes in dissent:

The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury.63

Justice Holmes went on to point out that the members of the press had asked the court not to continue proceedings that evening because of the potential danger, and the court adjourned until the following Monday morning.64 “On that morning, when the solicitor general entered the court, he was greeted with applause, stamping of feet and clapping of hands,” and the judge advised Frank’s counsel that it would be safer if not only Frank but also his lawyer were not present in the courtroom.65 Holmes continued: “When the verdict was rendered, and before more than one of the jurymen had been polled, there was such a roar of applause that the polling could not go on until order was restored.”66 As a result of these circumstances, Frank argued, unsuccessfully in the majority’s view, that “the trial was dominated by a hostile mob and was nothing but an empty form.”67

From Holmes’s opinion, the reader learns not only that the trial was public, but also that the court was packed with hostile spectators who clapped their hands and stamped their feet with approval when the solicitor general entered and then applauded again when the verdict was rendered.68 From Holmes’s opinion, the reader learns not only that Frank had the “benefit of counsel for his defense,” but also that his counsel was advised that it would be safer for both him and Frank to be absent from the courtroom when the verdict was returned.69 Through concrete

63. Id. (Holmes, J., dissenting).
64. Id. at 345–346.
65. Id. at 346.
66. Id.
67. Id.
68. Id. at 344–346.
69. Id. at 344, 346.
details from the individual circumstances, Holmes provided substance for the claim that even if the process coincided with the appropriate form, the form was “empty.”

To provide context for the students’ analysis, I assign excerpts from a law review article about Justice Holmes’s judicial opinions, as well as a news article recounting the lynching of Leo Frank four months after the Supreme Court decision. We walk through the steps of rhetorical analysis together: What is the historical and cultural context, including the inherited language, of the opinion? What is the author’s background and experience? How has the author used rhetorical strategies? How effective is the rhetoric?

As for the practice written analyses, Justice Jackson’s majority opinion in West Virginia State Board of Education v. Barnette was the subject of the first short paper I assigned during a recent semester. The context, the period between 1940 and 1943 when the United States was entering World War II; the abrupt shift in the Court’s reasoning from a decision rendered only three years earlier; and the language of Justice Jackson’s opinion lend themselves to rhetorical analysis.

In Barnette, decided in 1943, Justice Jackson and a majority of the Court overturned a ruling that had upheld a compelled flag salute in Minersville School District v. Gobitis, decided in 1940. Reversing itself, the Barnette Court found unconstitutional a resolution of the West Virginia Board of Education ordering that the flag salute become “a regular part of the program of activities in the public schools,” and requiring all teachers and pupils to participate, with “refusal to salute the Flag [to] be regarded as an Act of insubordination.”

70. Robert A. Ferguson, Holmes and the Judicial Figure, 55 U. Chi. L. Rev. 506 (1988).
71. From the article Honoring Leo Frank, Frank was kidnapped on Aug. 16, 1915, from the state prison in Milledgeville by a group of prominent Mariettans after his death sentence was commuted to life in prison by Gov. John M. Slaton. The next morning, the men threw a rope over the branch of an oak tree and tossed its noose over Frank’s neck. They kicked a table from beneath his legs and watched as he died. No one was ever prosecuted for his murder. Rodriguez, supra n. 60, at JF2.
72. 319 U.S. 624 (1943).
73. 310 U.S. 586 (1940).
74. 319 U.S. at 626, 642.
Here is Justice Jackson’s description of those challenging the State Board of Education and of the consequences of the resolution:

The [Jehovah’s] Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.” They consider that the flag is an “image” within this command. For this reason they refuse to salute it. 75

In this paragraph, Justice Jackson described the challengers in a way that allowed the audience to view them as the reasonable followers of an understandable religious belief, rather than as posing any threat to the loyalty and security of the country. He explained that their objection to the flag salute stemmed from a literal interpretation of Bible verses that were familiar to many; he made the objection seem a simple and logical result of applying the Biblical language prohibiting “any graven image” to the flag as an image.

Justice Jackson continued,

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. 76

In this paragraph, Justice Jackson again portrayed the challengers as playing sympathetic and familiar roles: they are schoolchildren and their parents. In contrast, it is the unnamed “officials” whose actions are alarming; they have expelled and threatened the children “for no other cause” than their religious beliefs, and they have prosecuted and threatened their parents as well.

75. Id. at 629.
76. Id. at 630.
After a step-by-step rebuttal of the reasoning of the *Gobitis* decision, Justice Jackson ends with language that has become “part of what we are as a polity[,] . . . a central part of our civic constitution.”

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Here, Justice Jackson seemed to acknowledge that some will disagree with the decision because “the flag involved is our own.” He asked those who disagree to consider the more complex argument that protecting freedom of thought is worth the costs. And finally, he concluded,

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

At the time of the *Barnette* opinion, the Supreme Court had not yet “fixed” a Constitutional interpretation that protected

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79. *Id.* at 642.
against the prescription of orthodoxy. But Justice Jackson’s eloquent statement that this interpretation already constituted a “fixed star” with no exceptions that “now occur to us” seemed to express confidence that given these principles and this explanation, audience members would agree. In part, the Barnette opinions reward rhetorical reading because they “invite you to work through to your own judgment. . . . [B]oth justices [Jackson in the majority; Frankfurter in the dissent] evidently believe that it matters a great deal what they say and how they say it.”

To provide context for this analysis, I asked students to read a biographical sketch of Justice Jackson as well as the discussion of Barnette in Constitutional Law Stories; the chapter describes the holding in Gobitis and the context as the Barnette decision was handed down in “June of 1943 as American troops were engaged in combat in North Africa and the South Pacific.” The chapter recounts “hundreds of violent attacks against Witnesses and their property” in the wake of the Gobitis decision and characterizes the Barnette opinion as “obviously correct . . . and yet so difficult to justify.”

In their constitutional law textbook, students will come across the central paragraphs of Barnette quoted above, but they usually see (and hear) nothing about Gobitis or the circumstances that contributed to its abrupt overruling. Opening the lens broadens and deepens their understanding of the context and the

81. Vincent Blasi & Seana V. Shiffrin, The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and Freedom of Thought, in Michael C. Dorf, Constitutional Law Stories 433 (Thomson/West 2004). For additional background on the case, see Barrett, supra n. 77. Among other things, this compilation tells us that the plaintiff’s name, Barnett, was misspelled by the courts. Gregory L. Peterson, Welcoming Remarks, 81 St. John’s L. Rev. 755, 755 n. 1 (2007) (one essay in a collection of essays: Recollections of West Virginia State Board of Education v. Barnette, 81 St. John’s L. Rev. 755 (2007)). In addition, the compilation notes that the Supreme Court issued twenty-three opinions between 1938 and 1946 addressing issues raised by the Jehovah’s Witnesses, a time when the Witnesses were involved in hundreds of cases addressing issues including freedom of speech, freedom of religion, freedom of assembly, and freedom of conscience. Shawn Francis Peters, Prelude to Barnette: The Jehovah’s Witnesses and the Supreme Court, 81 St. John’s L. Rev. 758, 758 (2007) (one essay in a collection of essays: Recollections of West Virginia State Board of Education v. Barnette, 81 St. John’s L. Rev. 755 (2007)).
82. Blasi & Shiffrin, supra n. 81, at 433.
83. Id. at 443.
84. Id. at 434.
language used to justify the Court’s seemingly sudden change of mind.

Here is a portion of one student’s narrative analysis of Justice Jackson’s opinion:

Jackson’s *Barnette* opinion is cast in a journey narrative. He summons the concepts of route, shortcuts, collision, beginnings, ends, and navigational beacons to guide the way. He tells a story in which society (from which the cast is composed) seeks an end: national loyalty. But along the way there is confusion, loss of direction, and the temptation of shortcuts. Throughout, Jackson assumes the role of tour guide. . . .

The steady state maintains a very brief existence. Jackson begins by citing *Gobitis* and an ensuing West Virginia statute requiring courses of instruction in Americanism—this illustrates the attempt at loyalty. From here, trouble is immediately introduced: the Board of Education adopts a resolution requiring all pupils to participate in the pledge of allegiance or be expelled. Jackson then expends considerable energy (efforts) to prove that stepping in this direction of compulsion is a shortcut leading to a disastrous slippery slope.

As our guide through the trouble, Jackson informs of the dangers awaiting a society that compels loyalty. He says, “[s]truggles to coerce uniformity . . . have been waged by many good as well as by evil men.” Then he warns that “[c]ompulsory unification of opinion achieves only the unanimity of the graveyard” as those of dissenting views are eventually exterminated. Jackson’s effort to guide from this unwanted end is an appeal to his chief navigational instrument: the First Amendment; he says it was “designed to avoid these ends [death] by avoiding these beginnings [coerced belief].” He then diverts society from disaster and restores the status quo by declaring “no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.”

Another student analyzed the opinion’s use of reframing and images:

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85. Paper on file with Author (citations omitted).
Another example of Jackson reframing the issue is in his fourth point regarding the *Gobitis* opinion. Jackson adds to his credibility when he recognizes that national unity is an important factor for national security when he says, “National unity as an end which officials may foster by persuasion and example is not in question.” By choosing not to argue over whether national unity is desirable or important for national security, he avoids attempting to win a losing argument. And by refocusing specifically on the lawful means of achieving national unity, Jackson creates a new framework for resolving the issue . . . .

* * *

Jackson also portrays the Court as the reluctant lawgiver, a long-used rhetorical strategy in which a Justice exhibits reluctance to wield judicial power in order to cultivate social trust and social acceptance of the Court’s judgment. Regardless of whether the Court is competent in a specialty such as public education, Jackson wrote, “We cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.” By portraying the Court as reluctant and reticent, Jackson softens the blow for those people who will dislike the Court’s ruling and also helps instill respect for and trust in the Court for everyone.

When advocating against upholding the flag salute statute, Jackson uses a parade of horribles in which he lists similar episodes in history where attempts to compel cohesion have failed: “the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies.” This list is effective in eliciting the emotions of the readers . . . , but it is a logical fallacy . . . .

After providing feedback on the first paper, usually followed by some in-class discussion of brief examples drawn from the students’ work, I assign a second short paper. In the same semester as the assignment of the *Barnette* opinion, the second assignment

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86. See Robert L. Tsai, *Sacred Visions of Law*, 90 Iowa L. Rev. 1095, 1099 (2005) (discussing *Marbury v. Madison* as a symbol that has “spawned a set of catechisms and tropes repeated to spread the myth of the judge as a reluctant lawgiver”).

87. Paper on file with Author (citations omitted).
was to write a classical rhetorical analysis of one of the opinions from *Walker v. City of Birmingham*.88 There, a 5–4 majority upheld the arrests of civil rights demonstrators because they failed to use proper judicial procedures to test the validity of an injunction that was struck down as unconstitutional two years later.89 Even though Justice Stewart acknowledged the shortcomings of the injunction and its application, he wrote for the majority that disobeying the injunction was illegitimate as “no man can be judge in his own case . . . however righteous his motives.”90

Like the *Barnette* decision, the *Walker* opinions struggled with how far to protect free speech at a time of social and cultural disruption. Like the *Barnette* decision, the *Walker* opinions revealed marked disagreement among the justices. And like the *Barnette* decision, some of the *Walker* opinions seemed irreconcilable with precedent. Finally, like the *Barnette* decision, the *Walker* opinions raise provocative and important rhetorical questions; reading the statements of facts in the majority and dissenting opinions is enough to change the minds of anyone who believes that judicial opinions merely “state the facts.”91

Although students were much more familiar with the civil rights demonstrations of the 1960s than they were with the 1940s context of *Barnette*, the *Walker* setting seemed remote to many students. To help them analyze the rhetoric of the opinions in the context of the times in which they were decided, we explored a range of background materials, collected by me and the students, including excerpts from films, photographs from archives, participant and witness histories, contemporaneous news accounts, and even the oral arguments heard by the Supreme Court.92

91.  See Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ALWD 209 (2004) (providing an in-class exercise involving the contrasting fact statements of Justices Stewart (for the court) and Brennan (in dissent)).
As an example, here is an excerpt from one student’s analysis of the opinions’ use of pathos, or appeals to the audience’s values, beliefs, and emotions:

Shortly after Justice Stewart begins his opinion, he quotes the bill of complaint filed by Birmingham officials. This complaint frames our vision of the petitioners for the majority opinion; the complaint refers to the petitioners as trespassers, as congregating mobs, as unlawful picketers, as violators of numerous ordinances, and as people trying to provoke breaches of the peace; moreover, all of these activities were expected to continue. While Stewart mentions the holiday dates of the demonstrations, primarily in passing, he does not refer to the religious nature of the demonstrations, nor did he refer to the commendable political reasons—to publicize the plight of African Americans in the south. With only this information, the reader will likely be disinclined to whatever the petitioner wants accomplished in this case.

Contrast this to Justice Brennan immediately explaining who the petitioners are (ministers) and why they wanted to demonstrate (“peaceably to publicize and dramatize the civil rights grievances of the Negro [P]eople”). Moreover, Brennan offers an emotional context to the circumstances in which the petitioners were convicted of violating the injunction: “These were the days when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peaceably sought.”

Justice Stewart discusses the demonstrations in a way that appeals to our need for safety . . . .

Justice Brennan, on the other hand, emphasizes the peacefulness of the demonstrations . . . .

For the final paper, students select both a rhetorical approach (described in Part III infra, these approaches include frameworks for rhetorical reading, interpretation, and criticism suggested by classical and contemporary rhetoricians) and an argument (legal,
political, historical, or cultural) to which they will apply it. During most semesters, almost every rhetorical approach discussed in class is applied by at least one student. Students research and select the arguments that they will use as the topics for their final papers; in addition, they often research the rhetorical approach they have selected beyond the class materials. Their argument selections have ranged from well-known Supreme Court opinions, such as *Korematsu v. United States* and *Marbury v. Madison,* and much-analyzed models of oral rhetoric, such as the summation of Justice Robert Jackson at the Nuremburg War Crimes Trial and President Lincoln’s Inaugural addresses, to less-analyzed speeches including Malcolm X’s speech entitled *The Ballot or the Bullet,* Winston Churchill’s *Sinews of Peace* address, and Chilean President Salvador Allende’s final radio address delivered on September 11, 1973, while he was barricaded inside his presidential residence.

To illustrate their work, I have included excerpts below from two final student papers. The first is from an analysis based on *logos, ethos,* and *pathos,* the classical rhetorical modes of persuasion; the analysis is of a closing argument by William M. Evarts in the prosecution of defendants who had been indicted for piracy in 1861 for commandeering the ship, the *Savannah.*
Evarts’s speech begins with an ethical appeal. Evarts shows his respect for the court and the jury by beginning with the traditional “May it please your honors, and gentlemen of the jury.” Evarts then shows more good will towards the court, the jury, the counselors, and the Union itself, when he gives them all high praise:

I know no better instance of the distinction between a civilized, instructed, Christian people, and a rude and barbarous nation, than that which is shown in the assertions of right where might and violence and the rage of passion in physical contest determine everything, and this last sober, discreet, patient, intelligent, authorized, faithful, scrupulous, conscientious investigation, under the lights of all that intelligence with which God has favored any of us . . . .

Evarts praises the court and jury in several ways in this sentence. First, Evarts uses three specific adjectives which are most likely to appeal to his jurors. Evarts says the jurors are civilized, instructed, and Christian, all qualities which were doubtless important to people at that time. Recognizing these important qualities serves to increase the credibility of the speaker and argument. Second, Evarts uses comparison to further recognize the importance and uniqueness of the court, the jurors, and the judicial process when he contrasts a civilized Christian nation with a rude and barbarous nation. This comparison also serves to appeal to the pathos of the audience by implying that the defendants are essentially part of a rude and barbarous “nation” of the South. Finally, Evarts heaps on more praise for the judicial process with a long list of adjectives. By opening his speech with such praise and demonstration of good will towards the court and jury, the jury being especially important as it is the jurors whom it is Evarts’s job to convince, Evarts impresses his audience and has increased his chances of convincing the jury with the rest of his speech.103

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103. Paper on file with Author (citations omitted).
The second example is from a rhetorical reading of *Varnum v. Brien*, the Iowa Supreme Court opinion recognizing the right of same-sex couples to marry:

The opinion began by characterizing the plaintiffs and the controversy sympathetically through categorizing the plaintiffs as everyday Iowans:

*The lawsuit is a civil rights action by twelve individuals who reside in six communities across Iowa. Like most Iowans, they are responsible, caring, and productive individuals. They maintain important jobs, or are retired, and are contributing, benevolent members of their communities. They include a nurse, business manager, insurance analyst, bank agent, stay-at-home parent, church organist and piano teacher, museum director, federal employee, social worker, teacher, and two retired teachers. Like many Iowans, some have children and others hope to have children. Some are foster parents. Like all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected—a belief embraced by our state motto.*

Casting the situation in this light orients the reader/audience to view the situation compassionately. The plaintiffs are immediately taken outside of the category of “different” or “unnatural” and are re-categorized as your average Iowan trying to get by. One of the major functions of category systems is to promote cohesiveness within cultural groups—giving the group a cognitive solidarity and a powerful bond. This technique in effect puts the reader in the plaintiffs’ shoes for the rest of the opinion, and the reader can more easily imagine the plaintiffs’ strife. Compare *Varnum’s* opening of its statement of facts to a more clinically detached opening of an opinion [in another case] that was decided against the plaintiffs . . . : “The trial courts in these consolidated cases held that the provisions of Washington’s 1998 Defense of Marriage Act (DOMA) that prohibit same-sex marriages are facially unconstitutional under the privileges and immunities and due process clauses of the Wash-

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104. 763 N.W.2d 862 (Iowa 2009).
ingston State Constitution. King County and the State of Washington have appealed. The plaintiffs-respondents, gay and lesbian couples, renew their constitutional arguments made to the trial courts, including a claim that DOMA violates the Equal Rights Amendment.”

* * *

[The Iowa court’s] continuing characterization of same-sex couples as regular-people-making-normal-life-decisions would not be possible if the court did not take the time to include these nonessential, nonlegal facts. The inherited culture is one in which the public is against same-sex marriage, particularly in the Midwest, and the majority of the inherited language of caselaw treats same-sex couples more or less as faceless litigants on the short end of public policy choices. By categorizing same-sex couples as people other Iowans can empathize with, the Iowa Supreme Court “tr[ied] . . . to add or to drop a distinction [to the language of the law], to admit a new voice, to claim a new source of authority.”105

C. Constructing the Class as a Rhetorical Community

As my students and I study the legal rhetorical community, we construct a rhetorical community of our own.106 One component of this construction is an “exchange” between teacher and students. When the students become the teachers, they inject energy and imagination; the experience builds a sense of shared responsibility for the community of the classroom. A second component is in the interchange between students. When the students focus on how their classroom discussions can best enhance learning and teaching, they share responsibility for considering how language use affects understanding.

For their oral presentations, students choose the topic and the date that they wish to teach a class, and they decide whether they wish to teach individually or as part of a team. I provide no formal structure other than the subject matter, a requirement that they post their lesson plans and handouts in advance,107 and

105. Paper on file with Author (citations omitted).
106. I suppose it is not surprising that every class constructs its own rhetorical community, with its own conventions and rules, but I never thought about it in this way before I taught this class.
107. Students were required to post their lesson plans and handouts on the TWEN
a request that their goal be “to expand our understanding of a particular subject by engaging your fellow students in some method of active learning. . . . [T]hink of some way that you can explain or illustrate the subject with a concrete example and some way that you can involve us in using and deepening our understanding of the subject.”

Almost all students followed some variation of the same general lesson plan: a brief overview of the topic at the beginning (spoken, written, visual); fuller explanation using concrete examples (usually visual); and application in hands-on exercises (usually involving some collaborative component or group discussion). Students were uniformly creative; most demonstrated substantial in-depth understanding of the concepts they presented, and most presentations actively engaged other students. Their concrete examples have ranged from large pieces of an unknown object that had fallen from the sky (constructed by the student) to print and television advertisements, Calvin and Hobbes cartoons, Monty Python movies, and The Simpsons television show; they have used audio and video clips from law-related movies and television shows, newsworthy addresses, and unscripted videotaped excerpts featuring lawyers, judges, and talk show hosts.108

Letting a student take over “your” classroom requires a surrender of control and a reciprocal gift of trust. Because students turn in their lesson plans before class, I have on occasion questioned a student about a proposed example, usually because I am concerned that a sensitive topic will not be handled with care. In each instance, the student has explained the reasoning for using the example, used the example, and treated the topic and the class members taking part in the discussion with respect. During class, I almost always let the student “teacher” control the experience; on a few occasions, I have responded to a comment, usually by a student other than the “teacher,” that I thought needed to be corrected. In retrospect, I doubt that I will respond similarly in the future because these teacher-like interventions change the classroom dynamic so that both teacher and students revert to their pre-exchange role.

Course Page twenty-four hours in advance. To encourage improvement and revision, students were allowed to bring in revisions on the date of their presentations.

108. Students rely on YouTube and Google images to find most of these examples.
Both teacher and students learn from the exchange; to understand the material well enough to teach it, students have to research and study more than they otherwise would, and teachers read, see, and hear new explanations and applications. There are less-obvious gains as well; when a student has to guide a classroom discussion, listen to student questions and concerns, struggle with explanations and answers, decide what examples and exercises will illuminate and engage as well as entertain, the student becomes more aware of what the teacher experiences. Sitting in the classroom as a student, I become more aware of how the classroom conversation feels from the perspective of a less-autonomous participant.

During one of the last few class sessions of the semester, informed by our exchange of roles and our reading about lawyering ethics, we discuss the ethics of classroom rhetoric.\textsuperscript{109} We try to determine what “rules of the game” have made the classroom work most effectively for the greatest number of participants:

Should speakers be required to treat listeners respectfully, no matter how they are behaving? Should speakers be required to be adequately prepared and to have something pertinent to say? Should speakers be required to respond to questions and concerns? Should speakers assume that audience members are acting in good faith?

Should listeners be required to be open to receiving new information? Should listeners be required to pose relevant questions and concerns? Are there limits to requiring audience members to listen respectfully? Should listeners assume good faith by speakers?

How does an expectation of class participation affect the “feel” of the classroom? How is the classroom environment affected by comments based on personal characteristics, gender, sexual orientation, religion, race, or ethnicity?

The extent to which a law school classroom can establish a rhetorical community became clear to me when I received an e-mail from a student late one semester, shortly after a classroom exchange between two students that had been polite, but tense.

\textsuperscript{109} Much of this discussion is based on the evolving rules of the game as discussed in Sammons, supra n. 19, at 100 (part of what keeps the practice ethical is “an ongoing inquiry into the nature of the practice itself”).
Following class, I had expressed some concern to another student about the students’ willingness to continue the conversation later in the week. Several hours after class, I received this e-mail from one of the students involved in the exchange: “FYI, I heard you were concerned about [the other student and me]. I am pleased to report that despite our differences, we remain ‘family.’ We are thankful for the forum that is the law school classroom.”

III. RHETORIC AS A STUDY, A PROCESS, AND A PERSPECTIVE

My goal in developing the course in Law & Rhetoric was to try to engage students in the study and process of law as a rhetorical activity, by helping them interpret and compose legal texts, and by suggesting rhetoric as a way of thinking about how the law works and as a portal for invention and imagination. As noted earlier, we begin and end the classroom conversation with two questions: (1) will engaging in “rhetoric” make you more or less effective as a lawyer? and (2) will engaging in “rhetoric” make you more or less ethical as a lawyer? Most students agree from the start that acquiring rhetorical skills will help them be more effective advocates; becoming a better advocate is one of their reasons for enrolling in the course. Early on, many students think the second question has an easy answer—the adversary system has built-in safeguards that will take care of any ethical questions involved in the use of rhetoric. This discussion is taken up again at the end of the semester, as discussed below.

A. Rhetoric as the Study of Legal Texts

The course begins the study of legal texts, the products of legal rhetoric, by introducing various ways to read, analyze, interpret, and criticize legal arguments. I ask students to apply a mode of rhetorical reading and analysis suggested by James Boyd

110. The student e-mails, student evaluations, and writers’ memos from which the quoted comments are taken are on file with the Author, as well as excerpts from student papers.
111. These questions match up with two of the three “apprenticeships” described in the recent Carnegie Foundation report. See William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 28 (Jossey-Bass 2007). The report uses different names for the three apprenticeships: legal analysis, practical skill, professional identity, id. at 13–14; cognitive, practical, and ethical-social, id. at 194–197.
112. See infra nn. 224–230 and accompanying text.
White; to read to discover the interpretive meaning frames of metaphor, narrative, and categorization; and to use Lloyd Bitzer’s approach to analyzing a rhetorical situation. Through their study of legal arguments as rhetorical performances, students become better readers of legal texts; this experience also helps them learn how to make more effective use of language, symbols, stories, and frameworks when they compose their own arguments.

Rhetorical reading and interpretation is different from what first-year law students seem to absorb, based on classroom dialogue, about how to read legal texts. In the first year of law school, law students read to find “the meaning” of a text by focusing primarily on the language with very little reference to history, culture, or the author’s background or intentions. They learn to read in this way through a process that includes Socratic dialogue about the texts they read:

[w]hen students attempt to tell the stories of conflict embodied in the cases assigned for their courses, they typically start by focusing on the content of the story. First-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework. What was the court authorized to decide? If it writes about hypothetical situations other than the one before it, students learn, this part of the story is to be separated from the “holding”—the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the correct procedure, delivered in the correct form. This is a new and very different sense of where to look when we decide what counts as a “fact,” how to construct valid accounts of events, and where to demand accuracy . . .

Although students are taught to focus precisely and in depth on “form, authority, and legal-linguistic contexts,” their comments on “content, morality, and social context” are often treated as not important enough to challenge.114

113. Mertz, supra n. 21, at 494–495.
114. Id. at 496. Mertz suggests that a similar dichotomy can be found in law review requirements of very precise checking of citations for format and accuracy and very little checking of the validity of the texts being cited. Id.
In contrast to this mode of reading for authority, the Law & Rhetoric class emphasizes the rhetorical mode of reading and analysis of legal texts\textsuperscript{115} first suggested by James Boyd White:

- First, examine the inherited context underlying the text: what is the language or culture within which this writer is working? What is the writer’s role and background? How does that affect the kind of language, authority, values, arguments, and materials the writer will use?

- Next, study the art of the text: how has the writer used, modified, or rearranged the language or culture that was inherited? What effect does the reworking have? Is the writing internally coherent? Is it externally coherent?

- Finally, describe the rhetorical community created by the text: what kind of person is speaking here? To what kind of person? What kind of voice is used? What kind of response is invited or allowed? Where do I fit in this community?\textsuperscript{116}

These questions require outside research, understanding of culture and history, and knowledge of language and law. The final question is especially difficult: I suggest that students “imagine” the rhetorical community created by a text by looking at concrete examples. At a colleague’s suggestion, we recently compared the Bible—a text that creates a distinctive rhetorical community out of our understanding of “who” is speaking, who is listening, and what kinds of responses are being invited—with other distinctive texts and their rhetorical communities (a law school applicant’s personal statement, a Fox News special).

For rhetorical reading and interpretation, students must go beyond semantic understanding of legal language.\textsuperscript{117} To do so, they should understand the frames and processes that help construct legal meaning, especially metaphor and narrative. The symbols and stories that we acquire from culture and through

\textsuperscript{115} For a series of suggestions for rhetorically reading the texts in any law school course, see Elizabeth Fajans & Mary R. Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 Cornell L. Rev. 163, 193 (1993) (reading for jurisprudential and interpretive posture, reading for context, reading for style, reading for narrative, reading for omission).

\textsuperscript{116} White, Law as Rhetoric, supra n. 9, at 701–702.

\textsuperscript{117} One author refers to “the study of the symbolic systems through which legal culture is constructed” as the discipline of “constitutional iconography.” Tsai, supra n. 86, at 1101.
experience come to serve as embedded knowledge structures as well as ideological baggage carriers: that is, they provide mental blueprints that help us sort through and understand new things, and they help us persuade others about the paths that events should follow and the frameworks into which things should fit.

1. **Metaphor**

Metaphoric thinking structures and influences the way that an audience reads and reacts to a legal argument. If the audience accepts the metaphor that copyrights constitute “property” like real estate, it will transfer inferences and rules from one concept to the other and certain consequences will follow: like real estate, copyrights can be bought and sold, divided, leased, and even protected against trespass.

By helping us make the imaginative leap of seeing one thing “as” another, metaphor is most obviously necessary to understand new and unfamiliar concepts and abstractions. For example, metaphor is used to classify and reason about technological advances; years after the introduction of the Internet, metaphor still pervades the way that we talk about it. Through the Internet, you receive electronic “mail” on your “desktop”; because of these images, it seems appropriate to treat a legal issue concerning the delivery of an e-mail the same way that you would analyze an issue involving a letter written on paper, deposited in a mailbox, and delivered to your physical desk. While using the Internet, you “browse” for information as you might in a bookstore, and you set “bookmarks” as you might keep your place in a book. Depending on the results they want, lawyers may characterize Internet providers of information as publishers or distributors or as newspapers, radio or television stations, and even bulletin boards. The choice of metaphor determines legal consequences.

Conceptual metaphor is equally effective for understanding and reasoning about the often-abstract concepts at issue in legal arguments. These metaphors are not the kinds of vivid images or attention-getting comparisons that most people envision when they think about metaphors: “he cowered at the brink of an abyss of criticism,” “her career has become a train wreck.” Instead, conceptual metaphors such as the “marketplace of ideas” or the “courtroom as arena” lie mostly beneath the surface, influencing audiences more subtly and pervasively, by providing an unseen structure.
Conceptual metaphor’s quiet presence supports its persuasive power, in part because it goes unquestioned but also because these metaphors are unconsciously and automatically acquired simply through living in the world. According to cognitive metaphor theorists, conceptual metaphors grow out of our bodily experiences, the images we see in the world, and the stories we are told. They are learned so gradually and embedded so deeply that their application to a new experience or concept will appear seamless and unremarkable.

To introduce metaphor theory, I ask students to discuss the origins of a series of metaphoric examples (visual images, bodily experience, cultural stories) and the implications, or entailments, of their use. We might begin with a list drawn from metaphor theorists George Lakoff and Mark Johnson: Good is Up, Argument is War, Life is a Journey, Knowing is Seeing, Nation is a Family. We also identify and examine more specifically legal examples, including some that structure legal reasoning (viewing the corporation as a person, treating ideas as property, applying the First Amendment within a marketplace of ideas, or addressing Establishment Clause issues in light of the wall of separation); some that emanate from war and sports and describe legal procedure (doing battle, serving as your client’s champion, seeking to dominate your opponent, aiming to level the playing field); and some that shape legal decision making (assessing the weight of the evidence, applying balancing tests, watching out for slippery slopes, using privileges as swords and shields).

118. For background on cognitive theory and research about metaphor, see George Lakoff & Mark Johnson, Metaphors We Live By (U. Chi. Press 1980) [hereinafter Lakoff & Johnson, Metaphors We Live By]; George Lakoff & Mark Johnson, Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought 128 (Basic Bks. 1999) [hereinafter Lakoff & Johnson, Philosophy in the Flesh]; Winter, supra n. 25.

119. See e.g. Lakoff & Johnson, Metaphors We Live By, supra n. 118, at 4–6 (argument is war), 16 (good is up).

120. I sometimes suggest that students study excerpts from opinions to identify their metaphorical influences; for example, the opinions in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), contain contrasting metaphorical and metonymical perspectives on the use of corporate money to finance election campaigns. See Linda L. Berger, Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation, 58 Mercer L. Rev. 949 (2007).
2. Narrative

Like cognitive metaphor theory, narrative theory reflects a shift away from formalism and toward agreement that what we see and think is always being filtered through and affected by interpretive frameworks. As a story unfolds, it filters and focuses, helping us make sense out of a series of chronological events that would otherwise lack coherence and consistency. Stories make it easier for us to communicate our experiences, and they also help us predict what will happen and what we will need to do when we find ourselves entangled in a particular plight. While metaphor serves as a template, narrative becomes a path; narrative forms can become “recipes for structuring experience itself, for laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future.”

Metaphor theorists suggest that narrative is understood because of metaphor; that is, we have constructed a framework that serves “as a kind of genetic material or template for a wide variety of stories in which the plot structure follows a protagonist through an agon to a resolution.” To explain its persuasive power, some scholars theorize that narrative is inherent in the nature of our minds or our language. Others claim that narrative persuades because it provides a structure for the characteristic plights of humans. By doing so, narrative makes experiences understandable and allows the observer to roughly predict the result.

In class, as an introduction to narrative analysis, students first follow the lead of Amsterdam and Bruner, who use “story seeing” to examine the apparently rule-based reasoning in Justice Scalia’s decision in Michael H v. Gerald D. There, Justice Scalia rejected the claim of a natural father and child that due process protected their relationship even though the child was born during her mother’s marriage to another man. Amsterdam and

121. Sherwin, supra n. 9, at 717.
123. Id. at 117.
125. Winter, supra n. 25, at 106–113.
126. Amsterdam & Bruner, supra n. 15, at 114–117.
128. Id. at 111–112, 131–132.
Bruner compare Justice Scalia’s opinion with classic stories in which adultery is depicted as a combat myth, add linguistic analysis, and assess Justice Scalia’s use of other rhetorical techniques.\textsuperscript{129}

Assigned to uncover stories that appear to underlie other judicial opinions,\textsuperscript{130} students first find the “bones”—the characters; the setting; the plot, including the initial steady state of ordinariness, the disruption by Trouble, the efforts at redress or transformation, and the restored or transformed steady state; and the moral of the story.\textsuperscript{131} Then they decide how and whether the uncovered stories provided a means for the author to characterize some actions as ordinary and legitimate, but to characterize others as related to the Trouble; to sketch characters as heroes, helpers, and victims; and to shape the plights of the parties in ways that affect their resolution.\textsuperscript{132}

While most narratives are structured to begin with a “canonical . . . steady state, which is breached, resulting in a crisis, which is terminated by a redress, with recurrence of the cycle an open possibility,”\textsuperscript{133} Kenneth Burke proposed that a narrative also can be analyzed by assessing the relationships among the elements of Act, Scene, Agent, Agency, and Purpose.\textsuperscript{134} The Trouble that drives the drama often emerges from an imbalance among the elements or a breach of cultural expectations.\textsuperscript{135}

Burke, who defined rhetoric as “the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols,”\textsuperscript{136} proposed the pentad as a system for ana-
analyzing language as a mode of action. The pentad examines the inter-relationships or tensions among the elements that constitute the dramatic action.

To use pentadic analysis, students first identify the elements in a particular argument or speech, and then they determine the relationships, or ratios, between the elements. The ratios suggest which elements are dominant, which allows the interpreter to understand the rhetor’s motive: for example, the scene/act ratio measures whether the scene or the act is more in control (in some scenes, for example, a church setting, only certain acts are appropriate or fitting). Similarly, the act/agent ratio measures whether certain acts shape or control agents; the agent/act ratio assesses how a person’s character affects the performance of particular acts. Once all the ratios are determined, the analysis is used to identify a pattern in which one or more of the terms is controlling.

We have used the pentad to compare the internal dramas portrayed in Senator Edward Kennedy’s speech after Chappaquiddick with those depicted in one of President Bill Clinton’s speeches during the Monica Lewinsky investigation. The resulting analysis pointed to the Scene (an unlit road, a narrow bridge built at an angle to the road, no guard rails, a deep pond, cold waters, strong and murky current) as the predominant element in the Kennedy speech, controlling the actor and the act. Similarly, pentadic analysis of the Clinton speech pointed to the Purpose of protecting his family as the predominant element in the Clinton rhetoric, controlling all the other elements in the pentad work, family, friends, activities, beliefs, and values; they share “substance” with people and things with whom they associate, and they separate themselves from other people and things. Id. The shared substances forge identification, and persuasion results: “You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his.” Id. at 192 (emphasis in original). According to Burke, identification can work in several ways: as a means to an end (we have the same interests); through antithesis (we have the same enemies); and through identification at an unconscious level (we have the same unspoken values). Id. at 192–193.

137. Id. at 197–200. Pentadic analysis can help the reader understand the rhetor’s orientation, discover alternative perspectives, and detect and correct for bias.

138. Id. at 200–202.

139. Id. at 202–203.


In both cases, emphasis on another element in the drama was used to shift attention away from the Actor.

3. Category

When a lawyer or judge defines a category and decides that a disputed object falls within or without its limits, the process of categorization appears to be syllogistic and the results inevitable. According to cognitive research, however, our perception that a category is a “box” or container with clearly defined boundaries derives from metaphor, not empirical observation. We see ideas as objects and categories as physical containers. We gather up ideas, group them together, and “contain” them; objects fit “inside” or fall “outside” the boundaries of the container. In this way, the process of categorizing items takes on the aura of literal, concrete truth.

In class, we discuss research results that suggest that rather than being box-like, categories are radial: because categories radiate out from a prototype at the center, the “fit” of two items that fall into the same category can be significantly different. For example, the category of bachelors includes the Pope, George Clooney, and Harry Potter, but surely one of them is a much better fit than the others. Further eroding confidence in categorical certainty is greater understanding of the imperfection of scientific knowledge, as shown by Pluto’s de-classification as a planet more than seventy years after its discovery; and of the effects of changing times, as shown by a library classification system for religion that allocated 90 percent of its slots to Western religions and divided the remaining ten percent among the religions practiced by the rest of the world.

143. Winter, supra n. 25, at 69–103.
145. See Dewey Decimal Classification System, http://www.oclc.org/dewey/about/default.htm (accessed on Feb. 2, 2010). When it was developed, Dewey’s system “represented ‘thinking that truth lies in figuring out the single correct way of ordering our categories,’ said David Weinberger, a fellow at Harvard University’s Berkman Center for Internet and Society. ‘Now we seem to pretty much agree that any single ordering of categories is going to express cultural and political biases, and that’s exactly where truth cannot lie.’” Motoko Rich, Crowd Forms against an Algorithm, N.Y. Times (Apr. 18, 2009) (available at http://www.nytimes.com/2009/04/19/weekinreview/19rich.html?emc=eta1).
4. **The Rhetorical Situation**

Another approach to rhetorical reading is to identify the trigger for the rhetoric, or the rhetorical situation that prompts the response; different prompts impose different constraints on the rhetorical response. In class, we apply Lloyd Bitzer’s approach to analyze rhetorical responses. Differentiating it from the “mere craft of persuasion,” Bitzer viewed rhetoric as a discipline that “provides principles, concepts, and procedures by which we effect valuable changes in reality.”146 These changes take place when rhetorical situations prompt speakers or writers to engage in rhetoric.

The rhetorical situation is “a natural context of persons, events, objects, [and] relations” surrounding an “exigence which strongly invites utterance.”147 Analysis of a rhetorical situation using the Bitzer approach requires students to find the exigence, “an imperfection marked by urgency . . . a defect, an obstacle, something waiting to be done, a thing which is other than it should be.”148 Bitzer believed that some exigences, such as earthquakes and wildfires, are not rhetorical because rhetoric cannot bring about a resolution. An exigence is rhetorical when it invites the speaker or writer to intervene to influence an audience.149

After identifying the exigence, a Bitzer analysis examines the relevant audience, “those persons who are capable of being influenced by discourse and of being mediators of change,”150 what responses are appropriate,151 and what constraints exist: what “persons, events, objects, and relations [that] are parts of situation . . . have the power to constrain decision and action.”152 Constraints can emerge from the situation or from the orator’s personal character and style; situational constraints might include prior precedent, other actors, cultural taboos, and contemporaneous or historical events.153

147. *Id.* at 5.
148. *Id.* at 6.
149. *Id.* at 7.
150. *Id.* at 8.
151. *Id.* at 6.
152. *Id.* at 8.
153. *Id.* Richard Vatz criticized Bitzer’s approach on the grounds that no rhetorical situation has a nature independent of the perception of its interpreter or independent of the rhetoric with which he chooses to characterize it. Richard Vatz, *The Myth of the Rhetorical Situation*, 6 Phil. & Rhetoric 154, 154 (1973).
We have applied the Bitzer analysis to both legal and non-legal rhetoric. For example, I have asked the class to analyze the rhetorical situation in *Walker v. City of Birmingham*, an opinion in which the justices had very different views of the “imperfection” that triggered a response. For Justice Stewart, the imperfection was the marchers’ disobedience of an injunction; for Justice Brennan, the imperfection was the unconstitutional city ordinance under which the injunction was issued. Thus, Justice Stewart described one incident that occurred during the Easter Sunday civil rights march as follows: “Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred.” Justice Brennan wrote about the same incident: “[t]he participants in both parades were in every way orderly; the only episode of violence, according to a police inspector, was rock throwing by three onlookers.”

A student presentation engaged the class in a comparison of the rhetorical situations that triggered Franklin Delano Roosevelt’s speech on December 8, 1941, one day after the attack on Pearl Harbor, with George W. Bush’s speech on the evening of September 11, 2001. Students’ initial reaction was that the exigence that triggered the rhetoric in both cases was an act that caused the death of many Americans. After some students argued that rhetoric was not a fitting response to that act, the discussion changed to whether the exigence to which these Presidents were responding was the need to reassure the American people, the need to call them to arms, or the need to forewarn them about hardships. Depending on their identification of the exigence, students raised differences in the situational and speaker-centered constraints faced by the two Presidents and how those differences affected their rhetorical responses.

155. *Id.* at 310–311.
156. *Id.* at 339–342 (Brennan, Douglas & Fortas, JJ., dissenting).
B. Rhetoric as the Process of Composition

For rhetorical approaches to the process of composition, the putting together of legal arguments, I draw from New Rhetoric composition theory and from classical rhetoric's modes of persuasion and canons of invention, arrangement, and style. I also introduce students to argumentation structures suggested by contemporary rhetoricians, including the layout of argument developed by Stephen Toulmin and the New Rhetoric theory of argumentation suggested by Chaim Perelman and Lucie Olbrechts-Tyteca.\(^ {159} \) By using these rhetoric-based approaches to critique and construct arguments, students gain better understanding of argument structure and audience response.

The classical rhetorical period of Aristotle and his successors is the starting point for using rhetoric as a process for composing legal texts. But the heart of the rhetorical process of composition is best described by the New Rhetoric of the 20th Century:

New Rhetoric believes that writing is a process for constructing thought, not just the “skin” that covers thought. The process of making meaning is messy, slow, tentative, full of starts and stops, a complex network of language, purposes, plans, options, and constraints. Its outcome is uncertain . . . .\(^ {160} \)

Students gain better understanding of current disagreements about how the law works by studying the historic division between rhetoric and anti-rhetoric.\(^ {161} \) Plato believed that dialectic, the “science” of human reasoning, could lead to knowledge that corresponded with fixed truth, but that rhetoric, the persuasive use of language, led away from truth and that rhetoricians were more concerned with appearance than with substance.\(^ {162} \) For

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159. See infra nn. 180–206 and accompanying text.
Gorgias and other Sophists, because absolute truth was unknowable, persuasion did not mislead, but instead was a way for society to come to consensual knowledge. Although a student of Plato, Aristotle organized and codified rhetoric into a system of argument and presentation. He distinguished syllogistic (formal) reasoning from enthymemic (informal) reasoning; delineated the rhetorical bases of persuasion (logos, ethos, pathos); and developed the use of the *topoi*, or topics, as ways to invent or discover an argument. In the twentieth century, New Rhetoric sought to re-discover the importance of rhetoric and the central role of persuasion and argument in building understanding.

1. Classical Rhetoric’s Modes of Persuasion and Invention

In class, we explore three of classical rhetoric’s canons: invention, arrangement, and style. Because the new ways of seeing necessary for argumentation come about through imagination, I emphasize invention. The purpose of *inventio* or heuristics (invention or discovery) is to find arguments to support whatever case or point of view the speaker supports. Aristotle’s category of artistic proofs relies especially on the three modes of persuasion—logos (rational appeal), pathos (emotional appeal), and ethos (ethical appeal).

My students say that the step-by-step process of invention outlined by classical rhetoricians is tedious, but surprisingly helpful, whether they are critically reading an opinion to examine how the arguments were constructed or generating arguments in support of a given position. As Aristotle pointed out, some *topoi*, or topics for argument, are certain. In legal reasoning, advocates know in advance that they must make certain moves: arguing


163. For discussion of the Sophists and Isocrates, the most influential Sophist teacher of his times, see Corbett & Connors, supra n. 33, at 491–492.


165. Corbett & Connors, supra n. 33, at 537–543.

166. The study of rhetoric was divided into five parts, these three plus memoria and pronuntiatio (addressing memorization and delivery of speeches). Id. at 17–23.

167. Id. at 17–19.
that a particular situation falls within the language of a statute or rule (plain meaning or legislative intent), that this situation is analogous or distinguishable on the facts or the reasoning from a precedent case, or that applying the rule to this situation would further or undermine the policies underlying the rule.

When the topics were not certain, Aristotle devised an organized list of topics as a method for discovering arguments. The common topics include such categories as definition, comparison, relationship, circumstance, and testimony. Aristotle also described special topics for certain categories, including judicial discourse: whether something happened (evidence); what that something is (definition); and the quality of what happened (motives or causes of action). In class, we apply the special judicial topics to a current lawsuit, and we use the common topics to develop arguments on a current, controversial issue such as international human rights violations, law school affirmative action programs, or application of the Second Amendment.

While exploring the modes of persuasion in class, we pay particular attention to logos, but we also debate whether appeals to reason alone are enough to support persuasion in the sense of “establishing belief in uncertain truths.” Students easily understand appeals based on the speaker’s ethos and the audience’s pathos, but they have more difficulty with the rules for syllogisms and enthymemes. A student presentation may begin by comparing the three modes; for example, one presentation asked students to identify which modes were being used in a series of videotapes produced by People for the Ethical Treatment of Animals (PETA). In a videotape showing a bodybuilder vegetarian touting the health benefits of his diet, students found syllogisms, enthymemes, and logical fallacies, all appeals based on logos. In a videotape showing the evolution from a live cow to a grilled steak, the students identified pathos, and in a third video, featuring the

168. *Id.* at 84–126.
169. *Id.* at 87–120.
170. *Id.* at 123–126.
171. Kronman, *supra* n. 1, at 680 (discussing a necessary “boundary between politics and law, where the passions must be engaged for the sake of establishing belief in uncertain truths, and mathematics, where the passions need to be neutralized so that truths of perfect certainty may be discovered”).
Rev. Al Sharpton on “Kentucky Fried Cruelty,” the students identified ethos and speculated that the choice of the speaker was part of PETA’s overall ethos-based strategy.

For discussions of logos, student presentations often focus on the differences between a logical syllogism, the primary tool of dialectics, and its rhetorical equivalent, the enthymeme. Working with syllogisms helps students detect logical fallacies, allowing them to attack an opposing argument based on the validity of the reasoning rather than having to prove the falsity of facts. Similarly, students are better able to point out flaws in opposition claims when they recognize that the most common form of “syllogism” in legal argument is an enthymeme. Because an enthymeme contains a conclusion and only one premise, the other premise being implied and both premises being only presumably true, the enthymeme cannot lead to certainty, but only to a tentative conclusion from probable premises.

Our discussion of the canons of arrangement and style is brief. Arrangement in classical rhetoric was a discipline; an appropriate arrangement might depend on the nature of the speaker, the subject, the speech, the audience, or the situation. As Michael Frost has noted, court rules and common practice for appellate briefs specify the same organizational requirements as those first formulated by Corax of Syracuse. Our practice in class with classical “style” has sometimes included purposefully writing in “bad” style and more often emphasizes how to recognize specific schemes and tropes in formal legal writing, informal writing, and visual venues such as Calvin and Hobbes cartoons (“AARRGH! AAIEEE! AAUGHH!”; “His train of thought is still boarding at the station.”; “Calvin eats one bite too many! He begins to swell! Inflating like a raft, he grows bigger and bigger! Oh!

176. Corbett & Connors, supra n. 33, at 53.
177. Id. at 20, 256–292.
178. Frost, Brief Rhetoric, supra n. 54, at 411–413.
No! How much larger can he get? Oooh, I think I’m going to explode.”).179

2. **Toulmin’s Layout of Argument**

From Stephen Toulmin’s contributions to contemporary rhetoric,180 we concentrate in class on the layout of practical argument and the “good reasons” approach to ethics.181 Like the distinction between syllogisms and enthymemes, Toulmin distinguished theoretical from practical arguments;182 a practical argument requires an inferential leap from data or evidence to reach a reasonable conclusion, and the leap must be justified by claims that fit the context of a specific situation.183 In contrast, a theoretical argument requires no such inferences because the conclusion is certain; it goes no farther than the data in the premises and is based on universal principles.184 Toulmin concluded that theoretical arguments were rare for several reasons: the subjects of arguments are rarely governed by a single principle, knowledge

179. These examples are taken from Bill Watterson, *The Complete Calvin and Hobbes* (Andrews McMeel Publg. 2005). In classical rhetoric, once arguments had been invented, selected, and arranged, they were put into words. Classical rhetoricians identified a number of figures of speech, schemes being a deviation from the ordinary pattern of words, and tropes being a deviation from the ordinary meaning of a word. Corbett & Connors, supra n. 35, at 377–379. Among the schemes are schemes of balance, such as parallelism and antithesis; schemes of unusual or inverted word order, such as anastrophe (inversion of the natural or usual word order), parenthesis, and apposition; schemes of omission, such as ellipsis, asyndeton (deliberate omission of conjunctions), and polysyndeton (deliberate use of many conjunctions); and schemes of repetition, such as alliteration, assonance, anaphora (repetition of the same word or group of words at the beginning of successive clauses), epistrophe (same but at the end of successive clauses), climax (arrangement in order of increasing importance), antitemetabol (repetition of words, in successive clauses, in reverse grammatical order), and so on. *Id.* at 380–395. The classically identified tropes include the related ones of metaphor, simile, synecdoche, and metonymy; puns; antanaclasis (or repetition of a word in two different senses); paronomasia (use of words that sound alike but have different meanings); periphrasis (substitution of a descriptive word for a proper name or of a proper name for a quality associated with the name); personification; hyperbole; litotes (deliberate use of understatement); rhetorical question; irony; onomatopoeia; oxymoron; and paradox. *Id.* at 395–409.


181. See Foss et al., supra n. 36, at 117–153; see also Saunders, supra n. 54, at 568–572.

182. Foss et al., supra n. 36, at 123–125. The difference is reminiscent of classical rhetoric: Plato’s logical ideal leads to absolute truths regardless of the individual situation while Aristotle’s enthymemes deal with probabilities and their persuasiveness depends on context. *Id.* at 121.

183. *Id.* at 120.

184. *Id.*
changes over time, and probabilities are more frequent than certainties.\textsuperscript{185}

To help construct justifications, the basis for practical arguments, Toulmin developed a layout of argument that is more similar to legal argument than to formal logic.\textsuperscript{186} Like lawyers, those who advance practical arguments often produce their reasoning after they arrive at their claims; rather than inferring claims from evidence, they justify their claims retrospectively. To succeed at justification, the arguer must be able to critically test and sift ideas;\textsuperscript{187} an argument is successful when it can survive criticism from experts in the field.\textsuperscript{188}

Toulmin’s layout of practical argument can be used both to critique and to generate legal arguments.\textsuperscript{189} The layout is based on a metaphor of movement along a path: “an argument is movement from accepted data, through a warrant, to a claim.”\textsuperscript{190} The claim is “the conclusion of the argument that a person is seeking to justify[,] . . . the answer to the question, ‘Where are we going?’” The data are “the facts or other information on which the argument is based[,] answering] the question, ‘What do we have to go on?’” The warrant “authorizes movement from the grounds to the claim and answers the question[ ], ‘How do you justify the move from these grounds to that claim?’”\textsuperscript{191} In addition to these primary elements—movement from data through a warrant to a claim—three additional elements account for the context of the particular argument. The first is the backing, which provides support for the warrant; if “the warrant answers the question, ‘What road should be taken?’, the backing answers the question, ‘Why is this road a good one?’” In addition, there is a modal qualifier, indicating the strength of the leap from the data to the warrant and answering the question, “How certain are we of arriving at our destination?” Finally, Toulmin’s layout of argument includes the rebuttal, that is, the specific circumstances

\textsuperscript{185} Id. at 124–125.
\textsuperscript{186} Id. at 129–134.
\textsuperscript{187} Id. at 129 (quoting Stephen Toulmin et al., An Introduction to Reasoning 10 (2d ed., MacMillan 1984)).
\textsuperscript{188} Id. at 130.
\textsuperscript{189} See Saunders, supra n. 54, at 568–572.
\textsuperscript{190} Foss et al., supra n. 36, at 131 (quoting Wayne Brockriede & Douglas Ehninger, Toulmin on Argument: An Interpretation and Application, Quarterly J. Speech 44 (Feb. 1960)).
\textsuperscript{191} Foss et al., supra n. 36, at 131.
when the warrant does not justify the claim, answering the question, “Under what circumstances are we unable to take this trip?”

For law students, Toulmin’s layout is similar to argumentation structures that they already know; the layout clarifies the levels of inference and support necessary to justify movement and the importance of individual circumstances. In their presentations, students have used the model to analyze the positions taken by women seeking the right to vote, the claims made in advertising testimonials, and the arguments made in a variety of movies and television shows (A Few Good Men, X-Files, Homer Simpson’s lawsuit for false advertising against The Frying Dutchman All-You-Can-Eat Seafood Restaurant).

As for ethical decisions, Toulmin suggested that they should be guided by analysis of “good” reasons from paradigm cases. Unlike the argument model, the ethics model works prospectively; it moves toward reaching the claim or conclusion, not retrospectively. The paradigm cases create an initial presumption about what actions would be ethical; the individual circumstance is then compared and contrasted with the paradigm case (a process much like analogy). Several problems may occur: the paradigm case may fit ambiguously, two or more paradigm cases may apply in conflicting ways, or the individual case may be unprecedented. For such decisions, Toulmin’s proposed model of practical argument is slightly different from his layout of argument. So, for example, if the question is whether a person should return a borrowed pistol to a friend, the data might include the friend’s statement that he will shoot someone when he gets the pistol back; the warrant would be a general rule developed from paradigm cases that borrowed property should be returned; the provisional claim would be that the pistol presumably ought to be returned but the rebuttal would consider the differences between the paradigm case and this case.

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192. Id. at 132–133.
193. Id. at 136–140.
194. Id. at 139.
195. Id. at 136–137.
196. The data apply to the warrant as well as the claim, eliminating the need for backing; modality has been incorporated into the claim with the phrase “presumably so,” and the rebuttal can be phrased “absent exceptional circumstances.” Id. at 138–139.
In class, we apply the Toulmin ethical decision model to everyday questions of conduct as well as to lawyers’ ethical dilemmas. For example, we discuss questions such as whether a student should repeat damaging allegations about another student, what an individual should do when a family member says she was the driver in a hit-and-run accident, and how a lawyer should respond when a client asks how to keep assets secret from an opposing party.

3. New Rhetoric’s Starting Points

Like Toulmin, Chaim Perelman and Lucie Olbrechts-Tyteca suggested a theory of argumentation based on a metaphor of movement: an argument is designed to move the audience from agreement about premises to agreement about some conclusion.197 This theory, set forth in The New Rhetoric: A Treatise on Argumentation,198 was based on extensive study of the arguments made about values in legal settings, political discourse, philosophical discourse, and daily discussions.199 The authors concluded that traditional rhetoric overemphasized style and that arguments about values were primarily rhetorical, not logical.200

While logic compels a conclusion based on deductive reasoning, Perelman and Olbrechts-Tyteca found that argumentation seeks audience adherence to a claim through persuasion. Beginning with premises the audience accepts, the aim of argumentation is a probable outcome, not a certain one. As premises with which to begin, the New Rhetoric authors distinguished starting points dealing with reality from those dealing with the preferable.201 Starting points dealing with reality include such premises as facts that are already agreed to; truths that enjoy universal agreement (principles that connect facts to one another such as scientific theories or philosophical or religious conceptions); and presumptions about what is normal and likely.202 Starting points dealing with the preferable include values; hierarchies of values;

198. Perelman & Olbrechts-Tyteca, supra n. 197.
199. Foss et al., supra n. 36, at 84–85.
200. Id. at 85–86.
201. Id. at 90–94.
202. Id. at 90–92.
and ways in which value hierarchies can be organized, including quantity, quality, and order.203

Perelman and Olbrechts-Tyteca suggested ways that speakers might focus attention on, or give presence to, the right elements in an argument. Liaison, for example, transfers agreement from the premises to the conclusion through quasi-logical arguments, which are persuasive because they are similar to logic, or through arguments based on the structure of reality.204 Dissociation gives presence by separating elements that language or a recognized tradition have tied together; starting with a single concept, dissociation splits it into two independent, but related, concepts, such as appearance and reality.205 To illustrate this approach, I have asked students to use New Rhetoric’s starting points to generate arguments about current controversial issues such as the constitutionality of specific gun control laws.206

C. Rhetoric as a Perspective on How the Law Works

As for rhetoric as a perspective, a way to develop a rhetorical “gaze,” I suggest to students that effective legal interpretation and composition will sometimes depend on their ability to see with new eyes and to observe from different vantage points. In this portion of the course, students explore different rhetorical approaches to invention and imagination: approaches that can help them adopt different lenses,207 make the familiar strange,

203. Id. at 92–94.
204. Id. at 97–103.
205. Id. at 103–104.
206. The gun control argument exercise occurred before the United States Supreme Court’s decision and while a petition for rehearing was pending before the Court of Appeals in Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), aff’d, District of Columbia v. Heller, 128 S. Ct. 2783 (2008). Given the unresolved questions left by Heller, the exercise still seems workable.
207. For example, to use metaphor to resolve problems, Donald Schön suggested that the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to “see” one situation “as” other situations. Donald A. Schön, Generative Metaphor: A Perspective on Problem-Setting in Social Policy, in Metaphor and Thought 137, 150–161 (Andrew Ortony ed., 2d ed., Cambridge U. Press 1993). Schön’s advice echoes the metaphor-generating advice of Kenneth Burke: “If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc.” Burke, supra n. 134, at 504 (discussing metaphor, metonymy, synecdoche, and irony in connection “with their role in the discovery and description of ‘the truth’”); see also John Dewey, Human Nature and Conduct: An Introduction to Social Psychology 196 (Henry Holt & Co. 1922) (“The elaborate systems of science are born not of
look from the outside in and the inside out, and link abstractions to concrete images and stories.\textsuperscript{208}

Toward the end of the semester, I also ask students to focus again on how rhetorical awareness will affect their study and practice of law, bringing together Amsterdam and Bruner’s discussion of the interaction of rhetoric and culture with bell hooks’s cultural critique and Jack Sammons’s views on the ethics of legal rhetoricians.\textsuperscript{209} Recalling Gerald Wetlaufer’s description of legal rhetoric as being marked by claims of one right answer, Amsterdam and Bruner suggest that rhetorical strategies are often used to conceal the contestability of legal interpretations.\textsuperscript{210} They apply this suggestion to Justice Powell’s opinion in \textit{McCleskey v. Kemp},\textsuperscript{211} where the United States Supreme Court turned down a claim that imposing the death penalty on the defendant was unconstitutional because it was part of a pattern of racially discriminatory capital sentencing in Georgia.\textsuperscript{212} Amsterdam and Bruner argue that Justice Powell constructed a narrative in which the important value that needed to be protected was sentencing discretion, not racial equality.\textsuperscript{213} Flowing from this narrative, Justice Powell was able to create an either-or choice, making it appear that the Court could not vindicate McCleskey’s claims without destroying judicial discretion and concealing interpretations that would have made other choices seem possible.\textsuperscript{214}

Reacting to this reading, student presentations have addressed the ethics and the effectiveness of similar rhetorical moves that conceal differing interpretations of law and facts. For example, one student illustrated the techniques used by the prosecution and defense arguments in the movie version of \textit{A Time to Kill},\textsuperscript{215} pointing out differing concrete details and coded meanings

\begin{itemize}
\item[208.] The concept of making the familiar strange comes from Amsterdam and Bruner, \textit{supra} n. 15; the concept of looking from the outside in and the inside out comes from bell hooks, \textit{Feminist Theory: From Margin to Center}, at preface (S. End Press 1984).
\item[209.] Amsterdam & Bruner, \textit{supra} n. 15 at 217–291; bell hooks, \textit{supra} n. 208, at 26–29; Sammons, \textit{supra} n. 19, at 99.
\item[210.] Id. at 282–283, 319.
\item[211.] Amsterdam & Bruner, \textit{supra} n. 15, at 173–176.
\item[212.] Id. at 210–216.
\item[213.] Id. at 210–216.
\item[214.] \textit{A Time to Kill} (Warner Bros. Picture 1996).
\end{itemize}
in the two sides’ closing arguments and the presupposition by the defense attorney of his own shortcomings. Another student highlighted techniques in Amsterdam and Bruner’s own rhetorical analysis of McCleskey v. Kemp that the student suggested were aimed at concealing the challenges that could be made to the authors’ own interpretations.

From rhetorical analysis of arguments about racial discrimination in criminal sentencing and prosecution, the class moves to discussion of other links between rhetoric and culture, beginning with Amsterdam and Bruner’s analysis of race and culture in decisions about public education and continuing with the advocacy rhetoric of bell hooks. Consistently cited by students as the course’s most provocative author, hooks challenges students to think about how an outsider’s perspective might affect interpretation. In class, we discuss her argument that race, class, and gender affect our creation and understanding of rhetorical and cultural products; as an example, I use an article in which hooks discusses gangster rap. We also work through hooks’s proposal that the best standpoint for the rhetoric is in the margins, especially when rhetoric is linked to struggles against dominant structures. This is so, hooks claims, because those in the margins are able to look “both from the outside in and the inside out.”


217. See Foss et al., supra n. 36, at 265–298. bell hooks was the name of her great grandmother; she chose to use the name as a reminder that she was not her ideas; the lowercase spelling was a sign that readers should focus on substance, not on who is writing the words. Id. at 270.

218. One student sent me an e-mail after a class discussion of whether hooks was a feminist (one young woman in the class suggested that the class’s hostile reaction to the work was because hooks was an “old school” feminist): “I am . . . going to send a copy to my Mom and Aunt and ask them is this the feminism that they fought for.”

219. To examine hooks’s claims, we discuss an article that hooks wrote in 1994, in which she argued that “gangsta rap does not appear in a cultural vacuum, but, rather, . . . [t]he sexist, misogynist, patriarchal ways of thinking and behaving that are glorified in gangsta rap are a reflection of the prevailing values in our society.” bell hooks, Sexism and Misogyny: Who Takes the Rap? Misogyny, Gangsta Rap, and the Piano, Z Mag. 26 (Feb. 1994). hooks’s article was written in response to a New York Times article that had castigated gangsta rap for fostering the myth “that middle-class life is counterfeit and that only poverty and suffering, and the rage that attends them, are real.” Brent Staples, The Politics of Gangsta Rap: A Music Celebrating Murder and Misogyny, N.Y. Times A28 (Aug. 27, 1993).

220. Foss et al., supra n. 36, at 282–284.

221. Id. at 272 (quoting bell hooks, supra n. 208, at preface).
equipping them with a “radical perspective from which to see and create, to imagine alternatives, new worlds.”

After discussing these interactions of culture and rhetoric, the class again takes up the ethics of classroom rhetoric, reacting to Jack Sammons’s suggestion in *The Radical Ethics of Legal Rhetoricians* that good rules emerge from good practice, and then students respond in writing to the challenge posed by an imagined Socrates in James Boyd White’s *A Dialogue on the Ethics of Argument*. Speaking as Socrates, White tells two young lawyers that

> by reason of your training and natural capacities you have what is commonly called a great power, the power of persuading those who have power of a different kind, political and economic power, to do what you wish them to do. . . . Your professional aim is to present your case, whatever its merits, so that those with control over economic and political forces will decide for your client, and you most succeed when you most prevail. You use your mind, as we used to say of the Sophists, to make the weaker argument appear the stronger. . . . [But] neither the power of money nor the power of persuasion is a good thing of itself; that depends upon whether it is used to advance or injure one’s interest, and that is no concern of yours, with respect to your client or apparently to yourself.

> You say you are your client’s friend, but you do not serve his interests; in truth you are not his friend . . . . Likewise, you are no friend to the law . . . .

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222. Id. at 273 (quoting bell hooks, *Yearning: Race, Gender, and Cultural Politics* 149–150 (S. End Press 1990)).
223. See supra nn. 109–112 and accompanying text.
224. In addition to Sammons, supra n. 19, at 93, see Jack Sammons, *A Symposium: The Theology of the Practice of Law, February 14, 2002 Roundtable Discussion*, 53 Mercer L. Rev. 1087 (2002). This article provides further discussion of the ethics of rhetoric: [W]hen rhetoric is appropriately located within its own tradition it is never unbridled in the way we tend to think of it. It is almost always instead a craft with constitutive restraining rules located in a particular rhetorical culture that carries within it a certain understanding of the virtues and vices based upon ideals of character for both rhetoricians and for their particular audiences. . . . And, what is more, while rhetoric is not only about persuasion—the beauty of the argument on the other side can be appreciated—it is always about persuasion as opposed to force, isn’t it?
225. White, supra n. 162, at 215.
In all of this you are least of all friend to yourself . . . . You never ask yourself in a serious way what fairness and justice require in a particular case, for to do that would not leave time for what you do.\textsuperscript{226}

White imagines the lawyers’ responses in the dialogue as well. In one of them, he makes the case that practicing law has a tendency “not to injure but to improve the character,” a tendency “greatly affected by the nature of the ethical community that one establishes both with one’s clients and with other lawyers and judges.”\textsuperscript{227} He claims that Socrates misunderstands the lawyers’ enterprise, which is to “preserve and improve a language of description, value, and reason—a culture of argument—without which it would be impossible even to ask the questions that you think are most important, questions about the nature of justice in general or about what is required in a particular case.”\textsuperscript{228}

By understanding the process in which the lawyer takes part, the lawyer’s life can be justified:

the lawyer’s task will always be to make the best case he can out of the materials of his culture in addressing an ideal judge. By its very nature, this is to improve his materials, both by ensuring their congruence with the world of facts outside the law and by moving them toward greater coherence, fairness, and the like.\textsuperscript{229}

This view provides an answer as well to ethical questions:

while I am in a sense “insincere” when I say to a judge, for example, that “justice requires” or “the law requires” such and such result, this insincerity is a highly artificial one, for no one is deceived by it. . . . But at the same time I am implicitly saying something else, with respect to which I am by any standard being sincere: that the argument I make is the best one that my capacities and resources permit me to make on this side of the case.\textsuperscript{230}

\textsuperscript{226} Id. at 218–219.
\textsuperscript{227} Id. at 223.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 227.
\textsuperscript{230} Id. at 225.
At the beginning of the semester in Law & Rhetoric, most of my students respond to ethical questions by citing their belief that the adversary system automatically protects against any ethical problems that might otherwise be caused by “rhetoric” (in the sense of making the weaker argument seem the stronger). By the end of the course, their understanding of law as rhetoric is much more nuanced, and some students are counting not only on the adversary system but also on themselves to act as knowledgeable and responsible practitioners within it. Following are some excerpts from their responses to White’s imagined dialogue:

Justifying my study of rhetoric is easy. . . . [W]hen I enrolled I had no idea that I would be gaining such a “great power.” It’s like asking Link from the Nintendo game Legend of Zelda: “you have found the Sword of All Power, you can destroy the universe, how can you live with yourself?” Of course Link replies “hey man, give me a break, I was just walking in the woods, now I have a sword, it’s not like I’m instantly evil. . . .”

My thoughts on [the reading]: I think I see myself as an intermediary between the abstract and the real. I am the conduit that brings words of law and words of life together.

As I struggle with the personal decision whether or not I want to be a lawyer I am constantly confronted with [arguments against lawyers] . . . so my defense of rhetoric here is really a metaphor for my defense of the legal profession as a whole. . . .

IV. HOW STUDENTS VIEW THE COURSE

“[If you hurt her,] I swear to God, I will tear you to pieces with my bare hands. Or vicious rhetoric.”

The study of “law as rhetoric” provides illumination and warmth, a respite from the cold comfort of the forms of legal reasoning that are said to be governed only by rules, politics, or pow-

231. White concludes that the dialogue teaches us “that we cannot help speaking a language that is made by others, yet forms our mind; that we are responsible for how we speak and who we are; [and that] self-conscious thought on these questions is among the most important tasks of a mature mind. . . .” Id. at 237.

232. Pete (Topher Grace) in Win a Date with Tad Hamilton (DreamWorks SKG 2004) (quoted by a student in response to the final essay assignment).
For at least some students, rhetorical study seems to avert the total eclipse that legal argumentation casts on the “full story” and that norms of law school discourse cast on student views of right and wrong, justice and injustice, and what it means to be a good person and a good lawyer. Encouraging students to experience law as a rhetorical activity gives them a chance to think through the professional roles they will play and to more fully engage their left and right brains, their heads and their hearts, their pasts and their futures.

Through their reading and writing, students acquire knowledge, skills, and attitudes that deepen their responses to the rhetorical efforts of others and improve their own rhetorical effectiveness. In comments taken from anonymous student evaluations, writers’ memos accompanying papers, and e-mail responses to specific questions, students credited the reading, analysis, critique, and discussion that they are required to do in Law & Rhetoric with enabling them to read more critically and encouraging them to read more reflectively. For example, one student wrote that the class “has helped remind me that I understand things best when I can look at the essence/foundation of what they are. I know that after taking this course I will never again read a Supreme Court opinion and think ‘wow that chief justice had a lot of really good points,’” rather than reading and analyzing the opinion in more depth.

Students also become more aware of the influence on legal texts of the historical, social, and cultural context within which they are produced; the backgrounds of their authors; and the ways in which those authors construct arguments and use language. As one student wrote, “This is a course that . . . gets to the ‘heart’ of the law and unavoidably compels the student to reflect on the meaning of it and what is really underlying judicial opinions.” As discussed earlier, a particularly good example is Justice Jackson’s majority opinion in West Virginia State Board of Education v. Barnette. Opening the lens more widely shifts stu-

233. See bell hooks, Outlaw Culture: Resisting Representations 9–10 (Routledge 1994), for the source of the ideal classroom conversation as “a place of radical openness of recognition and reconciliation where one could create freely.”
234. The student e-mails, student evaluations, and writers’ memos from which the quoted comments are taken are on file with Author.
235. Student evaluation on file with Author.
236. 319 U.S. 624 (1943).
dents’ gaze from the often-quoted and evocative “words” to the rhetorical choices made by Justice Jackson to explain the Court’s departure from precedent, in the middle of World War II, to protect school children who refused to salute the flag because their religion barred them from worshipping graven images.

Similarly, through rhetorical analysis, students who have been critical of the results reached by particular judges in specific lawsuits reach a more nuanced understanding of how those judges’ opinions emerged. For example, one student who analyzed Justice Clarence Thomas’s dissent in *Grutter v. Bollinger* said he had reconciled the author’s use of specific language within the context of the particular controversy: “I am satisfied because I stuck to my guns with analyzing a controversial topic written by a reticent man.”

By the time students are in their third year of law school, many say they are reading cases with only one goal: “finding” the rule they need to extract from the cases. But in Law & Rhetoric, they read cases with the specific purpose of understanding how the law is made: “I really value that this class has shown me that to . . . understand law you have to read behind and between the lines of legal text.”

In addition to more reflective reading, students consistently comment that they have acquired skills and approaches that have helped them become more rhetorically effective as writers. These tools and techniques range from methods for more fully developing logical arguments, to discovery of embedded stories and metaphors, to use of heuristics to imagine the full range of arguments. Comments included this from one student: “I am still amazed at how just understanding the rhetorical techniques can make my writing so much tighter.” Another wrote that “I never expected that one of the real skills I would get from this class is finally learning to slow down and plan before I write. I am not sure if this is a result of understanding argument better . . . .”

Studying law as rhetoric may also help students recognize and work through the tension they will encounter as lawyers be-

238. Positive comments from students are the norm, but they are not universal; one student in the 2007 class wrote that “[t]he class had very little practical application to being a lawyer. Too much academic theory, not enough practical advice. Instead of ‘surveying’ the whole field of rhetoric, why not focus on a few principles of rhetoric that can be used by a practicing lawyer?”
tween abstract categories and individual stories. In her study of law school discourse, Elizabeth Mertz concluded that her findings, like the Carnegie Report, had “identified a tacit message in legal education’s signature pedagogy: that law’s key task is effective translation of the ‘human world’ using legal categories.”\textsuperscript{239} As Mertz puts it, “There is without question a certain genius to a linguistic-legal framework that [appears to] treat[] all individuals the same, in safely abstract layers of legal categories and authorities, regardless of social identity or context.” But, like other critics, she contends that the abstraction of categories conceals a good many things, including power dynamics and “closes in on itself at the point where any challenge to its underlying system of reasoning arises.”\textsuperscript{240}

In addition to discovering ways to shape legal arguments to accommodate diversity and individual circumstances that depart from the norm and the form, students find that Law & Rhetoric allows them to draw on personal experiences, interests, talents, beliefs, and values that law school often seems to ask them to leave at the door. They are grateful to be able to discuss their views of how practicing lawyers should deal with justice and injustice, right and wrong. As one student put it, the class was able “to open up and engage in real . . . dialogue” about beliefs and values. Another student said that she appreciated the opportunity to discuss the reality of law practice: “I hear all the time how it isn’t that hard to place your personal feelings about justice and fairness aside in ‘zealously representing’ someone. Maybe everyone is just afraid to say how hard it really is.”

Students appreciate being able to draw upon the things they carried with them into law school that they thought were unwelcome in law school. One wrote: “I . . . infused [in the paper] a few poetic nuggets for you!” Another comment was similar: “I am sure you have heard the saying ‘Law school is where creativity goes to die’; this class is proof that this doesn’t have to be true. It gives me hope for my place in a profession that, on the surface, seems so rigid.”

My students and I agree: what law school needs is more immersion in the rhetorical process, accompanied by more awareness of it and more reflection about it. Rhetorical analysis shows

\textsuperscript{239} Mertz, \textit{supra} n. 21, at 505 (citations omitted).
\textsuperscript{240} Id. at 507 (citations omitted).
us that “law is a human exercise; that it is driven neither by immutable truths . . . nor by arbitrary whims.”

Isn’t it ironic that after teaching students how to think like lawyers, we must remind them that they will be practicing law as human beings? In the first year of law school, most teachers find some students who “just don’t get it”; these students are unable to focus on “the issue,” and they insist on bringing up “irrelevant” information. Engaging in “law as rhetoric” reminds us that there is more to the issues we face than “legally relevant” information, that practicing law is a rhetorical activity undertaken by individuals using inherited language and symbols to build and transform their culture and community.


242. The Carnegie Report points out that the signature pedagogy of law school leads students “to analyze situations by looking for points of dispute or conflict and considering as ‘facts’ only those details that contribute to someone’s staking a legal claim on the basis of precedent.” Sullivan et al., supra n. 111, at 187. “By contrast, the task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the method.” Id.
THE NEW ACCREDITATION STANDARDS ARE COMING TO A LAW SCHOOL NEAR YOU—WHAT YOU NEED TO KNOW ABOUT LEARNING OUTCOMES & ASSESSMENT

Susan Hanley Duncan

I. BACKGROUND: ACCREDITATION GENERALLY

Since 1952, the Department of Education has recognized the American Bar Association (ABA) as the national agency for the accreditation of programs leading to the first professional degree in law. At its first meeting in 1878, the ABA formed the Committee on Legal Education, which was renamed in 1893 to the Section of Legal Education and Admissions to the Bar.1 The ABA instructed the Committee and later the Section to work with the admitting authorities, usually the highest court of each state, to assist in establishing the legal education requirements for admission to the bar.2 As a result, the Section established the first standards and interpretations of these standards for law schools in 1921 and began publishing the names of the schools which met the standards. These ABA Standards reflected efforts to improve the competence of individuals entering the legal profession. In addition, the standards relieved the admitting authorities from the burden of evaluating the quality of an applicant’s educational experiences.3

2. Id.
3. Id. at 440.
The process for amending the accreditation standards involves multiple steps. Amending the standards begins with the Council’s Standards Review Committee (SRC), which seeks input from concerned groups and individuals. In recent years, the legal writing community has attended SRC meetings to monitor proposals and offer input before SRC refers recommendations to the Council. The Council then collects further input by conducting public hearings on the proposals. When the Council votes to adopt a revision, it is reviewed by the ABA House of Delegates, which may concur in the revision or send it back to the Council for further consideration. Ultimately, the Council’s decision will become final after the second referral.

The standards remained virtually unchanged until their first major revision in 1973. Since 1970s, the Council has regularly engaged in a comprehensive review of the standards “to ensure that they are appropriate requirements for current legal education programs and that they focus on matters that are central to the provision of quality legal education.” These reviews usually
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The revision process is important to monitor because the standards and their interpretations form the framework for the accreditation process and impact the delivery of legal education.

In September 2008, the Council of the Section of the Legal Education and Admissions to the Bar began a comprehensive review of the ABA Standards and Rules of Procedure for the Approval of Law Schools. To date, not many proposals have been sent to the Council because it is very early in the process, which is expected to take three years. The SRC developed a schedule and a statement of goals and objectives, which are available on the Committee’s website. The website also has drafts of proposed changes to the standards, interpretations, and rules of procedure as they become available. To date the SRC’s review has been lim-

additional rigorous writing experience after the first year.” Sourcebook, supra n. 8, at 221. In addition, several new interpretations also impacted legal writing. The Council adopted Interpretation 302-1 that outlined the factors to be considered in evaluating the rigor of writing instruction. Id. These included “the number and nature of writing projects assigned to students; the opportunities a student has to meet with a writing instructor for purposes of individualized assessment of the student’s written products; the number of drafts that a student must produce on any writing project; and the form of assessment used by the writing instructor.” Id.

This review is required of all agencies approved by the United States Department of Education. See 34 C.F.R. § 602.21 (2009). The regulation states

(a) The agency must maintain a systematic program of review that demonstrates that its standards are adequate to evaluate the quality of the education or training provided by the institutions and programs it accredits and relevant to the educational or training needs of students.

(b) The agency determines the specific procedures it follows in evaluating its standards, but the agency must ensure that its program of review—

(1) Is comprehensive;

(2) Occurs at regular, yet reasonable, intervals or on an ongoing basis;

(3) Examines each of the agency’s standards and the standards as a whole; and

(4) Involves all of the agency’s relevant constituencies in the review and affords them a meaningful opportunity to provide input into the review.

(c) If the agency determines, at any point during its systematic program of review, that it needs to make changes to its standards, the agency must initiate action within 12 months to make the changes and complete that action within a reasonable period of time. Before finalizing any changes to its standards, the agency must—

(1) Provide notice to all of the agency’s relevant constituencies, and other parties who have made their interest known to the agency, of the changes the agency proposes to make;

(2) Give the constituencies and other interested parties adequate opportunity to comment on the proposed changes; and

(3) Take into account any comments on the proposed changes submitted timely by the relevant constituencies and by other interested parties.

9. The Committee’s web site can be found at http://www.abanet.org/legaled/committees/comstandards.html.
ited to Standards 102 and 103 (Provisional and Full Approval), Standards 202 and 203 (Self Study and Strategic Planning), Standard 105 (Major Change in Program or Structure), Chapter 2 (Governance), some of Chapter 3 (Program of Legal Education), and Chapter 5 (Admissions and Student Services).\textsuperscript{11} The review is a dynamic process, and therefore, the drafts change frequently undergoing continuous revisions as subcommittees obtain feedback from interested parties. Consequently, this Article will most likely be outdated when published; however, it will be useful in memorializing what was happening at least at this moment in time and providing a context for the eventual changes.

The proposed changes to Chapter Three are being spearheaded by the Student Learning Outcomes Committee, a subcommittee of the ABA’s Section on Legal Education and Admission to the Bar’s Standards Review Committee. The subcommittee’s work has been guided by a report of a special committee on outcome measures appointed by the then-Chair of the Section, Honorable Ruth V. McGregor.\textsuperscript{12} In conducting its research, that special committee examined relevant literature in the legal education field including the Carnegie Foundation’s report on legal education\textsuperscript{13} and the \textit{Best Practices} report published by Roy Stuckey and others,\textsuperscript{14} which pointed to the value of incorporating outcome measures into the accreditation criteria.\textsuperscript{15} In addition, the special committee reviewed literature and heard testimony about how other fields of professional education used outcomes measures in their accreditation process.\textsuperscript{16} Finally, the special committee was influenced by general literature reflecting the trend towards outcome measures in undergraduate higher education, which ultimately recommended that the standards be revised to more


\textsuperscript{15} \textit{Outcomes Measure Report, supra} n. 12, at 6.

\textsuperscript{16} \textit{Id.}
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heavily rely on output measures, shifting the focus in legal education from teaching to learning.\textsuperscript{17}

Drawing on the special committee’s report and input from various interested parties, the Student Learning Outcomes subcommittee currently proposes revising the Standards and Interpretations to shift from a teaching-centered regime to a regime focusing on student learning as well as shifting from a curriculum focus to an outcomes focus. The Student Learning Outcomes subcommittee has developed five drafts to date and continues to make revisions, making it difficult to analyze the actual language of any revised standard; however, some guiding principles seem to be surfacing around the outcome measures issue.\textsuperscript{18} Parts II and III of this Article analyze these principles and their possible ramifications, both good and bad, on legal writing programs, the legal academy, law students, and the public. The Article then predicts a positive impact on legal education if outcome measures become more prominent in the standards. Exploring the rich literature on learning objectives and assessment, the Article offers law school faculties generally, and legal writing professors specifically, concrete and practical suggestions on how to prepare for the changes outcome measures will require. Because legal writing professors already use many assessment tools, they are particularly well suited to help other faculty members as this shift occurs.

\textbf{II. WHY THE SHIFT?}

The assessment practices from other disciplines, other countries, and recent research and studies specific to American legal education all support a move to outcome measures. However, not all law professors will welcome this change but instead “find the call to student outcomes assessment threatening, insulting, intrusive, and wrongheaded.”\textsuperscript{19} Some faculty members object to assessment because they think it will endanger their academic freedom or be used to blame individual professors unfairly.\textsuperscript{20} In addi-

\begin{enumerate}
\item Id.; see also Sherrill B. Gelmon et al., Assessing Service-Learning and Civic Engagement 1 (Campus Compact 2001). This push for outcome measure is not new but it appears for the first time to be gaining serious traction. See Gregory S. Munro, Outcomes Assessment for Law Schools (Inst. for L. Sch. Teaching 2000).
\item Stands. Rev. Comm., Comprehensive Review, supra n. 11.
\item Barbara E. Walvoord, Assessment Clear and Simple 8–9 (Jossey-Bass 2004); see
\end{enumerate}
tion, others might question whether the real goals of higher education can be measured or argue that student learning is affected by factors beyond faculty control. Some might just be comfortable with the status quo and object to any change especially one they perceive might make them work harder.

Others will not be as pessimistic or hostile to changing the culture but may be confused as to what this means for law schools. A necessary first step is to review the process followed by the subcommittee examining this issue, which helps give context and meaning to the practical impact this outcomes measure model will have on faculty and law schools. The Student Learning Outcomes subcommittee initially started its job by contemplating a list of questions, including whether certain outcomes should be mandatory, whether law schools should develop outcomes, how the schools and the ABA should measure outcomes, and what revisions may be necessary in the standards if outcome measures were included.

In contemplating these discussion questions, the subcommittee accepted comments and feedback on various drafts. The committee also invited representatives from other disciplines to speak with them about shifting from legal education’s traditional input-based model, which focused on areas and types of instruction a law school should supply instead of the types of lessons the students should have learned at the time of graduation. Overall, the submissions supported this change in philosophy, and the subcommittee’s early drafts revising the standards were well received by the SRC. At the time of writing this Article, however, the subcommittee continued its work and the SRC had taken no official action. What the final revisions will ultimately contain and how these changes will impact legal education generally, and legal writing specifically, remain to be seen.

also Allen, supra n. 19, at 7. She also reassures faculties that this process “is about student learning; it is not about faculty evaluation.” Id. at 16.

21. Id. at 9–10.

22. These questions were circulated at the September 2009 Denver Crossroads conference and are included in the Appendix A of this Article.

23. Various groups and individuals submitted formal position papers on the outcomes issues including ALWD, Clinical Legal Education Association (CLEA), Society of American Law Teachers (SALT), etc. Those submissions are available on the Standards Review Committee website, supra n. 11.

To date, the subcommittee’s changes to Chapter Three of the standards centers upon a four-fold approach that would require law schools to (1) identify outcomes; (2) offer a curriculum so students achieve outcomes; (3) assess outcomes; and (4) assess the assessment. These strategies reflect an instructional design method invented by Grant Wiggins and Jay McTighe known as “backwards design.” The circular nature of the model begins by articulating what a teacher (or a program) wants students to learn and then planning experiences and instruction to aid students in their learning. The circle continues by gathering evidence to determine if these learning objectives have been met and then using those results to improve teaching and learning. These stages and the subcommittee’s recommendations specific to each stage will be examined more fully below.

III. IMPACT ON LEGAL EDUCATION

Although the devil will be in the details, we can predict with a fairly high degree of certainty that the revisions will contain some level of outcomes-based standards that will require law schools and legal writing programs to reevaluate and perhaps adjust their delivery of legal education. In some ways, legal writing programs may experience less of a sea change than other areas in the legal academy because many of the underlying philosophies and practices associated with an outcomes-based approach are already accepted and being utilized by legal writing professors. Many legal writing professors already identify concrete objectives for student learning, assess that learning, and use the results of the assessments to improve their classes. Other legal writing professors may not be as explicit in their class development but welcome the chance to rethink and reorganize their classes. Regardless, legal writing professors will be natural leaders for their colleagues both within and without the legal writing discipline as everyone adapts to this new paradigm. Because legal writing professors can play substantial roles in helping their

27. Franklin Pierce is a program that does this extremely well and would be an excellent resource for any professor attempting to incorporate learning outcome measures.
institutions understand and meet these new standards and because most law professors have been trained as lawyers and not as experts in educational or learning theory, an in-depth review of how the standards may be modified is both timely and necessary.

A. Require Schools to Identify Outcomes

The subcommittee has suggested that law schools identify desired learning outcomes consistent with each law school’s mission and have avoided a “one size fits all approach.”28 Before attempting to craft these learning outcomes faculties need to identify the mission and goals of their law schools. This unique mission and the goals associated with each law school will impact the content of the learning outcomes. While the mission statement is a more holistic description of the purpose and philosophy of a program, the goals are general statements concerning the knowledge, skills, and values graduates will have. The learning objectives describe how the students will show mastery of their knowledge, skills, and values and much more specific than the mission and the goals as depicted by the pyramid below.29 These build upon each other to help achieve the mission.

28. Memo from Steven Bahls, Chair of Student Learning Outcomes Comm., to ABA Stands. Rev. Comm., Assessment and Student Outcomes—Implications of Proposed ABA Standards on Student Learning Outcomes (May 27, 2010). Language proposed for the standard changes is constantly changing. Anyone interested in this issue needs to be advised to check with the ABA for updates on all the changes discussed in this article.

Goals and learning outcomes can be derived using various techniques. Schools can look to other institutions to get ideas; use a top-down approach by analyzing catalogues, brochures, and other literature that describe the program; or use a bottom-up approach looking to individual syllabi, assignments, and texts to ascertain the goals and learning objectives.\textsuperscript{31} In addition, goals and learning objectives can be developed by considering what a successful lawyer needs to know and be able to perform.\textsuperscript{32}

Explicitly including legal analysis and reasoning in the standard underscores the importance of this skill to the practice

\textsuperscript{30} U. of Conn., Assessment Primer: Goals, Objectives and Outcomes, http://www.assessment.uconn.edu/goals1.htm (accessed May 3, 2010). “The Outcomes Pyramid shown in figure 1 above presents a pictorial clarification of the \textit{hierarchical} relationships among several different kinds of goals, objectives, and outcomes that appear in assessment literature.” \textit{Id}.

\textsuperscript{31} Allen, supra n. 19, at 32–33.

\textsuperscript{32} \textit{Id}. at 33.
of law.\(^{33}\) Thus, the challenge for the legal writing teachers will not be in convincing their institutions that students must be capable of performing legal analysis and reasoning upon graduation but rather how to explicitly identify outcomes for their classes and their individual assignments to make sure this happens. Legal writing courses add great value to legal education when learning outcomes are clearly stated and explained, which greatly assist students in focusing their effort in the course. In addition, these outcomes need to be measurable, which will be discussed in greater detail under the “Assessment” heading. Finally, legal writing professors need to develop learning outcomes beyond the program, but also at the course level and the module-unit level.

Although this sounds relatively straightforward, drafting effective outcomes can be quite challenging. Bloom’s Taxonomy of Educational-Objectives-Cognitive Domain, a renowned classification of learning objectives, is a very useful resource for educators to consult when drafting learning outcomes.\(^{34}\) Bloom’s taxonomy consists of six levels of cognitive development organized from lower to higher order thinking skills: knowledge, comprehension, application, analysis, synthesis, and evaluation.\(^{35}\)

In her book, *Assessing Student Learning*, Linda Suskie offers several helpful tips:\(^{36}\)

- Aim for goals that are neither too broad nor too specific.
- Use concrete action words that describe what students should be able to do.

\(^{33}\) Multiple surveys of lawyers and judges rank legal writing as one of the most important skills law graduates need. Jennifer Jolly-Ryan, *Coordinating a Legal Writing Program with the Help of a Course Webpage: Help for Reluctant Leaders and the Technologically-Challenged Professor*, 22 Quinnipiac L. Rev. 479, 481 (2004) (American Bar Foundation survey reveals that law firm hiring partners expect new lawyers to come to the job with fully developed writing, communication, and library research skills.); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Leg. Educ. 469, 472–474, 488 (1993) (describing the findings of a survey of young Chicago attorneys that written communication was the second most important legal skill); Garth & Martin, *supra* n. 30, at 488 (discussing how at least 90 percent of Chicago hiring partners indicate written communication skills should be brought into the firm, not taught there).

\(^{34}\) B. S. Bloom, *Taxonomy of Educational Objectives: The Classification of Educational Goals* 201–207 (Susan Fauer Co. 1956); see also Peter W. Airasian & Helena Miranda, *The Role of Assessment in the Revised-Taxonomy*, 41 Theory into Practice 249 (Autumn 2002) (discussing the revised taxonomy that has a dual perspective on learning and cognition).


\(^{36}\) Suskie, *supra* n. 26, at 78–79.
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- Define fuzzy terms.
- Focus on the end, not the means.
- Focus on your most important goals.
- Work with colleagues.

In addition to keeping these tips in mind, when developing specific learning outcomes Suskie also suggests educators contemplate the type of jobs students will obtain after graduation and what knowledge, skills, and attitudes employers will be looking for in these students.37 Besides input from employers, talking to current and former students and involving them in the process may also be helpful.38

Most legal writing professors would have no difficulty identifying legal analysis, writing, and citation as essential skills students must be proficient in after taking a legal writing course. These might be very worthwhile overarching program goals but not particularly effective learning outcomes.39 What some legal writing and non-legal writing professors might do better is supplement these with more detailed and specific outcomes the students will be able to know, think or do by the end of the course to show competence.

Franklin Pierce’s legal writing program provides an excellent example of specific, focused, and clear outcomes that can be easily measured in a first semester legal writing course. Included in Appendix B of this Article is a matrix given to students at Franklin Pierce that lists multiple concrete, specific skills students will be able to perform in each of the broad legal analysis, writing, and citation categories. For example, under legal analysis skills, students will be able to derive precise and accurate legal rules from authorities and distinguish between settled and unsettled legal issues. Under writing skills, students will be able to prepare documents using a requested format and use effective transitions. Finally, under citation skills, students will be able to cite to every legal proposition and accurately format quotations.

37. Id. at 88.
38. Palomba & Banta, supra n. 35, at 33.
39. Id. (“Goals are used to express intended results in general terms. The term goals is used to describe broad learning concepts such as clear communication, problem solving, and ethical awareness. The term objectives is used to describe specific behaviors students should exhibit. For example, graduates in speech communication should be able to interpret non-verbal behavior and to support arguments with credible evidence.”).
Although most professors implicitly expect these outcomes and develop assignments and learning experiences to help students meet these outcomes, not all law professors explicitly share these outcomes at the beginning of the class with their students. Providing this roadmap to students at the beginning of the semester “helps them focus on what’s most important and get the most out of their learning experience.”

Compare the detailed chart developed by Franklin Pierce to more general language contained in some syllabi:

This course is designed to teach skills, which are indispensable to a practicing attorney: legal research, analysis and writing. The course allows students to build an understanding of the legal process and the lawyer’s role as an advocate within the legal system.

The chart, more effectively than the syllabi language above, communicates to students the competencies they will learn.

Identifying these outcomes make take some retraining for many professors. Class notes and syllabi need to be reworked to reflect not what the course will cover but what the students will be expected to know and do. In preparing to teach the course and each individual class, the professor must begin to reconceptualize the delivery of the class to reflect the emphasis on learning and not on teaching and share this with the class in concrete terms.

B. Require Schools to Offer a Curriculum So Students Achieve Outcomes

The subcommittee currently proposes “that law schools offer a curriculum that is designed to produce graduates that have attained the identified learning outcomes. The proposed standard, with a few exceptions . . . leaves it to each law school to determine what the curriculum will be.”

Meeting this standard will require faculties to examine both the curriculum as a whole and

40. Suskie, supra n. 26, at 90.
41. Palomba & Banta, supra n. 35, at 32.
individual course content to ensure students can achieve learning outcomes. As a result, faculties will need to engage in both macro and micro review of the full course of study and individual courses.

1. Curricular Review and Curriculum Mapping

Developing a curriculum for meeting student outcomes will require deliberate and intentional effort by the faculty. Typically, law professors design their own courses but do not participate in a review of what is happening in courses not taught by them. More than nine years ago, law professor Gregory S. Munro suggested that more coordination needed to occur and offered five necessary characteristics for a curriculum to serve outcomes: focus, coherence and coordination, incremental and developmental, required aspect, and integral assessment.\(^{43}\) By focus, it must relate to the mission, goals, and outcomes of the law school.\(^ {44}\) Coherence and coordination requires the faculty to take a holistic approach to the curriculum, instead of focusing only on their individual courses, and see how all the parts fit together to meet the mission and outcomes.\(^ {45}\) The knowledge and skills students learn should be incremental and appropriate to the level of a student’s development, which will require coordination between faculty members.\(^ {46}\) The faculty will also need to work together to determine which courses need to be required in order to make sure all graduates learn a base set of knowledge and skills.\(^ {47}\) Finally, ongoing and valid assessments are an integral part to the learning outcome model.\(^ {48}\)

When engaging in this process, faculties need to be mindful of section (b) of the new Standard 303 that focuses on making sure law schools provide “authentic assessments” for their law students.\(^ {49}\) These assessments are “similar to or embedded in relevant real-world activities.”\(^ {50}\) Law schools need to supplement their classes with clinics or pro bono service activities in order for

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43. Gregory S. Munro, *How Do We Know If We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation* 1 J. ALWD 229, 233–234 (2001).
44. *Id.* at 233.
45. *Id.*
46. *Id.* at 234.
47. *Id.*
48. *Id.*
49. Allen, *supra* n. 19, at 8.
50. *Id.* at 165.
students to practice and “test” the skills they are learning. These opportunities are an important part of the curriculum and are often the best way for students to fully achieve outcomes.

The Council’s retaining the two legal writing experiences requirement confirms that this skill is considered essential to the law school’s educational program. Retaining some inputs in combination with a new output measures approach is a well-balanced approach. Other professional schools’ accreditation standards also retain some input requirements even while emphasizing output measures. 51 Although law schools should be free to design the curriculum in a manner that best meets their mission, some courses or experiences remain so tied to a sound program of legal education that they should be required to be offered by all law schools. Unfortunately not all law schools will offer these if not mandated by the standards, which arguably is why the writing requirements were added into the standards. Deleting them now would be a step back in progress and would be detrimental to students. 52

Assuming the requirement of two rigorous writing experiences stays in subsequent drafts, the more important issue legal writing professors need to be discussing with their schools is whether more needs to be offered in the curriculum than what is outlined in Standard 302(b) in order to achieve the learning outcomes identified in 302(a). Requiring two rigorous legal writing experiences should just be a start as these two experiences will not be enough to reach competent levels of mastery of the learning outcomes. The implementation of the new standards focusing


52. Thanks to Sophie Sparrow who suggested that an argument could be made that changes in the curriculum would result without requiring this input if schools had to provide evidence that students could analyze, research, and write competently by the end of their fifth semester. She noted that once the ABA decided to measure bar passage, schools started to spend a lot of attention and resources on bar courses, instructors, materials, and other support. The result might be the same if the writing competently outcome is part of the standards.
on output measures provides the opportunity for faculties to substantively review their curriculums to determine what is necessary to offer students in order to help them achieve the various identified learning outcomes. As a result, the new standards will require faculty members to discuss with each other what they do and how each of their parts contributes to the whole. Legal writing professors have a unique window during this period of curriculum review to advocate for more writing classes, more credit hours awarded to writing classes, and writing across the curriculum by tying these requests directly to learning outcomes.

To reach this level of coordination law faculties may find curriculum mapping useful. Curriculum mapping is a process of identifying where the intended learning outcomes fit within the curriculum. Done correctly the outcomes should align with the curriculum and gaps identified can be corrected. Designing a curriculum that achieves the learning outcomes and an assessment program requires a significant amount of time of the faculty but is a necessary prerequisite to student learning. One way to engage in curriculum mapping is to design a matrix similar to this:

---

53. Palomba & Banta, supra n. 35, at 33.
Curriculum Alignment Matrix
(Assessing Academic Programs in Higher Education by Allen 2004)

<table>
<thead>
<tr>
<th>Course</th>
<th>Program Objective 1</th>
<th>Program Objective 2</th>
<th>Etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>I</td>
<td></td>
<td></td>
</tr>
<tr>
<td>101</td>
<td></td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>102</td>
<td>D</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>103</td>
<td>I</td>
<td>D</td>
<td></td>
</tr>
</tbody>
</table>

Etc.

I = introduced, P = practiced, D = demonstrated

In order for the curriculum mapping process to be useful and successful, careful planning is necessary. Although directed at k-12 institutions, Susan Udelhofen has written a book, Keys to Curriculum Mapping, which may be a good resource for law faculties engaging in this process for the first time.55 The book begins by exploring the research supporting curriculum mapping and its benefits.56 Subsequent chapters offer a step-by-step approach to the process including detailed timelines and curriculum mapping templates.57 One of the most helpful figures is a list of over 100 action verbs that describe some higher order thinking skills law students should master that could be very useful as law faculties draft goals and learning objectives.58 Udelhofen offers several completed curriculum maps that identify content, skills, and assessment that could be modified from the k-12 curriculum to fit a law curriculum.59 Finally, there is a chapter on curriculum mapping software programs and a bibliography of further references on this topic.60

56. Id. at 1–8.
57. Id. at 9–51.
58. Id. at 33.
59. Id. at 80–91.
60. Id. at 69–75, 93–94.
2. **Individual Course Review**

In addition to advocating for school-wide changes to strengthen the writing curriculum, whether with dedicated writing classes or instilling writing experiences in doctrinal classes, legal writing professors should also take the opportunity to reflect on the design of their own courses and evaluate to what extent their current framework helps or hinders students in meeting the identified learning outcomes. Specifically, identifying these learning outcomes and memorializing them in writing as discussed above also aids the professor in designing learning activities that will teach these skills. This may mean increasing or decreasing assignments and/or redesigning them in light of the learning outcomes. The activities and assignments should be carefully crafted and “arranged in a particular sequence so that the energy for learning increases and accumulates as students go through the sequence.”

Traditionally, legal writing classes are designed applying many of the concepts found in the assessment literature and are excellent models to imitate. For example, legal writing professors design several assignments and specifically identify the goals of each writing assignment. These assignments build upon each other and allow students the opportunity to progress from lower- to higher-order thinking skills, reinforcing old skills while learning new ones. Detailed rubrics and checklists are often provided to students and to help them have a clear understanding of what is expected and how the grade is assigned. Assignments usually include multiple drafts and conferences with detailed cri-
tiques helping students to understand and subsequently correct substantive and writing issues. Finally, the process of critiquing papers also helps legal writing professors improve their teaching because the papers are clear indicators of what worked and did not work in class.

C. Require Schools to Assess Learning Outcomes

The subcommittee recognized that an integral step to this process is assessing the learning outcomes. The standards would not require that law schools assess the level of achievement of each student in each learning outcome. Instead, the current proposal leaves the determination of how to assess learning outcomes to the individual schools but requires a variety of formative and summative assessments methods should be utilized across the curriculum to provide meaningful feedback to students. The types of assessment conducted by each school will vary since assessments must be designed to assess the unique missions and learning objectives of that institution. Although the assessment methods chosen may vary among schools, some guiding principles gleaned from the extensive literature on this topic may be useful as legal educators begin to think about how to implement this standard. Initially, legal educators will need to understand there are many different types of assessment with only one of them being the traditional method of measuring student learning, grading. Assessments focusing on improving a student’s learning or improving a professor’s teaching often are referred to as “forma-


69. Palomba & Banta, supra n. 35, at 6.

70. Allen, supra n. 19, at 17. Legal educators need to become familiar with the assessment vocabulary and assessment procedures, which will most likely require trainings and support.
The New Accreditation Standards Are Coming

tive assessments,” while assessments focusing on giving a grade are called “summative assessments.” Although grades play a role in measuring student learning they cannot be the sole indicator because grading and assessment criteria may differ, grading standards may be vague or inconsistent, and grades alone may give insufficient information on student strength and weaknesses. In addition, formative assessment, unlike grades, can help teachers determine what works and what does not helping improve the quality of their courses.

This fundamental difference will not be the only concept law faculties need to understand. For these new standards to work, law schools will need to educate their faculty on good assessment practices and how to implement them. Multiple options for choosing an assessment strategy exist as well as assessment tools. Some of these tools will be familiar to law faculties, especially direct measures such as exams, papers, and interaction with a client.

Other indirect measures encouraging reflection of students or alumni about their learning may not be as familiar to law faculties. Some of these measures may include conducting surveys, focus groups, and interviews. Other ways to get students to reflect include minute papers, journals, and self-ratings. The purpose of these measures, often referred to as formative measures, is to help students learn.

72. Id. at 154. Other authors use the terms “traditional measurements” for describing traditional tests compared to “performance measurements,” which requires students to “do” something to show their level of mastery. Allen, supra n. 19, at 7–8.
73. Suskie, supra n. 26, at 6–8. For a good discussion of the differences between grading and assessment see Allen, supra n. 19, at 11–13. For example, she makes an excellent point that a grade point average from a class does not tell the professor which learning objectives are being mastered.
74. Allen, supra n. 19, at 11.
75. Trudy W. Banta et al., Designing Effective Assessment (Jossey-Bass 2009).
76. Suskie, supra n. 26, at xii.
77. Walvoord, supra n. 20, at 3.
78. Id.
79. Suskie, supra n. 26, at 223.
80. Id. at 168–184. Minute papers involve “giving students just a couple of thought-provoking questions and ask them to write no more than one sentence in response to each.”
81. Schwartz et al., supra n. 71, at 137.
Because the more traditional ways of assessing student learning have flaws and may be incomplete, law faculties will need to become more familiar with the alternative measures to get a more complete and accurate picture. One measure of particular interest to legal writing professors may be assembling assessment information into portfolios. Although often associated with K-12 education, architecture programs have used portfolios for many years. Many legal educators’ first reaction to this idea may be one of dread because portfolios are often time consuming and logistically challenging. Legal educators, however, should not prematurely dismiss this idea without learning more about how portfolios might work. Although beyond the scope of this Article, Suskie does a wonderful job in her book on assessment of helping educators decide when portfolios may be useful and if so the practical steps necessary to make the process a success. Moreover, a few law schools across the country have incorporated portfolios into their curriculum with favorable results.

No matter which assessments are chosen, legal educators should design several assessments and vary them. When using summative assessments to assign a grade, this is particularly important because no research finds that giving one exam at the end of the semester will adequately assess a student’s knowledge. External variables (student is sick, something is going on in student’s life, for example) may prevent a student from doing well on a particular day. In addition, a student may do better with one type of assessment compared to another.

If law faculties take seriously the research that variety and quantity matter with assessments, more work will be demanded
than writing one exam. In their book, Professors Schwartz, Sparrow, and Hess offer a helpful checklist for law professors to ask themselves when designing assessments. This list of questions includes the following:

- What is the rationale for this assessment?
- What do you want students to do?
- How much time will it take for students to complete?
- Will the assessment be completed in or outside of class?
- What is the assessment’s content?
- Is there a particular format students should use?
- How much can students collaborate on the assessment?
- How will you provide feedback?

The book also provides helpful commentary for each one of these questions that can aid any professor planning his or her course.\textsuperscript{91}

In recognizing that more assessments and more intentional design of assessments is contrary to most law school's practice and culture, the authors also encourage law professors to develop clear grading criteria through checklists, rubrics, or samples to help save time.\textsuperscript{92} In addition, students appreciate knowing exactly what was expected of them in advance.\textsuperscript{93} Assessment literature strongly urges educators to develop a scoring guide to evaluate assessments.\textsuperscript{94} To that end, many resources exist to help law faculties develop for the first time or improve existing rubrics.\textsuperscript{95} Franklin Pierce's excellent rubric for an interoffice memo included in Appendix B of this Article is just one example of how a rubric can be designed.

Designing effective assessments and rubrics is just the beginning as they should be continually assessed and improved. For example, rubrics can be evaluated by using a metarubric, a

\textsuperscript{90} \textit{Id.} at 163.
\textsuperscript{91} \textit{Id.} at 139–143.
\textsuperscript{92} \textit{Id.} at 147; see also Sparrow, \textit{supra} n. 65.
\textsuperscript{93} Schwartz et al., \textit{supra} n. 71, at 158.
\textsuperscript{94} Suskie, \textit{supra} n. 26, at 123.
\textsuperscript{95} \textit{Id.} at 123–151; see also Dannelle D. Stevens & Antonia Levi, \textit{Introduction to Rubrics An Assessment Tool to Save Grading Time, Convey Effective Feedback, and Promote Student Learning} (Stylus 2005).
rubric used to evaluate rubrics.\textsuperscript{96} In addition, the rubrics can be revised as teachers use them and become more focused on what the rubric should contain.

In summary, law professors need to assess student attainment of the learning outcomes through multiple measures. These assessments need to be ongoing and focused not only on outcomes but experiences. They should be designed using best practices and the latest research on learning and teaching. In addition, designing effective rubrics requires professors to focus on the learning outcome or objective that students are expected to achieve and work backwards defining possible criteria that students need to demonstrate to show competency. These rubrics also provide students valuable feedback about their progress in achieving learning outcomes.

D. Require Schools to Assess the Assessment

“Assessment is about learning” and that is why an integral part of this process involves assessing the assessment and making changes based on the information received.\textsuperscript{97} This needs to be done continuously and not just at the individual professor level but also at the institution level.\textsuperscript{98} In her book, \textit{Assessing Academic Programs in Higher Education}, Mary J. Allen offers an excellent definition of program assessment as “a framework for focusing faculty attention on student learning and for provoking meaningful discussions of program objectives, curricular organization, pedagogy, and student development.”\textsuperscript{99} Recognizing the importance of this step in the learning process, the committee proposes that “law schools review the pedagogical effectiveness of their curriculum with the goal that all students are likely to achieve proficiency in the identified learning outcomes.”\textsuperscript{100}

While part (a) of Standard 304 focuses more on assessing student progress, part (b) requires every law school to develop indicators to determine its effectiveness in achieving its goals as an institutional community. Obviously because student learning is a fundamental part of law school missions, the assessment of

\textsuperscript{96} Stevens & Levi, supra n. 95, at 93.
\textsuperscript{97} Palomba & Banta, supra n. 35, at 15.
\textsuperscript{98} Allen, supra n. 19, at 4.
\textsuperscript{99} Id.
\textsuperscript{100} Bahls, supra n. 42, at 2.
student learning is an essential component of the assessment of institutional effectiveness, which is why assessing is highlighted in the standards. A uniform set of measures to assess institutional effectiveness will not be possible because effectiveness measures will be dependent on the unique mission of each law school. However, certain characteristics should be present for any effective assessment. These include processes that are useful, cost-effective, reasonably accurate and truthful, carefully planned, and organized, systematic, and sustained.101

Any assessment of institutional effectiveness will need to be proceeded by the law school defining clearly articulated institutional goals and implementing strategies to achieve those goals. Only after completing these first two steps is the law school able to assess the achievement of those goals and use the results to improve programs and services and inform planning and resource allocation decisions.

Perhaps reviewing what accrediting agencies of undergraduate institutions look to when evaluating assessment documentation may shed some light onto what might meet this possible new ABA standard.102 In its guide to team visits, the Middle States Commission on Higher Education lists several questions its reviewers may ask when analyzing whether a university is meeting its obligation to assess its effectiveness. These questions include the following:

i. Do institutional leaders support and value a culture of assessment?

ii. Are goals, including learning outcomes, clearly articulated at every level: institutional, unit-level, program-level and course-level?

iii. Have appropriate assessment processes been implemented for an appropriate proportion of goals?


102. In addition, a bibliography was developed by a leading expert in assessment, Linda Suskie, which will be very helpful to law professors wanting to learn more about how to conduct institutional effectiveness assessments. The bibliography, Institutional Effectiveness Biography, is available on the Frostburg State University web site, at http://www .frostburg.edu/admin/opa/Bibliography-Institutional%20Effectiveness.pdf.
iv. Where assessment processes have not yet been implemented, have appropriate assessment processes been planned?

v. Do assessment results provide convincing evidence that the institution is achieving its mission and goals, including key learning outcomes?

vi. Have assessment results been shared in useful forms and discussed widely with appropriate constituents?

vii. Have results led to appropriate decisions and improvements about curricula and pedagogy, programs and services, resource allocation, and institutional goals and plans?

viii. Have assessment processes been reviewed regularly?

ix. Where does the institution appear to be going with assessment?103

In addition, in their book, *Best Practices for Legal Education: A Vision and a Roadmap*, Roy Stuckey and others list six principles underlying best practices for assessing institutional effectiveness specifically in law schools.104 These mirror many of the considerations above and include

*The school regularly evaluates the program of instruction to determine if it is effective at preparing students for the practice of law.*105

Most law schools do this through their self studies in preparation for site visits and strategic planning. The idea of curriculum mapping discussed earlier in this Article should also be an integral part of this evaluation to make sure the curriculum stays aligned with the mission, goals, and learning objectives.

*The school uses various methods to gather quantitative and qualitative information about the effectiveness of the program of instruction.*106

103. Middle States Commn. on Higher Educ., supra n. 101.
104. Stuckey et al., supra n. 14.
105. Id. at 265.
To date, many law schools present as evidence of institutional effectiveness their bar passage rate and job placement figures. However, many more methods for institutional assessment exist. Other ways to assess effectiveness include the self-study, accreditation and site visits, interviews, questionnaires and surveys, statistical information, and faculty portfolios.\footnote{107}

*The school uses student performance and outcome assessment results in evaluation of the educational effectiveness of the school’s program of instruction.*\footnote{108}

The main point of this principle is that the results of the assessments must be shared. The data needs to be distributed to the faculty for a thorough evaluation to occur.

*The school’s processes of conducting assessments of student performance and educational outcomes meet recognized standards for conducting assessments in higher education.*\footnote{109}

This principle makes it incumbent on law schools not only to create the assessment systems but to make sure the systems themselves are being assessed.

*The school solicits and incorporates opinions of its alumni as well as other practicing judges and lawyers who hire and interact with graduates of the school.*\footnote{110}

This principle suggests some mechanism should exist for constituencies outside the law school to provide feedback. This feedback should not be limited to periods of self study but should be ongoing.

*The school demonstrates how educational outcomes data is used to improve individual student and overall program performance.*\footnote{111}
The important point with this principle is that the institution must do something with the results. The institution has an obligation to make improvements from the information it collects.

The best way for a law school to begin assessing the assessment is to engage in an assessment audit. The purpose of this audit is to determine what is already being done and what is being planned or desired in the future. Collecting centralized data about what is being done will involve collecting both classroom and institution-wide assessment measures currently being used. In addition, the audit should determine how this data relates to the various goals and learning objectives. Another critical part of the audit is to articulate how the assessment is used to make changes. Finally, the audit needs to make recommendations for improving the assessment process. In her book, Assessment Clear and Simple, Barbara Walvoord provides several charts for various disciplines to illustrate what a completed assessment audit may look like.

Assessments can be staggered over several years and do not need to be completed on all students every year. In addition, faculties can be selective about which learning objectives to assess and might consider assessing only a small amount of learning objectives at first. The main point is to do some type of assessment every year instead of waiting for the year before a site visit. In her updated book, Linda Suskie offers other ideas for keeping the assessment process simple including keeping paperwork minimal and looking at samples to evaluate outcomes instead of each student’s work. Additionally, Suskie urges work

112. Walvoord, supra n. 20, at 34.
113. Id.
114. Id. at 54–55.
115. Id. at 58.
116. Id. at 59.
117. Id. at app. F.
118. Allen, supra n. 19, at 6.
119. Id. Linda Suskie suggests starting with no more than three to six. Suskie, supra n. 26, at 87.
121. See also id.
plans to reflect the time commitment it takes to lead and participate in assessment efforts.122

V. CONCLUSION

The switch to a learning-outcomes approach will likely positively impact legal education. Although any change brings with it challenges, this change has the potential to make us better teachers, help students learn better, and make our institutions more efficient and more accountable. This shift from a teaching-driven method of instruction to a learning-based method will be something very familiar to most legal writing professors. Many legal writing professors already articulate learning objectives, gather information about how well students are meeting these objectives, and use the information to improve teaching. Being familiar with the process makes legal writing professors ideal players for helping incorporate these changes at an institutional level. To further our influence, it would behoove all legal writing professors to become thoroughly knowledgeable about assessment and the rich literature discussing it. Even if we implement assessment best practices in our individual classes, we need to know how to translate this to the institutional level as many of us will be on strategic planning, curriculum, self study, and no doubt, newly formed assessment committees. Luckily, the legal writing community already has professors who have done just that.123 These experts will be valuable resources for legal writing professors and schools trying to understand and comply with the new standards.

122. Id. at 88.
123. Sophie Sparrow, Linda Anderson, Pamela Lyssaght, Richard Neumann, and Margaret McCabe all have extensive knowledge of this field.
QUESTIONS FROM OUTCOMES SUBCOMMITTEE OF SRC

1. Should [outcome measures] be a mandatory or alternative regime?
2. How are measured outcomes determined?
   - Must all schools measure against certain outcomes (e.g. bar exam, placement). If there are mandatory outcomes that must be measured, may law schools compensate for deficiencies in mandatory standards by showing strong performance with respect to other outcomes?
   - Should the standards provide a list of other relevant outcomes that must be measured if relevant to the law school's mission? Should the standards or interpretations specify how to measure these outcomes?
   - Should the standards allow law schools to develop other outcomes, if a case can be made that they tie to mission (e.g. number of students that go into public service)? If so, what process must law schools use to determine what outcomes measures to use?
3. How does ABA validate outcomes and the measurement of outcomes that it requires or allows the schools to consider? How do schools validate the outcomes and measurement of outcomes they consider?
4. Can outcomes be internal to the law school (e.g. 25% of classes have significant legal writing and reasoning component), as opposed to outputs oriented (e.g. bar pass rate)? Must law schools address both?
5. Which standards need revision?
   - Standard 202 (Self Study) and Standard 203 (Strategic Planning and Assessment)
   - Standard 301 (objectives) and Standard 302 (Curriculum)
   - Standard 303 (Academic Standards and Achievements)
6. Does a shift to outcome standards make other standards unnecessary? (E.g. input standards)
7. Can there be a period where law schools elect to be evaluated under either traditional standards or standards focusing more on outcome standards?
### Minimum Competencies for Legal Writing I

By the end of the first semester, when presented with a set of facts, students will do the following:

<table>
<thead>
<tr>
<th>Legal Analysis Skills</th>
<th>Writing Skills</th>
<th>Citation Skills</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Read, comprehend and write about legal authorities, including accurately identifying:</strong></td>
<td><strong>Organize:</strong></td>
<td><strong>Usage:</strong></td>
</tr>
<tr>
<td>▪ Cases’ holdings, rules, reasoning, key facts</td>
<td>▪ Prepare documents using requested format</td>
<td>▪ Cite to every legal proposition</td>
</tr>
<tr>
<td>▪ Statutory elements or factors</td>
<td>▪ Design small-scale paragraph organization that communicates the logical progression of the argument</td>
<td>▪ Cite accurately to source</td>
</tr>
<tr>
<td>▪ Hierarchy of authority</td>
<td>▪ Use thesis and topic sentences to create coherence</td>
<td><strong>Form:</strong></td>
</tr>
<tr>
<td>▪ Weight of authority</td>
<td><strong>Writing style and conventions:</strong></td>
<td>▪ Accurately use long and short form case citation</td>
</tr>
<tr>
<td><strong>In writing, based on legal authority and client’s facts:</strong></td>
<td>▪ Based on word choice, issue, location in paragraph and grammar, organize sentences for efficient reading</td>
<td>▪ Accurately use long and short form statutory citation</td>
</tr>
<tr>
<td>▪ Identify key client facts</td>
<td>▪ Revise written work to eliminate excess words</td>
<td>▪ Accurately use signals and explanatory parentheticals</td>
</tr>
<tr>
<td>▪ Select applicable legal authority using all minimum competencies listed for LW I</td>
<td>▪ Omit contractions and slang</td>
<td>▪ Accurately format quotations using Bluebook rule 5.</td>
</tr>
<tr>
<td>▪ Derive precise and accurate legal rules from authorities (common law, and statute and common law)</td>
<td>▪ Write out or use numerals as appropriate</td>
<td><strong>Usage:</strong></td>
</tr>
<tr>
<td>▪ Distinguish between settled and unsettled legal issues</td>
<td>▪ Abbreviate as appropriate</td>
<td>▪ Cite to every legal proposition</td>
</tr>
<tr>
<td>▪ Based on the nature of legal issues, design large-scale organization using reasoned choices about where to include:</td>
<td>▪ Use italics, underline, or underlining only where appropriate</td>
<td>▪ Cite accurately to source</td>
</tr>
<tr>
<td>▪ Rule/s</td>
<td>▪ Avoid passive voice where appropriate</td>
<td><strong>Form:</strong></td>
</tr>
<tr>
<td>▪ Descriptions of the rule/s</td>
<td>▪ Use effective transitions</td>
<td>▪ Accurately use long and short form case citation</td>
</tr>
<tr>
<td>▪ Reasons for the rule/s</td>
<td><strong>Use accurate grammar and punctuation:</strong></td>
<td>▪ Accurately use long and short form statutory citation</td>
</tr>
<tr>
<td>▪ Explanations showing how and why the law/case analysis applies to the client facts</td>
<td>▪ Subject-verb agreement</td>
<td>▪ Accurately use signals and explanatory parentheticals</td>
</tr>
<tr>
<td>▪ Counter argument</td>
<td>▪ Preposition-verb coherence</td>
<td>▪ Accurately format quotations using Bluebook rule 5.</td>
</tr>
<tr>
<td>▪ Select appropriate reasoning methods (deductive,</td>
<td>▪ Complete sentences</td>
<td><strong>Usage:</strong></td>
</tr>
<tr>
<td>▪ Inductive, and mixed methods)</td>
<td>▪ Possessives</td>
<td>▪ Cite to every legal proposition</td>
</tr>
<tr>
<td></td>
<td>▪ Capitalizing proper nouns</td>
<td>▪ Cite accurately to source</td>
</tr>
<tr>
<td></td>
<td>▪ Semi-colons</td>
<td>▪ Form:**</td>
</tr>
<tr>
<td></td>
<td>▪ Quotation marks</td>
<td>▪ Accurately use long and short form case citation</td>
</tr>
<tr>
<td></td>
<td>▪ Antecedent-pronoun</td>
<td>▪ Accurately use long and short form statutory citation</td>
</tr>
<tr>
<td></td>
<td>▪ Use of capitals, abbreviations, and acronyms</td>
<td>▪ Accurately use signals and explanatory parentheticals</td>
</tr>
<tr>
<td></td>
<td>▪ Use of contractions and slang</td>
<td>▪ Accurately format quotations using Bluebook rule 5.</td>
</tr>
</tbody>
</table>
The New Accreditation Standards Are Coming

<table>
<thead>
<tr>
<th>inductive) based on rule, nature of law, and client facts</th>
<th>agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Organize by issues and sub-issues</td>
<td>• Modifiers</td>
</tr>
<tr>
<td></td>
<td>• Articles</td>
</tr>
<tr>
<td></td>
<td>• Commas</td>
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<table>
<thead>
<tr>
<th>LWI Standard Rubric</th>
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<tbody>
<tr>
<td></td>
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<tr>
<td></td>
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<tr>
<td></td>
</tr>
<tr>
<td>QUESTIONS PRESENTED</td>
</tr>
<tr>
<td>If a section is missing (Question Presented, Summary, Facts)</td>
</tr>
<tr>
<td>-----------------------------------------------------------</td>
</tr>
<tr>
<td><strong>SUMMARY</strong></td>
</tr>
<tr>
<td>• Clear conclusion/prediction on issue(s)</td>
</tr>
<tr>
<td>• Includes some key facts</td>
</tr>
<tr>
<td>• Uses and applies legal principles</td>
</tr>
<tr>
<td><strong>FACTS</strong></td>
</tr>
<tr>
<td>• Includes all material facts; excludes extraneous facts and legal conclusions</td>
</tr>
<tr>
<td>• Includes facts supporting counterargument</td>
</tr>
<tr>
<td>• Organized logically</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Legal Writing:</strong> (3 criteria)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Organization</strong></td>
</tr>
<tr>
<td>• Document follows format; paragraphs effectively organized and well ordered to communicate logical progression; uses thesis and topic sentences</td>
</tr>
</tbody>
</table>
## Writing Style and Conventions (see competencies)

| Based on word choice, issue, location in paragraph, transitions, and grammar, sentences provide for efficient and fluid reading; writing is a pleasure to read | Based on word choice, issue, location in paragraph and grammar, sentences are organized for somewhat efficient reading | Sentences are hard to follow; may have to be reread to understand
| Writing is concise and uses nearly error-free mechanics and conventions | Contains some excess words or legalese or inaccurate mechanics or conventions

## Discussion: Describing and Explaining the Law: (14 criteria)

- Organizes around issues and sub-issues
- When appropriate uses effective point headings throughout
- Accurately identifies main rules
- Accurately and thoroughly identifies sub-rules/sub-elements/sub-issues and exceptions
- Synthesizes cases
- Selects effective and sophisticated range of authorities for client, including accurately applying weight of authority
- Describes the rules using authorities
- Explains the reasons for the rules
- Shows how the analysis applies to client facts
- Explains why the analysis applies to client facts
- Identifies and refutes counter-arguments
- Identifies and distinguishes law supporting counter-argument
- Identifies and distinguishes key facts supporting counter-argument
- Selects appropriate reasoning methods (deductive, inductive) based on rules, nature of law and client facts
- Organization unclear or confusing and overlapping
- Point-headings somewhat effective
- Main rules inaccurate
- Sub-rules/sub-elements/sub-issues and exceptions—are inaccurate or missing
- Cases described individually
- Selects some basic authorities for client; applies weight of authority somewhat accurately
- Somewhat describes the rules with limited use of authorities.
- Reasons for the rules unclear
- Unclear how the analysis applies to facts
- Unclear why the analysis applies to facts
- Did not identify or refute counter-argument
- Did not identify or distinguish law supporting counter-argument
- Did not identify or distinguish facts supporting counter-argument
- Lacks effective reasoning methods (deductive, inductive) based on rules, nature of law and client facts
Score: ___________/44  Legal Analysis, Organization, Writing, Format
Score: ___________/6  Citation (see Citation Rubric)
Total: ___________/50
This Memo:  _________
Class average:  _________
Class median:  _________

Memo 1– Multiply by .2 = _____/10
Memo 2– Multiply by .3 = _____/15
Memo 3– Multiply by .7 = _____/35
USING THE ELEMENTS OF RHYTHM, FLOW, AND TONE TO CREATE A MORE EFFECTIVE AND PERSUASIVE ACOUSTIC EXPERIENCE IN LEGAL WRITING

Bret Rappaport*

“Yea, in my opinion no rhetoric more persuadeth or hath greater power over the mind; nay hath music her figures, the same with rhetoric.”

Rhythm: An alternating recurrence of similar elements.
Flow: The seamless transition as the story moves along.
Tone: The author’s attitude toward the subject as expressed by word choice which, in turn, designates the mood and effect of a work.

I. INTRODUCTION

Lawyers “tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers,” writes

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1. Gerard G. LeCoat, Music and the Three Appeals of Classical Rhetoric, 62 Quarterly J. Speech 157, 157 (Apr. 1976) (quoting Henry Peacham, who was an English author best known for his The Compleat Gentleman (1622), important in the tradition of courtesy books, which dealt with the education, ideals, and conduct befitting a gentleman or lady).

Chief Judge Frank H. Easterbrook. His colleague, Judge Richard A. Posner, comments that “[l]egal writing by federal judges and the lawyers who appear before them is today generally serviceable, in the sense of being pretty clearly written, pretty careful, businesslike, grammatical.”

By “serviceable,” Judge Posner means that the writing is logical, cogent, and follows some form of the basic IRAC model. The legal profession should collectively take some credit for having come this far. In 1936, Yale Professor Fred Rodell famously wrote that “[t]here are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think about covers the ground.”

Over the decades, legal writing scholars have penned articles and books to aid attorneys and judges in overcoming these failings, particularly as to content. But this type of functionally acceptable legal writing is “in fact mediocre or pedestrian,” for among other reasons it is “a style self-consciously professional” rather than a more effective legal writing style that is “nontchnical, colloquial, narrative [and] essayistic.”

Even if a functional written message is presented in a logical manner, it is not certain that the reader will grasp the message, much less be persuaded by it. The “messenger needs rhetorical knowledge to be able to catch the attention of, and convince an audience.”

In that regard, this article explores some sparsely surveyed rhetorical terrain. As with all forms of non-fiction, legal
writing\textsuperscript{10} “comes burdened with various unhelpful assumptions, none more so than that it benefits from a pre-existing logical structure. This allegedly cuts out much of the agony—and the ecstasy—of writing: the author need only follow the yellow brick road from start to finish.”\textsuperscript{11}

In law, that \textit{yellow brick road} is IRAC—issue, rule, analysis, conclusion. But slavish travel down the IRAC road only leads all too often to “the tedious march of sentences across the page.”\textsuperscript{12} Tedium bores. Bored readers pay little attention to text and even less to message. The reader may just stop reading. Boredom can be battled with brevity. “Let thy speech be short, comprehending much in few words.”\textsuperscript{13} Lawyers can also employ a narrative to more effectively retain a reader’s interest. These persuasive legal writing techniques are explored elsewhere.\textsuperscript{14} This Article instead explores, theorizes, and explains how to write more persuasively by incorporating rhythm, flow, and tone into text. As recent scholarship reveals, there is a scientific basis for why rhythm, flow, and tone attract and keep readers’ interests—the innate connection between language and music.\textsuperscript{15}

While legal writers’ use of popular musical lyrics as metaphor or adjective attests to music’s superficial appeal,\textsuperscript{16} this article examines a different use of music in legal writing. Here, as a predicate to theorizing how musical elements should be incorporated into legal writing, the author summarizes research establishing


\textsuperscript{13} Sirach 32:8 (King James, Apocrypha) (available online at http://etext.virginia.edu/toe/modeng/public/KjvSira.html). In \textit{Illinois Bell Telephone Co., Inc. v. Box}, 548 F.3d 607, 609 (7th Cir. 2008), Judge Posner makes a similar point by noting that “the parties did not have to assault us with 206 pages of briefs, brimming with jargon and technical detail, in order to be able to present the issues on appeal adequately. Clarity, simplicity, and brevity, are underrated qualities in legal advocacy.”


\textsuperscript{15} See infra nn. 33–34 and accompanying text.

\textsuperscript{16} Alex B. Long, \textit{[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing}, 64 Wash. & Lee L. Rev. 531 (2007).
how music and language co-evolved. The neurological mechanisms that operate to perceive and be influenced by music are the same ones (or many of the same ones) that operate in the brain for language—first spoken and then written. We hear what we read.17

Rhythm, flow, and tone are essential components of music, and, therefore, essential components of well-written prose. Such components must be consciously incorporated by attorneys into their persuasive legal writing. By doing so, legal writers encourage readers to pay more attention to the text, facilitate a more enjoyable experience, and entice readers to ultimately agree.

Part II offers background on evolutionary psychology and explores how human and proto-human brains evolved through natural selection to house information processing traits that we moderns call “human nature.” It examines the scholarship of biomusicology and explains the neurological overlap of music and language—musilanguage. Part III examines the writings of Benjamin Cardozo, Frank H. Easterbrook, Ernest Hemingway, Robert Jackson, and others to reveal how they effectively incorporated musilanguage components of rhythm, flow, and tone into their writings. Part IV provides practical ways for instructors to teach rhythm, flow, and tone in legal writing and demonstrates how attorneys can incorporate these musical elements in their memoranda and briefs. Part V offers some concluding observations about the importance of using musically derived devices to make legal writing more persuasive and the obligation that legal writing professors have to their students and the profession to go beyond teaching unadorned IRAC.

II. EVOLUTIONARY PSYCHOLOGY, LAWYERS, BIOMUSICOLOGY, AND READING, SPEAKING, AND SINGING

Changing environmental conditions require that species adapt (evolve) or perish. Evolution achieves this result through the combination of genetic drift (changing genes passed down to descendants), and natural selection (survival of individuals within a population because of certain advantageous genetic traits). These processes combine, over time, within a population of animals to allow that population to adapt to live and procreate in the face of changing environmental conditions. From the pink sand-colored skin of the Grand Canyon Rattlesnake to the fuzzy ends of the scarab beetle’s antenna, natural selection and genetic drift craft Nature’s creatures. The human body, from toenails to eyebrows, is also the product of evolution, as is the human mind. The founders of Evolutionary psychology observe,

Generation after generation, for 10 million years, natural selection slowly sculpted the human brain, favoring circuitry that was good at solving the day-to-day problems of our hunter-gatherer ancestors—problems of finding mates, hunting animals, gathering plant foods, negotiating with friends, defending ourselves against aggression, raising children, choosing a good habitat and so on. Those whose circuits were designed for solving these problems left more children, and we are descended from them.

A. Evolutionary Psychology and Lawyers

The principles of evolutionary psychology establish that the complexity of human behavior requires attention to biology because (1) the brain directs behavior; (2) the brain is a computa-

ional organ that is bound by physical principles; and (3) “the brain’s design, function, and behavioral outputs are all products of gene-environment interactions that have been shaped through time by various evolutionary and developmental processes.”

Lawyers and legal writers should understand and take into account the principles of evolutionary psychology in their persuasive writing for several reasons. First, evolutionary psychology and an evolutionary study of literature known as Literary Darwinism (or euphemistically the “Darwinian lit-crit”) can assist lawyers to better understand how to persuade readers. Although the development, administration, and application of the law are conceived of as reason-based where notions of the unconscious and instinct are banished, such an ideal does not exist. Humans, as humans, are affected by their emotions. While rational, analytical arguments convince people because of their truth, aesthetic concepts appeal to the emotional structure of the human mind. To be persuasive, a writer must utilize both, because

23. Judge Posner notes, [T]he judge’s role is conceived as identifying the applicable rule of law and applying it to the facts of the case. The task of identification may well be analytic, in the sense that the applicable rule is not given but must be derived from some higher-order principle; but the assumption is that the method of derivation is logical in the sense that syllogistic reasoning is logical. The premises are given and the conclusion follows as a matter of logic rather than of emotion, hunch, or empirical inquiry. Richard A. Posner, Law and Economics—Ethics, Economics, and Adjudication, http://ivrn-enc.info/index.php?title=Law_and_Economics—Ethics,_Economics,_and_Adjudication (last updated Apr. 17, 2009).
24. See James Boyd White, Book Review: What Can a Lawyer Learn from Literature? 102 Harv. L. Rev. 2014, 2021 (1989) (“Obviously the law, and the lawyer, can make much use of science, both social and natural, but the image of law as science is misleading, for it erases the center of what lawyers actually do, which is to deal with the particulars of cases in light of an array of authoritative texts: the statutes, judicial opinions, regulations, constitutional provisions, contracts, and other documents that define the terms of their thought and argument. The social sciences can provide data the lawyer can use, but to use them he must translate them into terms that make sense to his audience.”) (reviewing Richard A. Posner, Law and Literature: A Misunderstood Relation (Harv. U. Press 1988)).
emotion and learning are correlated. For example, thinking and feeling are evolutionarily combined in the human art of storytelling to persuade people that the story points to truth. Looking back through evolutionary time, literary Darwinists theorize that storytelling evolved as an adaptive defense reaction to the expansion of human intelligence which occurred about 40,000 years ago. Stories help humans regulate their complex "cognitive machinery." 

Second, evolutionary psychology helps lawyers to understand the "why" of laws. Scholars have begun to explore Darwinian Theory to understand and improve the effectiveness and efficiency of laws and legal systems. Because laws seek to regulate and influence human behavior, and because, to a large degree, human behavior is constrained by evolved dispositions, the exploration of intersections of law and behavioral biology is a fertile and important area of study. Scholars make a compelling point and demonstrate through concrete examples how "insights from behavioral biology into law can help discover useful patterns in some behaviors that law seeks to regulate . . . ." Beyond storytelling and examination of the evolutionary patterns of human behavior, an emerging sub-discipline of evolutionary psychology known as biomusicology demonstrates a more subtle lesson for
lawyers who want to avoid being the “wretched writers” about whom Chief Judge Easterbrook justly complains.

B. Biomusicology and Lawyers

Every known human culture has music, and every human being is capable of creating and responding to it. Music permeates every aspect of every human culture because music is evolutionary. Charles Darwin recognized in *Descent of Man*:

> When we treat of sexual selection we shall see that primeval man, or rather some early progenitor of man, probably first used his voice in producing true musical cadences, that is in singing, as do some of the gibbon-apes at the present day; and we may conclude from a widely-spread analogy, that this power would have been especially exerted during the courtship of the sexes,—would have expressed various emotions, such as love, jealousy, triumph,—and would have served as a challenge to rivals. It is, therefore, probable that the imitation of musical cries by articulate sounds may have given rise to words expressive of various complex emotions.

Biomusicology, a term coined by Niles Wallin in 1991, builds on this Darwinian foundation by scientifically analyzing the origins of music at the intersection with the origin of the human species. The three branches of biomusicology are evolutionary musicology, neuromusicology, and comparative musicology. Through positron emission tomography (PET) scans and functional magnetic resonance imagery (fMRI) this emerging science of biomusicology shows that music and language are processed in many of the same areas of the brain. These studies establish

37. Id.
that rhythmic ability appears to form a foundation for linguistic ability and that reading and music are processed in both the left middle, and superior temporal brain regions. It is no surprise, then, to discover that music causes behavioral and electrophysiological priming effects that are indistinguishable from those evoked by sentences. This observation, in turn, suggests that musical aspects of language may help convey narrative meaning.

This finding has led to practical applications in the schoolhouse. Educators, for example, have found that music is a valuable tool used to enhance beginning reading skills. Teachers realize that music creates a “reality construct” for students in a unique and captivating fashion” that in turn enhances learning. When letters of the alphabet are connected to pitch, some slow learners learn faster, just as learning new information is enhanced when presented in song. This all starts at birth. As Professor Daniel J. Levitin points out in his recent book, *The World in Six Songs: How the Musical Brain Created Human Nature*,

The brain learns music and language because it is configured to acquire rules about how musical and linguistic ele-

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**Music, supra n. 33, at 197 (stating in the abstract that “[r]ecent positron emission tomography and functional magnetic resonance imaging studies show that the cortical substrates for both language and music depend on widely distributed networks that in some cases overlap; use both sides of the brain, but are dominated by opposite hemispheres . . .”); Isabelle Peretz, The Nature of Music from a Biological Perspective, 100 Cognition 1, 20 (2006); Iain Morley, The Evolutionary Origins and Archaeology of Music 106–114, 123 (Darwin College Thesis Oct. 2003) (available at http://emma.dar.cam.ac.uk/dcrr/dcrr002.pdf); see also Petr Janata, When Music Tells a Story, 7 Nature Neuroscience 203, 203 (Mar. 2004) (noting that in Prokofiev’s “Peter and the Wolf,” different instruments and melodic themes are used to denote the different characters in the story).**


41. Janata, supra n. 38, at 204.

42. Susannah J. Lamb & Andrew H. Gregory, The Relationship between Music and Reading in Beginning Readers, 13 Educ. Psychol. 19, 19 (1993) (“Tests of phonemic awareness and of reading performance were also administered, with particular emphasis on ability at employing phonic skills in reading. The results support the hypothesis that discrimination of musical sounds is related to reading performance, but reveal that the influential factor in this relationship is a specific awareness of pitch changes.”).

43. Jesse Palmer & Susie Burroughs, Integrating Children’s Literature and Song into Social Studies, 93 Soc. Stud. 73, 73 (Mar./Apr. 2002) (citation omitted).

44. Erika Engstrom, Cartoons as Education, 23 J. Popular Film & TV 98 (Fall 1995) (citing various studies).
ments are combined; its computational circuits (in the pre-
frontal cortex) “know” rules about hierarchical organization
and are primed to receive musical and linguistic input dur-
ing the early years of development. This is why a child who
is denied exposure to music or language before a certain age
does not acquire normal music or language skills—the
pruning process has already begun and those neural circuits
that were waiting to be activated become eliminated.45

All of which leads to the conclusion that music is innate; we hear
what we read, and, like infants, we hear better with music than
with mere words.46

Several theories are offered by scholars to explain how music
and language co-evolved. Following Darwin’s lead, several
researchers point to the evolution of music as a courtship device in
the service of mate selection.47 Shakespeare wrote, “If music be
the food of love, play on; [g]ive me excess of it[.]”48 Geoffrey Mi-
ller, evolutionary psychologist, claims proof of the point. He has
studied all types of recorded music as well as the age and gender
of musicians. “In every genre of music men produce 10 times as
much as women and their output peaks at around age 30—near
the time of their peak reproductive years.”49 Miller concludes
what rock stars have realized for decades that “good musicians,
particularly good singers, attract sexual interest.”50 Led Zepp-
elin’s Robert Plant summed up the evolutionary notion of rock mu-
sic as a vehicle for sexual encounter this way: “I was always on
my way to love. Always. Whatever road I took, the car was head-
ing for one of the greatest sexual encounters I’ve ever had.”51

50. Id. Singers like Elvis Presley, Frank Sinatra and David Cassidy were sex icons of the 1950s and 1960s, as were many hard rock bands of the 1970s for which the phrase “cock rock” was coined. See Steve Waksman, Every Inch of My Love: Led Zeppelin and the Problem of Cock Rock, 8 J. Popular Music Stud. 5 (1996) (examining the band’s music and image as male sexuality).
Some view music as an adaptive bonding mechanism for a mother and her child used as part of the nurturing process—lullabies are universal. An infant who sleeps well is easier to care for, more likely to survive to adulthood, and more likely to have children with a similar affinity for music.

Others take the view that music’s adaptive role is to promote cooperation and cohesion of social groups. National anthems, military marches, and even campfire songs are all examples of group cohesion through music. “Singing together releases oxytocin, a neurochemical now known to be involved in establishing bonds of trust between people.” Groups of ancestors who sang and worked together were able to survive challenges that loners or dysfunctional groups could not. Thus, musical affinity, as an inheritable trait, was passed down to the descendants of those members of the groups that survived. Individuals in the groups that perished had no descendants.

Finally, there is the hypothesis that music is not a discrete human activity, but rather that music and language are evolutionarily connected. Steven Brown of McMaster University in Ontario coined the phrase “musilanguage” to describe how music and language co-evolved. Brown and others argue that language and music are merely opposite ends of a spectrum from referential meaning to emotive meaning and comprised of the essential building blocks of combinatorial syntax and intonational phrasing. In this view,

56. Levitin, supra n. 45, at 50–51.
music and language differ mainly in their emphasis rather than in their fundamental nature, such that language emphasizes sound reference while downplaying its sound emotion aspect (although it certainly makes use of sound emotion), whereas music's acoustic mode emphasizes sound emotion while downplaying its referential aspect (although it certainly makes use of referentiality).  

Brown theorizes that music and language have the phrase as their basic unit of structure and function, and that what makes singing and talking different from grunting and screaming is a limited repertoire of discrete sounds chosen from the infinite number of possible acoustic elements. “From this standpoint, both speech phrases and musical phrases are melodorhythmic structures in which melody and rhythm are derived from” the same sources. Brown offers a schematic to illustrate his point, which is reprinted in the appendix to this Article.

Both music and language function on two levels (meaning and phonological), which emerge out of a common set of principles described above. The two differ more in emphasis than in kind, as represented by their placement on different ends of the spectrum. Nearer the center are those speech-like styles of singing used in opera and oratorio, called recitativo and the more song-like leitmotifs (a recurring theme or motif used to illustrate a character or idea like the string instruments for Peter in Peter and the Wolf or the whinnying of the horses when Frau Blücher is mentioned on screen in Young Frankenstein).

The notion that music is adaptive is not without critics. Steven Pinker, a Harvard psychologist, traces the evolution of modern man in How the Mind Works. He argues that music is not adaptive, but rather mere “auditory cheesecake—simply a byproduct of language evolution, taking advantage of our brain’s pleasure centers in the same way cheesecake fulfills our innate desire for fats and sugars . . . nothing more than empty-calorie instruments of instant gratification.” Pinker states that the evo-

58. Brown, supra n. 57, at 278.
59. Id. at 273.
60. Id. at 275.
61. Id.
63. Id. at 524–525; see also Karen Schrock, More Than Auditory Cheesecake; Daniel Levitin’s New Book Explores the Science behind Humanity’s Love Affair with Music, Sci-
utionist arguments regarding the adaptive nature of music are “completely bogus explanations, because they assume what they set out to prove: that hearing plinking sounds brings the group together, or that music relieves tension . . . [b]ut they don’t explain why. They assume as big a mystery as they solve.”

Music may well be innate, he argues, but it evolved as a useless byproduct of language, which he sees, unlike music, as an actual adaptation.

Pinker’s argument seems to have been undercut by some recent genetic studies and archeological evidence. For example, Dr. Levitin notes the fossil evidence, which indicates that the Brodmann area 44—part of the frontal cortex that is important for auditory motor function—may have been in place two million years ago. He points out that the gene associated with human language “existed in Neanderthals [and] a form of it is found in songbirds.” Then, 37,000 years ago, at the time musical instruments first appeared, there was another genetic variation, all of which “primed the creation of the musical brain.”

This theory that music and language have a common lineage is supported in practice by interesting and important advances in education. For example, French researchers have shown that humans learn new words more effectively if those words are associated with distinct pitches—a melody—as opposed to those words being spoken in monotonous fashion. Music can be used to enhance concentration and cognitive function. The inclusion of musical elements in writing has a similar positive effect on the reader/listener’s reception, perception, and memory of information.

Although Pinker’s argument is in the minority, and regardless of whether further research and study show that Pinker or
the adaptivists are correct, the consequence for legal writers remains unchanged. Music is innate and understanding its structure and incorporating that structure into writing will enable readers to absorb the words as the reader’s mind is more in tune with the writing. Lawyers can learn to better understand their craft, writing, by better understanding what goes on neurologically in the brain of those who read what they write. These readers—judges, litigants, lawyers, clients—are not just extracting words from the page but they are hearing what the lawyer has written. To be better understood, that sound should be pleasing.

C. Reading, Speaking, Singing, and Musilanguage

The reading done by judges, litigants, lawyers, and clients, like everyone else, can be mathematically represented by “R=D x C,” where D is the mental process of decoding symbols (letters and punctuation) and C is comprehension (the use of context and inference to establish meaning). Incorporating musical elements into written text enhances the comprehension component of this reading equation. Research by University of Massachusetts Professor Emeritus Peter Elbow demonstrates that including musical elements in writing accomplishes enhanced comprehension by pulling the reader in and pulling the reader along. Musical elements of rhythm, and to a lesser degree melody (flow), create energy to “bind written words together so as to pull us along from one part to the next and to make us feel that all parts are held together into a magnetic or centripetal whole.”

Dr. Elbow, author of the landmark Writing without Teachers, was a pioneer of the process revolution in the teaching of writing. He helped free students from formal rules during the drafting stages of writing and helped them learn to explore themselves through creative uses of English. He points out how academics (and by analogy lawyers) fail to recognize that readers

hear what they read. These writers ignore the organizational lesson of music “to bind time.” Dr. Elbow cites to the evolutionary concepts explained earlier to conclude that “hearing—the modality that works in time—reaches an older, deeper, and more instinctual part of the brain than sight. Rhythm and movement reach inside us.”

Those writers who “lead us on a journey to satisfaction by way of expectations” recognize that “[s]entences are little pieces of energy or music—they have rhythm and melody—even on the page . . . .”

Dr. Elbow’s notion of incorporating musical elements into writing to pull the reader in and along is also used by speech makers who implicitly recognize the musilanguage. Thus, from the steps of the Lincoln Memorial, Martin Luther King resorted to musical elements to pull the multitudes in and along. His *I Have a Dream* speech is punctuated by musical elements of rhythm and repetition (italicized), with its call-and-response cadences:

*I have a dream* that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

*I have a dream* that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

*I have a dream* that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

*I have a dream* today.

*I have a dream* that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification; one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

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73. Elbow, *supra* n. 70, at 626.

74. *Id.*
I have a dream today . . . .

Forty years later, President Obama’s acceptance speech in Denver and his victory night speech from Chicago’s Grant Park both echoed with similar musilanguage elements. But it is his ten-minute concession speech upon losing the New Hampshire primary to Hillary Clinton that is already being called “one for the ages,” not for what he said as much as for how he said it. These words are strong, short, upbeat, and incorporate musical elements (italicized) of rhythm and tone. At the conclusion of his remarks, Senator Obama said,

For when we have faced down impossible odds, when we’ve been told we’re not ready or that we shouldn’t try or that we can’t, generations of Americans have responded with a simple creed that sums up the spirit of a people: Yes, we can. Yes, we can. Yes, we can.

It was a creed written into the founding documents that declared the destiny of a nation: Yes, we can.

It was whispered by slaves and abolitionists as they blazed a trail towards freedom through the darkest of nights: Yes, we can.

It was sung by immigrants as they struck out from distant shores and pioneers who pushed westward against an unforgiving wilderness: Yes, we can.

It was the call of workers who organized, women who reached for the ballot, a president who chose the moon as our new frontier, and a king who took us to the mountaintop.

75. The full text of the speech is available on line at http://www.usconstitution.net/dream.html. Dr. King used music not only for structure but as a metaphor itself as he proclaims “let freedom ring” six times in the last two paragraphs of this, most memorable of all speeches. See Mark Vail, The “Integrative” Rhetoric of Martin Luther King Jr.’s “I Have a Dream” Speech, 9 Rhetoric & Pub. Affairs 51 (Spring 2006); see also Melisa Cahnmann, The Craft, Practice, and Possibility of Poetry in Educational Research, 32 Educ. Researcher 32–33 (Apr. 2003).


and pointed the way to the promised land: Yes, we can, to justice and equality.

Yes, we can, to opportunity and prosperity. Yes, we can heal this nation. Yes, we can repair this world. Yes, we can.

And so tomorrow, as we take this campaign south and west; as we learn that the struggles of the textile worker in Spartanburg are not so different than the plight of the dishwasher in Las Vegas; that the hopes of the little girl who goes to a crumbling school in Dillon are the same as the dreams of the boy who learns on the streets of LA; we will remember that there is something happening in America; that we are not as divided as our politics suggests; that we are one people; we are one nation; and together, we will begin the next great chapter in America’s story with three words that will ring from coast to coast; from sea to shining sea—Yes. We. Can.78

The repetition of “yes, we can,” and the resort to a chronological litany of ancestors who each in their own way embodied that creed, lead to the climax, a crescendo in music, that urges us—the present—to carry forth that torchlight. The building “thump thump thump” can be heard in every succeeding sentence and in the end with three single-word sentences.

Great speeches are not unique examples of how musical elements can be used to enhance memory, comprehension, and persuasiveness of words. The incorporation of musical elements like rhythm to help students understand what they read has surfaced in the recent resurgence of “read-alouds” in high schools. A “read-aloud” is a text or passage selected by a teacher to read publicly to a group of students so that they can better focus on the content of the text.79 Many students who hear passages of information aloud learn better than they otherwise would. This appears to be true regardless of the subject matter.

Poetry presents perhaps the most patent use of words as lyrical art, and it is “art [that] allows [humans to] focus another’s attention on aspects of feeling or perception that he might not oth-

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79. See Barbara Erickson, Read-Alouds Reluctant Readers Relish, 40 J. Adolescent & Adult Literacy 212 (1996).
Poetry affects our emotions because it targets the evolutionary recesses of the human brain. The necessity that good poetry, like music, include rhythm, flow, and tone is not a novel notion. The modern theory that music and its relative poetry are evolutionarily adaptive can be traced back 2000 years. Cicero wrote that the ability to understand “the rhythms and pronunciations of words” is a subconscious instinct, “a faculty” that is “rooted deep in the general sensibility.”

“Nature, [Cicero] tells us, has placed in the ears a register which tells us if rhythm is good or bad” and everyone has rhythm.

Here is how lawyers should use it.

III. USE OF RHYTHM, FLOW, AND TONE IN WRITING

H.L. Mencken observed that “there are no dull subjects, only dull writers.” Thus, ineffective legal writers have only themselves to blame for boring briefs—the subject matter is guiltless. Uninteresting, rote writing is helped mightily by the incorporation of rhythm, flow, and tone because, as demonstrated above, music and language are evolutionarily linked. Incorporation of these musical elements in writing is a technique traditionally used in fiction writing. “[N]on-fiction puts emphasis on the precise and skilled use of words and tone, and the assumption that the reader is as intelligent as the writer.”

As Judge Posner points out, however, “[J]udges and lawyers who are disdainful of ‘fine’ writing . . . are mistaken.”

As writers of non-fiction prose, lawyers should use the musical tools of fiction to enhance the appeal of their writing. Professor Kathryn M. Stanchi, while expressing caution, notes that literary devices can be persuasive on a number of levels. The “poetry of the writing” (what Stanchi calls repetition, inversion,
rhythm, and emotion) catches the reader’s attention and “make[s] the reader see and hear about experiences”\textsuperscript{87} beyond his experience. The use of “aphoristic” writing can also “serve to embed the thoughts and feelings into the reader’s consciousness.”\textsuperscript{88} Rhythm, flow, and tone are innate; neglecting them is folly.

A. Rhythm in Writing

Welsh poet Dylan Thomas, observed that rhythm is inborn:

The first poems I knew were nursery rhymes, and before I could read them for myself I had come to love just the words of them, the words alone. What the words stood for, symbolized, or meant, was of very secondary importance; what mattered was the sound of them as I heard them for the first time on the lips of the remote and incompressible grown-ups who seemed, for some reason, to be living in my world. And these words were, to me, as the notes of bells, the sounds of musical instruments, the noises of wind, sea, and rain, the rattle of milk-carts, the clopping of hooves on cobbles, the fingerling of branches on a window pane, might be to someone, deaf from birth, who has miraculously found his hearing. I did not care what the words said, overmuch, nor what happened to Jack & Jill & the Mother Goose rest of them; I cared for the shapes of sounds that their names, and the words describing their actions, made in my ears; I cared for colours the words cast on my eyes.\textsuperscript{89}

Rhythm is recurrence, and recurrence captivates because recurrence is innate. Recurrence is seen in Nature’s rolling waves, patterns in leaves, and in the “noise of the wind.” In music, recurrence is heard as the background beat that holds the piece together. In text, recurrence is heard in the mind’s ear as it serves to move the piece along from word-to-word, sentence-to-sentence, paragraph-to-paragraph, and section-to-section, binding together a comprehensive whole. The essential elements of rhythm are balance, cycles of sound, and sentence structure and variety.

\textsuperscript{87} Id.
\textsuperscript{88} See Posner, supra n. 85, at 1423.
1. Balance

Balance in music (once a button on a stereo equalizer but now an iPod setting) moderates the acoustic relationship of sound sources to one another. Balance in writing is the relationship between, or repetition of, words or sounds within a sentence, as well as the variation of sentence length within a paragraph.

Literature offers an example. In For Whom the Bell Tolls protagonist Robert Jordan receives his assignment that he must blow up an enemy supply bridge. Ernest Hemingway wrote a set of lines at the story’s start that parallels a paragraph at the end of the book, creating balanced rhythm. In Chapter 1, he writes,

That was not his business. That was Golz’s business. He had only one thing to do and that was what he should think about and he must think it out clearly and take everything in as it came along, and not to worry. To worry was as bad as to be afraid.

Each sentence contains a word from the previous sentence (bold) and the sentences are short-long-short. After the bridge is destroyed and Jordan lies in wait to ambush the enemy as his comrades flee, Hemingway returns the reader in the final chapter to the “thump thump thump” of Jordan’s thinking:

Think about them being away, he said. Think about them going through the timber. Think about them crossing the creek. Think about them riding through the heather. Think about them going up the slope. Think about them O.K. tonight. Think about them traveling, all night. Think about them hiding up tomorrow. Think about them. God damn it, think about them. That’s just as far as I can think about them, he said.

90. William Moylan, Understanding and Crafting the Mix 155 (Focal Press 2007) (providing an example of musical balance graph for “Lucy in the Sky with Diamonds,” from the album, Sgt. Pepper’s Lonely Hearts Club Band).
91. Ernest Hemingway, For Whom the Bell Tolls 17 (Charles Scribner’s Sons 1968) (emphasis added).
92. Id. at 493 (emphasis added); see also Gabrielle Rico, Writing the Natural Way: Using Right-Brain Techniques to Release Your Expressive Powers 136–137 (J.P. Tarcher, Inc. 1983) (analyzing these passages).
The passage pulsates. Hemingway’s use of the staccato rhythm parallels Jordan’s heart beat—the pounding in his head—and draws the reader into the scene. Each sentence builds on the preceding one in Jordan’s mind until the last sentence when the thinking bursts out as he speaks.

Too many short sentences in a row can annoy readers, while too many long sentences in a row can bore them. “Short sentences are more dramatic; long sentences are calmer by nature and tend to be more explanatory and descriptive.” 93 For example, in I Am Charlotte Simmons, novelist Tom Wolfe varies sentence length and brackets the following passage with two crisp sentences to keep the reader’s interest:

Charlotte was astonished. The girl was reading one of the greatest of all French novels in an English translation—and Dr. Lewin hadn’t so much as made note of the fact. Charlotte quickly glanced at the girl on her left and the boy on her right. They were both reading the book . . . in English translation. It was baffling. She had read it in translation way back in the ninth grade under Miss Pennington’s tutelage, and she had spent the better part of the past three days reading it in the original, in French. Flaubert was a very clear and direct writer, but there were many subtle constructions, many colloquialisms, many names of specific objects she’d had to look up, since Flaubert put a big emphasis on precise, concrete detail. She had analyzed every line of it, practically disassembled it and put it back together—and nobody else was reading it in French, including the professor. How could that be? 94

Just as Hemingway and Wolfe did in their novels, legal writers like Judges Learned Hand and Benjamin Cardozo employed balance in their opinions. 95 A good example of this effective use of

balance in persuasive legal writing is *Palsgraf v. Long Island Railroad*, in which Judge Cardozo opened his opinion this way:

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.97

As pointed out by others, notice how Cardozo varies the length of the sentences and how after the word “moving” the choppiness of the sentences mirrors the chaos happening on the railroad platform.98 It is the length of the sentences, individually and in connection with those that precede and come after, that creates rhythm.

2. Cycles of Sound

The term “cycles of sound”99 refers to repetition of a sound, syllable, word, phrase, line, stanza, or metrical pattern in a writ-
ten work. It is the basic unifying device in all poetry, which itself owes much to music. Repetition can operate on many levels within a written work.\textsuperscript{100} For example, alliteration is when repetition of letters, syllables, or sound is found in the same sound at the beginning of two or more stressed syllables. The repetition of similar vowel sounds is called assonance.

Another oft-used and more obvious device to create a cycle of sound is an anaphora, which is the emphasis of words and phrases by repeating them throughout a sentence or paragraph. The most famous example is, perhaps, Dickens’s opening lines to \textit{A Tale of Two Cities}:

\begin{quote}
\textbf{It was} the best of times, \textbf{it was} the worst of times, \textbf{it was} the age of wisdom, \textbf{it was} the age of foolishness, \textbf{it was} the epoch of belief, \textbf{it was} the epoch of incredulity, \textbf{it was} the season of Light, \textbf{it was} the season of Darkness, \textbf{it was} the spring of hope, \textbf{it was} the winter of despair, \textbf{we had} everything before us, \textbf{we had} nothing before us, \textbf{we were} all going direct to Heaven, \textbf{we were} all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.\textsuperscript{101}
\end{quote}

Similarly, in his famous poem, concentration camp survivor Pastor Martin Neimoller uses an anaphora (bold) to make the message of the pernicious effects of apathy towards the plight of a people all the more poignant:

\begin{quote}
\textbf{When the Nazis} came for the communists  
I remained silent;  
\textit{I was not} a communist.

\textbf{When they} locked up the social democrats,  
I remained silent;  
\textit{I was not} a social democrat.

\textbf{When they} came for the trade unionists,
\end{quote}

\textsuperscript{100} \textit{See Brigham Young U., The Forest of Rhetoric} silva rhetoricae, \url{http://rhetoric.byu.edu/Figures/Groupings/of%20Repetition.htm} (accessed Jan. 17, 2010) (containing a full compilation of the dozens of ways of repeated sounds, words, phrases, and ideas).

\textsuperscript{101} Charles Dickens, \textit{A Tale of Two Cities} 1 (Penguin Classics 2003) (emphasis added).
I did not speak out;  
I was not a trade unionist.

**When they** came for the Jews,  
I remained silent;  I was not a Jew.

**When they** came for me,  
there was no one left to speak out.102

Repetition of words and phrases (italicized), as these passages demonstrate, works as a memory tool because the repetition of sound cues mental recall.103 And as Dylan Thomas lyrically attested, long before we read Dickens, nursery rhymes proved pleasurable, because as infants humans are already positively affected by sound similarities in syllables.104

These lessons of childhood are not lost on some judges. Justice William O. Douglas used repetition (bold and underscored) and alliteration (italicized) to illustrate that Jacksonville’s vagrancy ordinance was not only unconstitutional but bad for our well being. He wrote of the right to wander, stroll, and loaf and that:

These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be non-conformists and the right to defy submissiveness. They have encouraged lives of high spirit rather than hushed, suffocating silence.105

Justice Douglas deliberately chose words with similar front end sounds, like “self-confidence” and “creatively,” “dignified” and

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“dissent” and “defy,” and “spirit” and “suffocating silence,” to create that cycle of sound that strolls through this passage, like the plaintiff whose constitutional right to wander was being adjudicated.

Finally, the repetition of ideas is perhaps the most important repetition device for a legal brief. Repetition of the main terms of an argument is known as epanodos and can be used effectively by lawyers. A traductio is a more subtle means of repeating the same main terms of an argument by settling on a key term and repeating that term throughout the work.

In the majority opinion in Texas v. Johnson,106 Justice William Brennan used a traductio (that the flag is “cherished”), several alliterations (italicized), and an anaphora (underscored) to create a masterful piece of legal writing that illustrates the importance of upholding a person’s right to burn the American flag.

We are tempted to say, in fact, that the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation’s resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.107

107. Id. at 419–420 (emphasis added).
Returning to the crossroads of music and persuasive writing, lawyer and writer Bill Long noted one easy way to remember the power and importance of cycles of sound like an epanodos. On his website, he writes: “Epi” is ‘upon,’ ‘ana’ is ‘again,’ and ‘odos’ is ‘road.’ I always hear Willie Nelson singing ‘On the Road Again,’ whenever I think of the word epanodos.”

3. Sentence Structure and Variety

Sentence structure and variety are the last two rhythmic tools employed by writers to captivate and carry the reader. As in music, the rhythms of writing occur on multiple levels. A cycle of musical beats is known as a measure, and in writing, authors create this with sentence length, as demonstrated by the Hemingway and Wolfe passages discussed above. An important point can be made when a short, punchy sentence follows a long, languid one. Former Professor and editor of the Oregonian Newspaper Jack Hart cited to the New York Times story in the aftermath of the 9/11 Attacks to make his point:

Many people were busy on their cell phone, trying to reach friends and relatives they knew were in the buildings to alert their own loved ones that they were all right. But circuits were overloaded. Fear mounted.

The two-word sentence at the end provides a dramatic punch that draws the reader into the event. A long sentence would have failed.

Judges and lawyers often use sentence structure and variety to more effectively make their point. A typical IRAC-modeled paragraph generally introduces the principle first, then illustrates that principle with authorities, and finally provides some expanded conclusion. In Morehead v. New York ex. rel. Tipaldo, Chief Judge Hughes incorporated the specific rhythmic de-


109. Supra nn. 91–92, 94, and accompanying text; Moylan, supra n. 90, at 17; Tobias, supra n. 93, at 100.


111. See Peck, supra n. 2, at 35.

112. Id. at 35–36 (providing this example).
vice of sentence length variation to create a more effective paragraph that transcends traditional IRAC which serves as the paragraph’s structural base:

We have repeatedly said that liberty of contract is a qualified, and not an absolute, right. “There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” The numerous restraints that have been sustained have often been recited. Thus, we have upheld the limitation of hours of employment in mines and smelters; the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages; the prohibition of contracts for options to sell or buy grain or other commodities at a future time; the forbidding of advance payments to seamen; the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; the regulation of the size and weight of loaves of bread; the regulation of insurance rates; the regulation of the size and character of packages in which goods are sold; the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment; the regulation of sales of stocks and bonds to prevent fraud; the regulation of the price of milk. The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious, or one reasonably required in order appropriately serving the public interest in the light of the particular conditions to which the power is addressed.113

In each sentence, Justice Hughes has purpose; each sentence leads to the next; and each sentence varies in length. The beginning starts with a long quote setting the purpose. The middle offers examples in a rapid-fire power of semi-colons (stop like a period but the with a shorter pause) and then ends with a conclusion stated in the negative and then positive. Rhythm like this alone, however, cannot create a complete acoustic experience to legal writing. Rhythm must be held together. It must be fastened, and that fastener is flow.

B. Flow in Writing

In music, flow is called melody—the movement from one pitch seamlessly to another along with the structural principles that govern such progression. In writing, flow is the mental linkage between sentences, paragraphs, and ideas created by words. The mind’s ear is sensitive to rhythm, whereas the mind itself is sensitive to flow. The three elements necessary to accomplish this flow in persuasive legal writing are structure, transition, and logic.

1. Structure

Reading is a temporal exercise and a linear experience. As a person reads, the person’s eyes retrace lines. The links from word to word and line to line remain unbroken because of structure. Structure holds the experience together. Headings are an obvious structural device. But structure includes other more subtle techniques like focus, which emphasizes a word or part of a sentence with a strong adjective or emphasis with a correlative conjunction like either-or, neither-nor, or but-also. Correlative conjunctions have power in that they change the focus of the sentence for the reader in a way that a single conjunction (like “and”) does not. Professor Kolln provides a simple example in her text book on Rhetorical Grammar:

Individuals and nations must learn to think about the environment.

Compared with

Both individuals and nations must learn to think about the environment.

119. Id.
By resort to correlative conjunctions, the emphasis shifts from the predicate “learn” in the first example, to the subject “individuals and nations” in the second example. By doing so the reader is set up to read on about the subject. This subject use of a correlative conjunction effectively changes the structure and rhythm of not only the sentence, but the expectation of what will come next. It does so without bluster or bravado.

Perhaps the most famous and studied writing structure is Lincoln’s Gettysburg Address. President Lincoln arrived on that bloodied battlefield to dedicate a national cemetery five months after General Lee and the hopes of the Confederacy were turned back. The graves spread out before Lincoln by the thousands, and the words expected from his lips by the attendant audience were those of sorrow and grief. But Lincoln created a story, structured it chronologically, and in doing so placed the battle in context of a Nation “conceived in liberty and dedicated to the proposition that all men are created equal.” The war was ongoing, but President Lincoln structured the speech with words that manipulated time, beyond that present war, to include the past and the future—one that envisioned “a new birth of freedom” in which “this government of the people, by the people and for the people shall not perish from this earth.”

Philip Gerard, Professor of Creative Writing at the University of North Carolina, points out how structure made the Lincoln’s Gettysburg Address so effective:

Imagine if Lincoln had begun and ended with an account of the battle, mentioning specific acts of heroism, selfless deeds, moments of courage. Most writers probably would have written it that way. A modern president would have focused on some fallen boy who exemplified the virtues of the good soldier; maybe even invited his grieving widow or mother to the reviewing stand for a photo op and a sentimental plea for patriotism and solidarity. He would have been meticulously citing the details of the battle . . . and in doing so, he would have missed the story. The story wasn’t the dead at Gettysburg, but the living. The story was their

120. Id.
121. Id. at 164–166; see also Garry Wills, Lincoln at Gettysburg: The Words That Re-made America (Simon & Schuster 1992).
122. Wills, supra n. 121, at 262.
123. Id.
ongoing struggle with the idea of the Union—an idea so profound men were willing to die to test it, and must always be so.\textsuperscript{124}

Five score less three years later, the great trial lawyer Louis Nizer wrote about the importance of being close to your adversary lest you judge him wrongly by structuring a story where the reader becomes the story’s protagonist:

[A farmer], before sunrise on a cold and misty morning, saw a huge beast on a distant hill. He seized his rifle and walked cautiously towards the ogre to head off an attack on his family. When he got nearer, he was relieved to find that the beast was only a small bear. He approached more confidently and when he was within a few hundred yards the distorting haze had lifted sufficiently so that he could recognize the figure as only that of a man. Lowering his rifle, he walked towards the stranger and discovered he was his brother.\textsuperscript{125}

The parable is structured to take the reader on that walk with the farmer—seeing from his eyes as the haze lifts. The structure is that of the walk. Structure is what holds stories, as well as songs, together.\textsuperscript{126} Structure carries legal arguments, too.

2. \textit{Transitions}.

Flow within structure must be signaled. Transitions are this textual “attempt to persuade the readers that the reading is worth their time.”\textsuperscript{127} Transitions accomplish this feat by creating bridges from paragraph to paragraph and section to section. Bridges operate best when not necessarily noticed. In that regard, sentences should do the bulk of the work of carrying the reader from section to section. Heavy reliance on transitional phases like \textit{nonetheless, in addition, and in conclusion} can be an-

\begin{itemize}
\item \textsuperscript{124} Gerard, \textit{ supra} n. 117, at 165–166. Lincoln’s rhetoric is oft cited as an example of excellence in non-fiction prose. See Peck, \textit{ supra} n. 2, at 46 (describing the rhythm or order of expression in Lincoln’s farewell address to the people of Springfield, Illinois as he left for the White House in February 1861).
\item \textsuperscript{125} Louis Nizer, \textit{My Life in Court} 443 (Doubleday & Co., Inc. 1961).
\item \textsuperscript{127} James B. Stewart, \textit{Follow the Story: How to Write Successful Non-Fiction} 162 (Touchstone 1998).
\end{itemize}
noy ing to the reader. Instead of resorting to such overused phrases, a more effective transition is to repeat a key word from the prior paragraph in the succeeding paragraph. Amongst novelists this device is called a “hook.” The goal of authorship in prose and music is coherent unity. Creativity, rather than reliance on worn-out phases, will not only serve as the transition necessary to unite the piece, but also retain the reader’s interest.

In the first paragraph of *The Cricket Case*, Lord Denning offers an example of the well-placed use of subtle transitions (underscored) and repetition (bold) to paint a picture. The reader can almost smell the grass and certainly taste the contempt for the plaintiff:

(1) In summertime **village** cricket is the delight of everyone. Nearly every **village** has its own cricket field where the young men **play** and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have **played** these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the **players** and seats for the onlookers. The village team **plays** there on Saturdays and Sundays. **They** belong to a league, competing with the neighbouring villages. On other evenings after work **they** practice while the light lasts. (2) Yet now after these 70 years a judge of the High Court has ordered that they must not play there anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. (3) This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But **now** this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. **Now** he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. **They** do not go into the garden when cricket is

128. Theodore A. Rees Cheney, *Getting the Words Right* 87–88 (2d ed., Writer’s Dig. 2005); see also Peck, supra n. 2, at 34.
129. Peck, supra n. 2, at 64.
being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: (4) with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.132

Lord Denning uses transitions to set off the four parts of his story each against the other shown above by alternating italics and standard type font. The first part (1) sets the scene. The second part (2) stops the action. The third part (3) is all about “them”—the bad guys—and the final part (4) is the cancerous consequence of their selfishness. The transitions are underscored. Lord Denning also uses hooks (in bold) to present the cricket field and village in a way that the reader remembers throughout the rest of the opinion as the reader turns from the facts to the legal reasoning. His conclusion becomes a foregone conclusion: the newcomers were coming to the nuisance and, therefore, had no cause of action.

3. March of Logic

The most important element of flow in legal writing is the movement of the argument from point to point logically. In musical composition there is logic to the progression. For example, the piece may start slowly and build, such as Ravel’s sensual Bolero133 or Queen’s operatic masterwork Bohemian Rhapsody,134

In legal writing, there must also be a logical progression of thought, building toward a concluding point. For example, Justice Jackson’s majority decision in West Virginia State Board of Education v. Barnette,135 striking down a state law requiring that

132. Id. at 976 (emphasis added).
133. This build up of tempo and sound in this piece of music has made it a romantic favorite. See Tom Reichert & Jacqueline Lambiase, Sex in Advertising Perspectives on the Erotic Appeal 202 (Lawrence Erlbaum Assocs. 2003).
135. 319 U.S. 624 (1943).
public school students salute the American flag, demonstrates a
seamless flow of logical progression. Justice Jackson wrote:

Struggles to coerce uniformity of sentiment in support of
some end thought essential to their time and country have
been waged by many good as well as by evil men. National-
ism is a relatively recent phenomenon but at other times and
places the ends have been racial or territorial security, sup-
port of a dynasty or regime, and particular plans for saving
souls. As first and moderate methods to attain unity have
failed, those bent on its accomplishment must resort to an
ever-increasing severity. As governmental pressure toward
unity becomes greater, so strife becomes more bitter as to
whose unity it shall be. Probably no deeper division of our
people could proceed from any provocation than from finding
it necessary to choose what doctrine and whose program
public educational officials shall compel youth to unite in
embracing. Ultimate futility of such attempts to compel co-
herence is the lesson of every such effort from the Roman
drive to stamp out Christianity as a disturber of its pagan
unity, the Inquisition, as a means to religious and dynastic
unity, the Siberian exiles as a means to Russian unity, down
to the fast failing efforts of our present totalitarian enemies.
Those who begin coercive elimination of dissent soon find
themselves exterminating dissenters. Compulsory unif-
ication of opinion achieves only the unanimity of the graveyard.

If there is any fixed star in our constitutional constellation,
it is that no official, high or petty, can prescribe what shall
be orthodox in politics, nationalism, religion, or other ma-
ters of opinion or force citizens to confess by word or act
their faith therein. If there are any circumstances which
permit an exception, they do not now occur to us.136

Notice the “march of logic”137 that Justice Jackson employs as
he opens with a sentence of what some try to achieve and carries
“us” through a history lesson. There are seven alliterations, wo-
ven together with seven variations of “unity” and a concluding
sentence that leaves the reader with a hidden quandary: Does
“us” refer to the Supreme Court or all Americans? It seems that

136. Id. at 640–642.
137. Hart, supra n. 99, at 67–68; see also Ray, supra n. 105, at 208–211 (for in-depth
analysis of Justice Jackson’s style).
the flow of logic leads to the climactic conclusion of alliteration; “our constitutional constellation” refers to all of us.

The logical flow of language is similarly demonstrated by now-Justice Ruth Bader Ginsburg in her appellant’s brief in Kahn v. Shevin, a case challenging a $500 tax exemption Florida provided to widows but not widowers. Ginsburg, then counsel to the American Civil Liberties Union, offered the following argument in the opening brief:

Historically, women have been treated as subordinate and inferior to men. Although discrimination against women persists and equal opportunity has by no means been achieved, women have simultaneously been placed on a pedestal and given special benefits. Both discrimination against, and special benefits for, women stem from stereotypical notions about their proper role in society.

Special benefits for women such as the tax exemption here at issue result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes. Absent firm constitutional foundation for equal treatment of men and women by the law, individuals seeking to be judged by their own merits will continue to encounter law-sanctioned obstacles.

Ginsburg’s argument looks backward and forward, makes victims of both men and women and concludes with an inviting statement logically suggesting but not proclaiming the remedy.

Finally, the march of logic done deftly is powerfully effective. In Empro Manufacturing v. Ball-Co. Manufacturing, Judge Easterbrook demonstrated this technique, reasoning that a letter of intent was not enforceable:

The shoals that wrecked this deal are common hazards in business negotiations. Letters of intent and agreements in principle often, and here, do no more than set the stage for negotiations on details. Sometimes the details can be ironed out; sometimes they can’t. Illinois, as Chicago Investment, Interway, and Feldman show, allows parties to approach

139. The parties’ briefs are reprinted in Peck, supra n. 2, at app. A.
140. Id. at 194.
141. 870 F.2d 423 (7th Cir. 1989).
agreement in stages, without fear that by reaching a preliminary understanding they have bargained away their privilege to disagree on the specifics. Approaching agreement by stages is a valuable method of doing business. So long as Illinois preserves the availability of this device, a federal court in a diversity case must send the disappointed party home empty-handed. Empro claims that it is entitled at least to recover its “reliance expenditures”, but the only expenditures it has identified are those normally associated with pre-contractual efforts: its complaint mentions the expenses “in negotiating with defendants, in investigating and reviewing defendants’ business, and in preparing to acquire defendants’ business.” Outlays of this sort cannot bind the other side any more than paying an expert to tell you whether the painting at the auction is a genuine Rembrandt compels the auctioneer to accept your bid.\footnote{142}

Judge Easterbrook starts with a common-sense metaphor, flows into alternating statements of law and business reality, and ends by contrasting the plaintiff’s words with an analogy that proves the plaintiff mistaken. Alternatively, the judge could have rested on the simple IRAC model, but instead his use of an overlap of law, fact, and his choice of sentences that are “steps”—similar to the manner in which a letter of intent operates—re-enforcing in the reader the rightness of the ruling.

C. Tone in Writing

In music, tone is simply the quality of musical sounds. Tone in writing, often called “voice,” is the connection between the reader and the writer. Tone can be detached or personal.\footnote{143} Tone is set by the author’s attitude toward his characters or subjects and conveyed by the words and the literary techniques employed.\footnote{144} Tone modifies objective meaning\footnote{145} and helps establish the writer’s credibility with the reader—classically called “ethos.”\footnote{146}

\begin{itemize}
\item \footnote{142} Id. at 426.
\item \footnote{143} See e.g. William J. Brennan, Reason, Passion and “The Progress of the Law”, 10 Cardozo L. Rev. 3 (1988–1989) (discussing Justice Brennan’s view that judges should speak in personal tones).
\item \footnote{144} Writer’s Encyclopedia 450 (3d ed., Writer’s Dig. Bks. 1996).
\item \footnote{145} Theodore A. Rees Cheney, Getting the Words Right 48 (2d ed., Writer’s Dig. 2005).
\item \footnote{146} Smith, supra n. 96, at 101–126 (discussing ethos).
\end{itemize}
Generally, tone is either subjective or objective. The writer adopts the first when trying to affect the reader in some way. He adopts the second when he wants to provide the reader with authoritative information. Legal writing is a tonal slight of hand—or slight of ear. The purpose is to affect the reader—persuade him or her to agree with the proposition, and yet the surface presentation must be objective.

We all remember Lucy, Lady Duff Gordon—from the first day of law school. What do we remember about her? Why? In Wood v. Lucy, Lady Duff Gordon147 Judge Cardozo crafted the perfect example of tone. He opened with the following:

The defendant styles herself a “creator of fashion.” Her favor helps a sale manufacturer of dresses, millinery and like articles pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public when issued in her name. She employed the plaintiff to help turn this vogue into money.148

Cardozo’s statements are objective fact, but his tone resonates from every sentence. The reader is guided to the only possible outcome by the words; their placement—the tone. Lady lost.149

Tone in legal prose should be “measured rationality.”150 Too strident a tone and the reader will feel bludgeoned and may become angry; too colloquial and the reader will not believe the writer or take the matter seriously.151 So between these poles, the writer must find the use of words and phrases that fosters the reader’s trust in the writer. Such tone is achieved by a constant level of discourse and atmosphere that emerges from the entirety of the written work.152 This consistent level of tone is controlled

147. 118 N.E. 214 (N.Y. 1917).
148. Id. at 214.
149. Perhaps Judge Cardozo was right in his contempt for Lady Duff. Lucy and her husband, Sir Cosmo, were passengers on the Titanic. They survived—in a lifeboat filled with twelve people, seven of whom were crew. The boat had a capacity of forty. Richard Warner, Blog, http://www.kentlaw.edu/faculty/rwarner/classes/contracts/consideration/lucy.htm (accessed Sept. 7, 2008).
151. Id.
by three levers: punctuation, descriptors, and the selection and presentation of the information included.

1. **Punctuation**

   Punctuation reflects intonation in written text. The primary purpose of punctuation is clarifying structure by separating some words from each other and from groups of words. But it is more. Punctuation can be heard. In the 1950s, musician-turned-comedian Victor Borge demonstrated the sound punctuation makes in a skit with Dean Martin that can be seen today on *You Tube*. Each punctuation mark has a distinct beat and serves to create cadence, as well as help to set tone.

   Punctuation marks fall into two sound categories. Full stop punctuation marks include periods, question marks, exclamation marks, and semi-colons. For the period, the mind’s ear distinctly hears a drop and stop, whereas with the question mark there is a rise in pitch. The exclamation point screams out, and the semi-colon stops like a period, but the pause is shorter.

   The second group of punctuation marks is half stop marks such as a comma, dash, colon, and parenthesis. The comma is “the most ubiquitous, elusive, and discretionary of all stops, and it is the most significant.” The “sound of a comma is the sound of the last word warning that more is coming.” Colons sound like commas, and for brackets, parenthesis, or ellipses, the voice

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157. Robert C. Pinckert, *The Truth about English* 56–82 (Prentice-Hall, Inc. 1981) (discussing the third category of punctuation called “spelling marks,” such as an apostrophe that has no sound).


distinctly drops down to lessen the import of the words they embrace.\textsuperscript{160}

The three varieties of dashes fall into this second group.\textsuperscript{161} A hyphen is the shortest in length and divides words that break at the end of a line, or to connect parts of compound words such as \textit{tit-for-tat}. An em-dash is the longest and is used to indicate a break in thought or to separate a thought within a sentence. Finally, an en-dash, which is shorter than an em-dash and longer than a hyphen, indicates a range of values similar to using the words “to” and “from,” such as “ages 15–30.” An em-dash is the most powerful because it harshly sets off an interrupting thought.

Punctuation is critical to setting the tone for effective legal writing. A good example of the effective deployment of punctuation is found in what has been called “the greatest single piece of legal writing”,\textsuperscript{162} Justice Brandeis’s concurrence in \textit{Whitney v. California},\textsuperscript{163} where he wrote:

\begin{quote}
\textbf{Those who won our independence} believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. \textbf{They believed} liberty to be the secret of happiness and courage to be the secret of liberty. \textbf{They believed} that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. \textbf{They recognized} the risks to which all human institutions are subject. But \textbf{they knew} that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable gov-
\end{quote}

\textsuperscript{160} \textit{Id.}
\textsuperscript{163} 274 U.S. 357 (1927).
ernment; that the path of safety lies in the opportunity to
discuss freely supposed grievances and proposed remedies;
and that the fitting remedy for evil counsels is good ones.
Believing in the power of reason as applied through public
discussion, they eschewed silence coerced by law—the
argument of force in its worst form. Recognizing the occasion-
al tyrannies of governing majorities, they amended the
Constitution so that free speech and assembly should be
guaranteed.

Fear of serious injury cannot alone justify suppression of
free speech and assembly. Men feared witches and burnt
women. It is the function of speech to free men from the
bondage of irrational fears. To justify suppression of free
speech there must be reasonable ground to fear that serious
evil will result if free speech is practiced.\textsuperscript{164}

Justice Brandeis’s use of semi-colons in sets of three operates
to create dramatic rhythm and tone (bold) to the list of “those who
won our independence,” “believed,” “recognized,” and “knew.” The
em-dash harshly sets off the principle point of the argument—
that “they eschewed silence coerced by law—the argument of force
in its worst form.”

2. \textit{Descriptors}

Tone is helped by punctuation but set mostly by word
choice—those left in and those left out. Nouns and verbs are the
powerhouses of prose and in the editing process must remain so.
Descriptors—adjectives and adverbs—often fall victim to brevity’s
modern scissors—the delete key. But stop. Although descriptors
are unnecessary to convey essential information, in some cases
like Cardozo’s Lady Duff case discussed above, adjectives and ad-
verbs are important because they often carry the load in setting
tone; they add color and texture to otherwise naked text.

Gentlemen jockey Crawford Burton sold his testimonial and
picture for use in a 1934 ad for Camel cigarettes. The photo-
graph, with the legend beneath it that read, “When you feel all
in—get a lift with a Camel,” was plastered on the pages of maga-
zines across the country. It showed Mr. Burton holding his saddle

\textsuperscript{164} \textit{Id.} at 375–376 (emphasis added).
and girth “reproduced in such a manner that to a prurient or imaginative eye it appeared to show Mr. Burton indecently exposed as only a man could be.” He sued for he was teased by coworkers about the penis picture. The district court dismissed the defamation action because there was no falsity. Judge Learned Hand wrote an economical but powerful opinion reversing that dismissal. His judicious use of descriptors adds to the persuasive readability of this defamation decision where truth was not a defense:

We dismiss at once so much of the complaint as alleged that the advertisement might be read to say that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes by means of the legends. Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake. If the advertisement is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications. It does not profess to depict him as he is; it does not exaggerate any part of his person so as to suggest that he is deformed; it is patently an optical illusion, and carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false. It would be hard for words so guarded to carry any sting, but the same is not true of caricatures, and this is an example; for, notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule. The contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was so extravagant that, though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle; and the obvious mistake only added to the amusement. Had such a picture been deliberately produced, surely every right-minded person would agree that he would have had a genuine grievance; and the effect is the same whether it is deliberate or not. Such a caricature affects a man’s reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally,
therefore, the injury falls within the accepted rubric; it exposes the sufferer to “ridicule” and “contempt.”

This passage includes more than twenty descriptors including the adjective/adverb laden decisive statement “the contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was so extravagant that, though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle; and the obvious mistake only added to the amusement.” Without those descriptors, the power and effect of the paragraph would be lost. Seeing the actual photograph is unnecessary to come to agreement with Judge Hand.

In literature, descriptors are often associated with old-fashioned writing, but “there is much to be said of the sentences of Dickens.” For example, in the third paragraph of Great Expectations, Pip describes the land where he grew up:

This bleak place overgrown with nettles was the church yard . . . the dark flat wilderness beyond the church yard, intersected with dykes and mounds and gates, with scattered cattle feeding on it, was the marshes; . . . the low leaden line beyond was the river; and . . . the distant savage lair from which the wind was rushing, was the sea.

Extract “bleak,” “dark,” “leaden,” or “savage” and tone vanishes.

Descriptors must be chosen carefully to be effective. In legal writing, avoid adjectives that tell the reader how the writer feels such as “nice” or “great.” Descriptors must be chosen carefully to paint a picture to convey the proper tone. “Mammoth,” for example, conveys a tone distinct from the word “big.”

From the English moor let us go to the streets of North Philadelphia to see how the absence of descriptors can create tone. In Pennsylvania v. Dunlap, a Fourth Amendment probable cause case, Chief Justice Roberts employed a clear type of voice (noir

168. Robin Kacel, They Have Their Place: Adjectives and Adverbs, 22 Writing 14 (Apr./May 2000).
fiction) and started his dissent from a denial of certiorari as follows:


Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn’t buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy’s pocket. Head downtown and book him. Just another day at the office.

In this opinion, the voice is set by the absence of adjectives and adverbs coupled with choppy short sentences and use of terms and metaphors, they convey a gritty hard-bitten image, like “tough as a three dollar steak.” Purists can argue that such writing has no place in the writings of the Supreme Court of the United States, but it is hard to argue with the fact that the two paragraphs that start this opinion covey a message and meaning that the reader will remember. That is the first step in persuasion.

3. Presentation and Selectivity of Information

Emphasis and presentation also set tone. The placement of facts relative to each other serves to emphasize or de-emphasize them. Buried in the middle, a fact takes on little import. Presenting those facts in a heading or subheading heightens the tone, whereas avoiding headings and subheadings tends to lower the tone. In Painting with Print, Professor Ruth Anne Robbins

173. Dunlap, 129 S. Ct. at 448.
outlines in detail the importance of typographic and layout design in setting forth the tone of a legal brief.

Beyond descriptors and presentational emphasis, information itself creates tone. Bob Seger croons of the pain of “what to leave in, what to leave out” and that angst faces legal writers as they use the editing process to set tone. In *Palsgraf*, Cardozo made a deliberate choice on which facts to leave in and leave out to create the appropriate tone in the opinion. In *Debs v. U.S.*, Justice Holmes upheld the conviction of “the defendant” but in doing so he omitted any mention that Eugene Debs was a national labor leader, four-time presidential candidate, or a nominee for the Nobel Peace Prize. Because the boundaries of legally relevant and irrelevant are not fixed, lawyers who write briefs and judges who write opinions have wide discretion on what to include (or not) when crafting tone.

IV. WRITING AND TEACHING RHYTHM, FLOW, AND TONE IN LEGAL WRITING

Understanding the evolutionary foundations of music and the primacy of music as a foundation of language and writing is essential to learning how to write with rhythm, flow, and tone. Understanding how to use these elements is necessary to teach others. Below are some steps to incorporating rhythm, flow, and tone into both writing and teaching writing.

A. What Writers Can Do to Help Incorporate Rhythm, Flow, and Tone

Putting into practice the inclusion of rhythm, flow, and tone into legal writing first requires an awareness of these acoustic devices. Second, it is important to recognize these techniques (or the absence of them) in the writing of others—both fiction and non-fiction. That has been the aim of this article so far. There are several methods that legal writers should employ to enhance the inclusion of the musilanguage elements into legal prose: two
before the writing starts\textsuperscript{181} and two after the first draft is complete.\textsuperscript{182}

First the writer must write in silence—real silence: the total absence of distraction in any form. Purge the noise from the room and with it the clutter from your mind. The ears on the side of your head must sit idle for the mind’s ear to truly hear. A recent study of college students proves the point.\textsuperscript{183} Twentysomethings often listen to music while they use a computer. Forty-five psychology undergraduates wrote brief expository essays with music playing. Others did so in silence. The results were clear that background music significantly disrupted writing fluency (words generated per minute controlling for typing speed and including those words deleted before the final draft) even though no response to the music was required. The researchers concluded that even unattended music places heavy demands on working memory and disrupts writing. UCLA Professor Susan K. Perry writes that rhythm must come from within and “[a]ctual musical rhythms coming from outside your mind may interfere with the inner voices and cadence you’re listening so intently for.”\textsuperscript{184}

Once silence is secured, it is a good idea for the author to draw his or her brief—not write it—but draw it. One method of this kind of brainstorming is called “mind mapping,” which involves bubbles, lines, and sketches of ideas.\textsuperscript{185} It is a sophisticated doodle. By letting the ideas flow from mind to the paper, there is an uninterrupted connection to the rhythm, flow, and tone that are at the basis of musilanguage.

Another method of brainstorming that draws, in part, on musilanguage is to engage in an essentially uncensored stream of consciousness process by writing down whatever comes to mind on a topic—a process called free writing.\textsuperscript{186} The process is, unfor-


\textsuperscript{184} Susan K. Perry, Writing in Flow: Keys to Enhanced Creativity 171 (Writer’s Dig. Bk. 1999).


\textsuperscript{186} See Elbow, supra n. 71, at 3; Elizabeth Fajans & Mary R. Falk, Scholarly Writing
Unfortunately, too often ignored by lawyers in the writing process. Professor Moxley contends and this author agrees, that lawyers should free write more often because,

[the free writing process—opening the mind to all associations, possibilities, hunches that may occur—provides a powerful basis for exploring the factual and legal possibilities of the case. The ungrounded initial flights of fancy not only facilitate but may be essential to the development of the most grounded of plans.]

At the heart of free writing is the idea of banishing writer’s block by erasing the need to address formal rules and schema in the brainstorming phase. Humans’ innate musical ability is unharnessed in a medium called spontaneous composition—a sophisticated term for a “riff.” Similarly, since musilanguage is innate, writers can draw on their natural musical abilities by embracing free writing—a least in the first draft. Professor Elbow calls this innate writing “voice” and argues that a writer’s “voice is damped out by all the interruptions, changes, and hesitations between consciousness and the page. In your natural way of producing words, there is a sound, a texture, a rhythm—a voice—which is the main source of power in your writing.”

Resorting to free writing or mind mapping forces the legal writers to be aware of the rhythm, flow, and tone in their text. “Sentences are little pieces of . . . music.”

Once the work is written, lawyers can take two more steps to help facilitate the inclusion of rhythm, flow, and tone in their writings. First, all writers know that they must proofread their work looking for spelling, punctuation, and the like. Proofreading for musilanguage elements is different. Sentences are the key for

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188. Elbow, supra n. 71, at 40.
190. Elbow, supra n. 71, at 6.
191. Elbow, supra n. 70, at 626.
sentences are the arteries that bring the life’s blood of the writing to the surface. If the arteries clog; the patient will die.” By working and reworking sentences, the words in them and their placement in the paragraph, with a focus on rhythm, flow, and tone, the writer is able to bring those elements to the surface. The point of editing is often lost on writers and lawyers. Editing is not throwing away, because one’s best writing is “often mixed up together with his worst.” Therefore, as Professor Elbow counsels, “editing must be cut-throat” and “[e]very word omitted keeps another reader with you. Every word retained saps strength from the others.”

Finally, and perhaps most importantly, the legal writer must read the brief out loud, because his outer ear will be a check on his mind’s ear. “Hearing your own words out loud gives you a vicarious experience of being someone else [and] brings the sense of audience back into your act of writing.” The lawyers of tomorrow can get a head start on following in the pen strokes of Cardozo and Hand (or more likely keystrokes) if law school legal writing instructors would incorporate some lessons about the innate persuasive power of musical elements in legal writing.

B. What Writing Instructors Can Do to Help Teach Rhythm, Flow, and Tone

Law schools, like all schools, should be dedicated to learning. Too frequently, however, “schools tend to emphasize success and thereby undermine learning not teaching. When the price of failure is very high, a learner tends to close himself off from improvement . . . [in learning a] complex, global skill” such as legal writing. Student achievement is higher when the teaching approach emphasizes that writing is a process, not a product.

192. Tobias, supra n. 93, at 131.
193. Elbow, supra n. 71, at 41.
194. Id. Professor Karaba challenged the author in the use of this quote in an article that is so long—but by heeding Professor Elbow’s wisdom, the author shortened the paper by many a page.
197. Id. at 136.
Law schools, like most schools, tend to give students a prompt, with a topic and desired form and length. Master this, and the student earns an “A.”

Yet such a linear approach stifles learning and yields inferior writing. This traditional approach neglects the important early phase of writing (called pre-writing) that includes thinking, free writing, and discussion.199 Law students start on a path to the product the instructor seeks, because that is what they have been conditioned to do. Obviously, law students need to learn IRAC, need to incorporate IRAC, need to be graded, and that grade needs to be based in large part on the final product. But the path of getting there should be laced with learning, particularly when students are being introduced to call on their innate skills to include rhythm, flow, and tone in the legal writing. Here are a few suggestions on how to do that.

First, the instructor must encourage an environment that enhances the student’s ability to draw on his or her innate musilanguage skills. This author, for example, plays a song on his iPod as students are filing in for class. It offers a nice change of pace and encourages a better appreciation of the similarities between writing, speaking, and music. Reading and writing skills are closely related, so legal writing teachers should encourage,200 or assign, their students to read a novel. This author has made that argument elsewhere.201

Next, to encourage learning by making the assignment about a process and not a product, the writing instructor should allow, or require, that an ungraded draft be turned in. Research has established that comments on students’ final papers are ineffect in producing significant improvement in writing skills.202 By contrast, having an early draft reviewed and returned allows students to understand and correct organizational flaws early, and for him or her to worry about mechanical flaws later. This may

199. See generally D. Gordon Rohman, Pre-Writing; The Stage of Discovery in the Writing Process, 15 College Composition & Commun. 106 (May 1965).
well be a burden to already stretched teachers, but if the aim is for the student to learn to write effectively, then the alternative of an exclusively IRAC product centered result will fall short.

The final two suggestions to enhance the students’ ability and comfort in incorporating musical elements in their legal writing are modeling examples and modes of instruction. By modeling effective examples of use of musical elements in legal writing, like those of Cardozo, Easterbrook, and Jackson, the teacher will help the student to “get the feel for good writing.”

Good writing is not just opinions, but also briefs. An excellent example of the patently obvious use of musilanguage in an effective brief is the pro se reply authored by jazz musician Gregory Charles Royal in his post-decree fee dispute. Mr. Royal had been sanctioned for bringing a post-decree action in federal court. In his appeal, he stated that “he respectfully submits this reply brief utilizing rap/rhyme in the argument topics to better emphasize strong concept points.” With cogent and brief explanation below, Mr. Royal’s rap headings include

Regarding frivolous filings, one thing is clear.
Notice to show cause and proper service before you appear.

    * * *

And if Industrial vs. Marquardt is any measure,
It’s the frivolous allegations, not the venue of your endeavor.

    * * *

A domestic relations exception, I was supposed to know.
Appellee would know too, so why did he spend so much [dough]?

    * * *

Appellee dissed 814.04 for his 3 grand justification.

203. Id. at 6.
But he forgets that 977.08 puts the brakes on his compensation. 205

The appellate court did not mention this musilanguage technique in its decision, but did find that the lower court had erred. 206 Although the author is not advocating that lawyers become Jay-Z, Da Brat, or Kanye West, the Royal brief is a simple and straight-forward example of the use of rhythm in legal writing.

Classroom dynamics and the use of musical examples can also assist in teaching students the use of rhythm, flow, and tone in their writing. University of Chicago English and Literature Professor George Hillocks analyzed the instructional modes and their effect on students’ writing achievement. His ground-breaking study demonstrated that a presentational mode of teacher-led discussion, specific assignments based on the instruction just given, and grades on a final product was significantly less effective than the alternative natural process and environmental mode of instruction. 207 These modes, which include free writing, an emphasis on process rather than product, and a high level of one-on-one interaction between the student and teacher, lead to a much higher and more sustained level of learning.

In this regard, exposing law students to the concepts of rhythm, flow, and tone in their writing may require a professor to depart from the traditional presentational mode in order that students may learn to be comfortable with their innate musilanguage skills in formal legal writing. For example, to demonstrate the defining qualities of literary “voice” which includes tone, University of New Hampshire English Professor Brock Detheir cranks “Johnny B. Goode” by Chuck Berry, followed by the same song by the Beatles, the Rolling Stones, Beach Boys, Johnny Winter, the Grateful Dead, Jimi Hendrix, and Judas Priest, each distinctive yet the same. 208 The author resorts to Ozzy and the ramped up rock classic Crazy Train to make the same point, comparing it to

205. App.’s Reply Br. at 3–4, Royal v. Royal, No. 08-AP-1082.
206. Id.
a rendition by the Ohio State Marching Band, and another by—believe it or not, Pat Boone.\textsuperscript{209} These methods have proven not only effective in making the point, but an enjoyable departure from the routine class methodology.

V. CONCLUSION

Many lawyers, and certainly most citizens, are hard pressed to remember the Preamble to the United States Constitution. But if you are one of the millions of Americans now between the ages of 30 and 50 who watched Saturday morning cartoons on ABC, then you (like me) learned the preamble because you learned to sing this from \textit{Schoolhouse Rock}:

\begin{quote}
We the people  
In order to form a more perfect union,  
Establish justice, insure domestic tranquility,  
Provide for the common defense,  
Promote the general welfare and  
Secure the blessings of liberty  
To ourselves and our posterity  
Do ordain and establish this Constitution  
for the United States of America.
\end{quote}

Schoolhouse Rock’s lesson is simple—music aids memory, increases enjoyment, and enhances learning.\textsuperscript{210}

Humans are instinctively attuned to music. So we need to get in the “habit of listening to the words we write.”\textsuperscript{211} Justice Jackson, who admittedly predated (but perhaps portended) Schoolhouse Rock, sang a similar tune. He urged us legal writers to cultivate an interest in the sound of language:

\begin{quote}
The advocate will read and reread the majestic efforts of leaders of profession on important occasions, and linger over the manner of handling challenging subjects. He will master the Short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James
\end{quote}

\begin{flushright}
209. See Rappaport, supra n. 201, at 292.  
210. Engstrom, supra n. 44.  
211. Peek, supra n. 2, at 8.
\end{flushright}
Version of the Bible, and in the power of the terse and flashing phase of a Kipling or a Churchill.\textsuperscript{212}

Lawyers, as advocates for a client's cause, have an obligation to make their writing not only accessible and understandable, but interesting. This can be accomplished by including the ancient and innate musilanguage techniques of rhythm, flow, and tone.

\textsuperscript{212} Robert Jackson, \textit{Advocacy before the Supreme Court: Suggestions of Effective Case Presentations}, 37 ABA J. 801, 863–864 (1951) (cited in Peck \textit{supra} n. 2, at 8).
APPENDIX

213. Brown, supra n. 56, at 275.
A TALE OF ELECTION DAY 2008: TEACHING STORYTELLING THROUGH REPEATED EXPERIENCES

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Storytelling has always been a part of law and lawyering, but it is only relatively recently that narrative and storytelling have assumed an important place in legal scholarship. In the past two decades, scholars from throughout the legal academy have turned their attention to the role of narrative and storytelling in law and advocacy. In addition to a thorough examination of storytelling at trial,1 recent academic literature has used narrative as a lens to understand and describe a vast diversity of areas of law, including, among many others, intellectual property,2 family law,3 and

* © 2010, Stefan H. Krieger. All rights reserved. Professor of Law and Director Emeritus of Clinical Programs, Hofstra School of Law.
** © 2010, Serge A. Martinez. All rights reserved. Associate Clinical Professor, Hofstra School of Law. A paper describing this study was presented at the Applied Legal Storytelling Conference, Chapter 2: Once upon a Legal Story, in Portland, Oregon, in July 2009, and we wish to thank the participants at that conference for their comments and suggestions on this research. We also wish to thank the clinical faculty at Hofstra School of Law for their comments on this manuscript. Theo Liebmann and Steven Schlesinger for their assistance on the Election Day Project, and all the Hofstra law students who represented clients on that day. We also wish to give our gratitude to our research assistants Amy Latuga, Andriette Roberts, and Sean Wilsusen. Finally, we would like to thank Hofstra University for providing us with the research support that made this Article possible.
3. See Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511 (1992); Timothy E. Lin, Student Author, Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases, 99 Colum. L. Rev. 739 (1999);
corporate law. Storytelling in law has been the subject of several symposia. Major textbooks on advocacy all devote space to the importance of narrative. And the authors of the recent influential report by the Carnegie Foundation, Educating Lawyers, determined that “[a]ctual legal practice is heavily dependent on expertise in narrative modes of reasoning.” It is easy to understand why narrative scholars Anthony Amsterdam and Jerome Bruner have confidently declared that “[l]aw lives on narrative.”

The proliferation of scholarship on storytelling has been accompanied by a considerable body of literature on the pedagogy of storytelling skills, focusing primarily on teaching students to use this skill effectively by extensive study of storytelling and narrative theory and technique.

We became particularly interested in the pedagogy of storytelling after supervising a number of clinic students in a one-day project on November 4, 2008 as they assisted individuals to enforce their right to vote, when we noticed significant improvement

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in the students’ storytelling skills in a very short period. Our experiences and observations forced us to reconsider existing legal scholarship on the subject, and we turned to cognitive science research to explain the progress of our students in a single day. As a result of our research and our experiences, in this Article we propose a new way of teaching storytelling skills by focusing not on storytelling theory but by creating a learning environment that gives students repeated opportunities to tell stories in a short period of time while providing motivation, feedback, and support.

In Part I, we describe our experience supervising our clinic students on Election Day 2008 and our observations of their learning through the repetitive experiences they had representing several clients in rapid succession. In Part II, we discuss cognitive science research into skills learning, including several necessary elements for optimal learning. In Part III, we review existing legal scholarship on teaching storytelling to lawyers and compare it with cognitive science findings. Finally, in Part IV, we apply cognitive science principles to teaching storytelling through experiential learning and describe the necessary elements for creating effective learning situations. We also suggest some ways that our Election Day experiences might be replicated by teachers in more conventional areas of practice.

I. ELECTION DAY 2008

On Election Day, 2008, we supervised a group of eighteen volunteer students, from each of the seven clinical courses offered at Hofstra Law School, as they participated in a project to give emergency representation to individuals who were seeking to vote after being turned away at the polls. Because New York law gives judges broad power to direct that a petitioner who has been rejected at the polls be permitted to vote, many of these would-be voters eventually end up at the courthouse. In Nassau County,

10. We were also joined on Election Day by Steven Schlesinger, a local election law expert, and Professor Theo Liebmann, a colleague at Hofstra.

11. N.Y. Elec. Law § 5-100 (McKinney’s 2007). In addition, because New York has an interest in making sure that “voters be afforded the fullest opportunity to exercise their franchise,” Jones v. Gallo, 324 N.Y.S.2d 850, 852 (N.Y. App. Div. 4th Dept. 1971), judges are required to construe the Election Law “liberally.” N.Y. Election Law § 16-100 (McKinney’s 2009).
over 600 of these frustrated voters flocked to the courts to be able to vote in the historic election of 2008; our students represented approximately 25 percent of them.

We prepared our students for Election Day with a brief training session held a few days before the election. With the help of a local expert and practitioner who was intimately familiar with New York election law as well as custom and practice in Nassau County, we taught a two-hour orientation class that included essential elements of New York election law, the ethical considerations most likely to be relevant, a brief description of what the students could expect, and a few simulation exercises focusing on interviewing and courtroom advocacy.

On Election Day, we were at the courthouse representing clients who had been denied the chance to vote. A typical client came to court after trying to vote at the assigned local polling place and being turned away by poll workers, who informed rejected voters that they could look to the courts for assistance and directed them to the courthouse. Although most of the court system was closed for Election Day, several judges were sitting throughout the day exclusively to hear petitions from rejected voters.

Once inside the court, voters were directed to a crowded and noisy conference room, where they were assigned to one of the several volunteer attorneys working that day, including our students. Lawyers interviewed each client briefly and crafted a short petition, and together they would appear before a judge to present the case. A brief hearing was then held before the judge, with an appearance by a lawyer from the office of the County Attorney, a statutory party to the proceedings whose lawyers were quick to draw the judge’s attention to any questionable facts or circumstances. The hearings typically lasted only a few minutes, with little in the way of procedural or evidentiary formality. The judges made their rulings on the spot, and then the lawyers would rush back to the conference room to meet the next client on the list. The whole process rarely lasted longer than thirty minutes from the initial interview to the judicial decision.

There were some obvious differences among the several judges on Election Day. Some were surprisingly quick to allow people to vote; one in particular, however, was much stricter than all of the others. Most were willing to allow our clients to vote as long as we told a convincing story about why they should be permitted
to do so. As a result, the decision to grant or deny a petition tended to turn on whether the story that the lawyer told could convince the judge that the client should be permitted to vote. For our students, this meant that their lack of subject matter expertise was essentially a non-issue, and the most important skill of the day was their ability to translate the facts obtained in their client interviews into compelling stories about the injustice that would result if their clients were denied the right to vote.

All of the students were able to represent several clients, and some represented ten or more individuals. A few stayed for several hours longer than scheduled to help meet the intense demand for counsel. For each of their clients, the students conducted an interview in the chaotic lawyers’ room, translated the relevant facts into a compelling narrative, presented the story to the judge, and got a ruling before racing to meet the next client.

Without any conscious effort on our part, on Election Day, we were surprised to discover that as students progressed from their first case to their sixth or seventh case, their storytelling skills improved within a very short period of time, sometimes markedly. Because of the sheer pressure of the scores of cases, we had no opportunity to provide students with formal critiques and primarily debriefed them on the fly as we walked (or ran) back to the conference room for the students’ interviews of new clients. But, after only three or four hours of interviewing clients, preparing papers, and presenting multiple cases to judges, most students seemed more adept at telling their clients’ stories than at the beginning of their stints.

In this Article, we use “storytelling” to mean the organization and presentation of facts in a way that resonates with the hearer of the story; the skill of storytelling includes analysis of facts to find possible themes and images, selection of an appropriate theme (and, equally importantly, rejecting inappropriate themes), and crafting and presenting that story to convince a particular decision maker in a particular situation. On Election Day, we saw our students progress rapidly in their abilities to assess the facts they learned from each client, to filter out irrelevant information, to focus on the most relevant facts, to develop persuasive themes and images, to present those stories to the judges, and to adapt their techniques to individual judges.

Our assessment of our students is, of course, necessarily impressionistic and difficult to quantify, but we perceived their im-
provement in at least three interrelated ways. First, in their interactions with us, they displayed increased independence. Our interactions with each student started in typical professor/student fashion: they were unsure, for example, about what questions to ask the clients, how to tell the story to the judge, and such mundane but clearly jitter-inducing matters as where to stand and how to identify themselves to the court. With each successive wave of student arrivals we initially assumed the role of experienced practitioners guiding novice lawyers through the process. We noticed, however, that for most of the students, the interactions quickly became more collegial as we discussed strategies and pros and cons of various approaches to representation of particular clients. No doubt some of this feeling that we were on level footing can be attributed to our own inexperience in this area of law, but we believe that most of it was due to the rapid improvement in our students’ abilities. We have frequently seen this transformation from the professor/student relationship in our regular clinical courses, but it takes place over the course of weeks or months, not mere hours.

The second general improvement concerned the reduced number of interactions with us. With each group of students arriving throughout the day, we initially spent significant time sending them back several times to ask clients for more information and working closely with them to craft compelling stories to tell the judges. We repeatedly had to focus them by asking, “What is the story that you want to tell the court?” Very quickly, however, we experienced significantly less back and forth between the students and us, and less need for us to help them prepare their clients’ stories, with no reduction in the quality of representation. In fact, we believe that the representation improved despite the diminished role we played with respect to each successive client.

Finally, as the students handled more cases, they were better able to filter out irrelevant facts and focus on relevant facts in telling their clients’ stories. Most of the students approached representation of their first client in the same way: once they had conducted an appropriate intake interview, they prepared a story that was a recitation of everything the client had told them, even if, as in some cases, it was actually detrimental to their cases. By consulting with us and by observing how the court responded to the various elements of their stories, the students quickly learned
to filter out not only the negative facts but also the non-essential facts they had learned in their interviews. In short order, they were semi-automatically crafting concise, compelling stories on behalf of their clients.

This experience raised the question for us whether in contexts other than a special one-day project, students might improve their storytelling skills simply through multiple opportunities to tell stories in a particular subject-matter area. In the clinical courses that we both teach, we assign readings on narrative theory and storytelling skills and devote a seminar class to the craft of creating persuasive narratives for clients. Applying the methods we discuss in class, students in their actual cases draft—and redraft—their clients’ stories and eventually present them either orally or in writing to adversaries, courts, agencies, or legislatures. Usually students only have one or two opportunities to make these presentations, and quite candidly, by the end of the semester we often feel unsatisfied about most of our students’ development of storytelling skills. Witnessing the progress of students in honing these skills in just one day, we wondered whether from the perspective of cognitive science there might be more of a benefit to providing students with repeated experiences in storytelling than simply teaching them narrative theory and giving them one or two intensive experiences in the skill.

II. TEACHING STORYTELLING THROUGH THE LENS OF COGNITIVE SCIENCE RESEARCH

Reflecting on our Election Day experience, we turned to the extensive cognitive science literature on the development of expertise to explore the role of repeated experiences in the learning process. Before we review this scholarship, however, we need to make several caveats. First, we in no way intend to suggest that our project on Election Day was a rigorous empirical study. We initiated this program for the sole purpose of providing students with an exciting opportunity to engage in pro bono work on Election Day. In our planning, we had few pedagogical goals and certainly did not intend to test any hypotheses about the effect of multiple experiences on student learning nor did we develop any methodology for measuring student improvement in any lawyering skills. This Article is based solely on our students’ and our own impressions from our experiences that day.
Second, and relatedly, we cannot ignore the fact that November 4, 2008 was a very special day for the students and for us. As one of our colleagues observed, that day was the “perfect storm.” Many of the student volunteers had been active in the campaigns for one of the candidates; the clients were highly motivated to assert their rights to vote and tell their stories; and all of the participants, including the judges and court personnel, knew that this day would go down as an important moment in American history. In this context, it is hard to draw any definitive conclusions about the learning that took place. We are the first to admit that our experiences that day may very well have been anomalous.

Finally, in the context of our project, the literature on expertise has its own limited relevance to our experiences on Election Day. Most recent cognitive science studies show that it takes people at least ten years of intense involvement with a skill or profession to acquire expertise. It is inconceivable, then, that our students could miraculously acquire any expertise in any skill in the course of a mere four or five hours.

Even with these limitations, however, consideration of our experiences on November 4 through the lens of expertise literature can be useful in developing improved pedagogies for the teaching of storytelling, and perhaps other lawyering skills. While our inquiry is not a scientific study, by comparing our experiences with the findings reflected in the numerous empirical studies on development of expertise, we can gain a sense of what particular factors might have impacted the perceived improvement in our students’ storytelling skills. Obviously, further research on this issue will be required, but this particular experience, we believe, is a good starting point. And while the unique nature of the Election Day project may limit its application to more humdrum contexts, a close examination of what occurred that day can help us identify some possible ways of replicating the experience in everyday skills teaching. Finally, while we recognize that no students can acquire expertise in any lawyering skills one day, one semester, or even in the three years of law

school, one of the aims of skills education is to teach students the means to learn from experience. Examination of the scholarship on expertise acquisition can provide some guidance in assessing whether a pedagogy that gives students multiple experiences with a skill can provide a means for students to develop expertise as they practice.

A. Cognitive Science Research on the Acquisition of Expertise

Traditionally, theorists considered expertise to be an innate quality that was genetically transmitted and could not be altered by training. Practice could improve performance, but the maximum level of achievement was determined by heredity. More recently, theorists have expanded on this view asserting that expertise can be acquired through extensive experience in a particular domain or with a specific skill. They asserted that “extended experience led experts to acquire a gradually increasing number of more complex patterns. With experience, experts were thought to be able to use these new patterns as cues to retrieve stored knowledge about what actions should be taken in similar situations.” But subsequent studies in different areas have demonstrated that even experts with extensive experience in a domain do not necessarily perform better than “less-skilled peers or even . . . their secretaries.” Most individuals entering a new domain

14. Ericsson, Deliberate Practice, supra n. 12, at 870. Likewise, some theorists, based on self-reporting and myths, asserted that creative contributions of geniuses spring almost spontaneously from their minds. Most scientists now reject this view arguing that geniuses, like the rest of us, develop their insights from experience within their domains. See generally Stefan H. Krieger, Domain Knowledge and the Teaching of Creative Legal Problem Solving, 11 Clin. L. Rev. 149, 174 n. 124 (2004).
16. Id.; see generally Hubert L. Dreyfus & Stuart E. Dreyfus, Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer 30–31 (Free Press 1986). This theory, which, as discussed in the text, has recently been called into question, is proffered as the established model of expertise development by the Carnegie Report on Educating Lawyers. Sullivan et al., supra n. 7, at 117 (“[T]he novice must learn to recognize certain well-defined elements of a situation and apply precise and formal rules to these elements, regardless of what else is happening.”).
improve with experience over a period of time until they reach an acceptable degree of performance. But after they achieve that level, more experience does not by itself result in improved performance. Indeed, some studies even suggest that professional performance decreases in accuracy and consistency with length of experience.¹⁸

Since the evidence suggests that length of experience by itself is not sufficient to improve performance, cognitive scientists have begun to explore what particular factors impact the acquisition of expertise. They have found that those performers who become experts after extensive experience have acquired cognitive skills that “support [their] continued learning and improvement.”¹⁹ These skills are not attained simply by repeated experiences in the domain; rather, they develop from engagement in specific kinds of activities in particular types of learning environments.²⁰ To fully understand the nature of those activities and environments, it is helpful to consider three different but interrelated cognitive science theories on the development of expertise: schemas, deliberate practice, and flow.

1. Schemas

Based on empirical studies, several in the domain of medical expertise, most cognitive scientists now reject the notion that expert performance is merely “a process of pattern recognition”


based on prior experiences with similar problems.\textsuperscript{21} They also discard as inadequate the view that expert problem-solving merely involves the application of expert “production rules” learned from experience that are applied deductively to the problem at hand.\textsuperscript{22} Instead, a number of cognitive scientists hypothesize that expert reasoning involves accessing certain scripts or schemas for solving the problem.

Schemas are “ordered patterns of mental representations that encapsulate all our knowledge regarding specific objects, concepts, or events.”\textsuperscript{23} Developed from repeated encounters with similar experiences, “[a] schema can be viewed as a coded expectation about any aspect of an individual’s life, which dictates which characteristics of a given event are attended to, which are stored for the future, and which are rejected as irrelevant.”\textsuperscript{24} In regard to the acquisition of expertise, researchers theorize that as a result of greater experience in a particular domain, experts use their well-developed schemas to reflexively filter out irrelevant data and focus on relevant information to come to a solution.\textsuperscript{25} Experts automatically use their schemas to identify the deep structure of a situation (its systematic properties) and seek to reformulate it to reach a decision based on previous experience.\textsuperscript{26}

Schemas, however, are not acquired simply by repeated experiences in a domain. Cognitive science theory suggests that certain types of experiences nurture the development of schemas while others interfere with it. Scientists have found that because humans have limited attention and processing capabilities, there are significant constraints on the cognitive resources that can be used during learning.\textsuperscript{27} Under this “cognitive load” theory, if the instructional format requires students to engage in cognitive activities that are irrelevant to the pedagogical goals, knowledge


\textsuperscript{22} Id.

\textsuperscript{23} Mark P. Higgins & Mary P. Tully, Hospital Doctors and Their Schemas about Appropriate Prescribing, 39 Med. Educ. 184, 185 (2005) (citations omitted).

\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} Krieger, supra n. 14, at 168.

acquisition can be impeded. They simply become overwhelmed, turn off, and cannot develop effective schemas. Accordingly, this theory suggests that educational experiences should be fashioned in ways that do not impose a heavy extraneous cognitive load but instead help the student develop sound schemas for tackling similar situations in the future.

2. Deliberate Practice

While schema acquisition is essential to expert performance, cognitive scientists caution that schemas, by themselves, do not assure that individuals will achieve true expertise. Although schemas can make performance more efficient by proceduralizing (even routinizing) the cognitive process, they can limit the knowledge selected for use and the number of variables considered. While in many everyday situations, schemas can be advantageous, in non-routine or difficult situations, they can be harmful. In these latter circumstances, experts need to engage in more complex reasoning and consider alternatives to the scripted process.

Expertise, then, requires the ability “to distinguish between those situations in which schemas should be used and those in which routine procedures should be modified to adapt to difficult or unusual problems.” As cognitive psychologist K. Anders Ericsson posits, “[E]xpertise is not merely a matter of the amount and complexity of the accumulated knowledge or the ability to

30. Id. at 295.
33. See Ericsson, Deliberate Practice, supra n. 12, at S77 (“When medical conditions are frequently encountered in clinical practice, then experienced physicians will acquire patterns that will allow them to recognize each condition and access mental models or prototypes for the corresponding disease. When the disease or problem is unfamiliar, however, physicians cannot draw directly on their accumulated experience and knowledge and must, therefore, rely on reasoning and systematic generation of alternatives.”); Krieger, supra n. 14, at 175–176.
34. See Ericsson, Deliberate Practice, supra n. 12, at S77; Krieger, supra n. 14, at 175–176.
35. See Krieger, supra n. 14, at 205.
recognize patterns and schemas, it also reflects acquired cognitive mechanisms that allow the expert performer to keep refining and modifying representations even after extensive experience in a domain.”

“The key challenge for aspiring expert performers is to avoid the arrested development associated with automaticity and to acquire cognitive skills to support their continued learning and improvement.”

To learn these cognitive skills, Ericsson contends that future experts must engage in particular kinds of experiences, which he calls “deliberate practice.” Specifically, he asserts, this practice requires repetitive experiences with incrementally increasing complexity, immediate feedback, and the opportunity to fine-tune their performance. The combination of repetitive experiences and feedback prods students to reflect on the results of their performance. This process, Ericsson claims, encourages students to acquire the cognitive mechanisms to handle both routine and unique problems.

3. Flow

A third, related theory of cognitive science that is relevant to consideration of the activities that encourage learning from experience is the concept of “flow.” Cognitive psychologist Mihaly Csikszentmihalyi and his colleagues interviewed a large number of individuals who were considered “creative” in a variety of fields and found a common thread:

Artists, athletes, composers, dancers, scientists, and people from all walks of life, when they describe how it feels when they are doing something that is worth doing for its own sake, use terms that are interchangeable in their minutest details. This unanimity suggests that order in consciousness

37. Id. at E73. While Ericsson’s research initially focused on domains very different from the practice of law, such as musical and athletic performance, Ericsson et al., Acquisition of Expert Performance, supra n. 12, he has expanded his analysis to the field of medicine which, like legal practice, often requires professionals to confront ill-structured problems. See generally Ericsson et al., Expert Performance in Nursing, supra n. 15; Ericsson, Deliberate Practice, supra n. 12.
38. See Ericsson et al., Expert Performance in Nursing, supra n. 15, at E61.
39. Id.; Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 367.
40. Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 368.
41. See Ericsson, Deliberate Practice, supra n. 12, at 377.
produces a very specific experiential state, so desirable that one wishes to replicate it as often as possible. To this state, we have given the name of “flow,” using a term that many respondents used in their interviews to explain what the optimal experience felt like.42

To experience flow, an individual must become totally immersed in an activity.43 She must pay close attention to her actions, concentrate on achieving her goals, and monitor feedback.44 And her activities must stay close to the “boundary between boredom and anxiety.”45

The Csikszentmihalyi studies demonstrate that certain surroundings foster these elements of the flow process: those that provide easy access to information, stimulation of colleagues engaged in similar activities, and a supportive environment.46 In these settings, repetitive experiences can become more than humdrum routines and can lead to the development of creative practice and expert performance.

B. Optimal Learning Environment

The research on schemas, deliberate practice, and flow demonstrates the significance of particular kinds of activities and environments to the learning process.

1. Repeated Experiences with Clear Goals

All three of these theories suggest that repeated performances of an activity by students have limited value unless the experi-


44. Id. at 210–212. While Ericsson asserts that the concept of “deliberate practice” is inconsistent with flow, Csikszentmihalyi’s studies suggest that many of the subjects were able to attain flow precisely because they were engaged in activities similar to deliberate practice. Compare Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 368, with Csikszentmihalyi, supra n. 42, at 46; Mihaly Csikszentmihalyi, Creativity: Flow and the Psychology of Discovery & Invention 107–108, 114—116 (Harper Collins Publishers 1996) [hereinafter Csikszentmihalyi, Creativity].

45. Csikszentmihalyi, supra n. 42, at 228 (“When there are too many demands, options, and challenges, we become anxious; when too few, we get bored.”).

46. Csikszentmihalyi, Creativity, supra n. 44, at 127–147.
ences are designed to focus on clear tasks. Faced with performing an act with multiple, ambiguous, or open-ended goals, students are often likely to experience cognitive overload. Without clear goals, they will have difficulty becoming attuned to the deep structure of situations and will be unable to identify the relevant and irrelevant information in a particular situation. Consequently, they will be handicapped in developing the necessary schemas for handling similar tasks in the future. And with such multi-tasking, they will have little opportunity to repeat their performances with enough precision to correct their errors and improve their skills. Finally, it is impossible for students to achieve complete involvement in a flow experience if they are preoccupied with figuring out the nature of the goals rather than attempting to achieve them.

Accordingly, these theories show that teachers need to structure their exercises with clear goals to allow students to pay close attention to the task at hand. Then, with similar repeat experiences, students can focus with precision on areas for improvement, monitor their performance, and work to correct their errors. And then when these goals are met, a new set of precise goals can be developed so that they can achieve increased levels of performance.

2. Gradual Increases in Complexity

Even if the goals are clear and unambiguous, effective learning may not take place unless the experiences are designed with attention to the boundary between boredom and anxiety. On the one hand, as cognitive overload and flow theory posit, if the challenges of a particular exercise greatly exceed students’ skills sets, they feel anxious and are unable to learn from the experience. They have difficulty processing all the information required for

47. Farmer & Williams, supra n. 20, at 8. Comparing their previous approach to skills teaching in their courses on interviewing, counseling, and negotiations with their present use of deliberate practice in these courses, Professors Farmer and Williams observed that under their prior method,

each exercise call[ed] upon students to carry out a number of different tasks, [and] students tend[ed] to focus their preparation not on skills but on the substantive aspects of the problem. . . . Our students had almost no opportunity to repeat their performances with enough precision to correct their errors. The exercises did not provide a basis for accurately monitoring . . . progress of our students.

Id.
tackling the situation. Accordingly, optimal learning cannot occur if students do not feel they have a chance of completing a task. Teachers, therefore, should design tasks that take into account the students’ preexisting knowledge so that the task can be understood after a brief period of instruction.  

On the other hand, if the repeated experiences consistently demand the same level of complexity, students become bored and have little incentive to improve their performance. Moreover, without the feeling that the stakes are being raised, students do not acquire the cognitive skills that can assist them in learning from experience. With repeated tasks of gradually increased complexity, when students overcome challenges, they feel more capable and skilled. Accordingly, by designing exercises for students that require them both to build on their prior experiences and also overcome challenges of new ones, teachers can give students a learning environment conducive to the development of deliberate practice and flow.

3. Feedback

These cognitive science theories also demonstrate the importance of feedback during the process of repeated experiences. As discussed previously, teachers need to design exercises with clear goals so that students have the opportunity to develop schemas for handling similar situations. But for optimal learning to take place, students also need to receive feedback so that they can measure their progress in achieving their goals. Indeed, studies have shown that, “[i]n the absence of adequate feedback, efficient learning is impossible, and improvement minimal even for highly motivated subjects. . . . [M]ere repetition of an activity will not automatically lead to improvement in . . . accuracy of performance.”

The effectiveness of feedback depends considerably on the nature of the activity. Most cognitive scientists contend that im-

48. Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 367.
49. Csikszentmihalyi, supra n. 42, at 41.
50. See Krieger, supra n. 14, at 203–204.
52. Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 367.
53. Csikszentmihalyi, supra n. 42, at 56–58.
mediate feedback is essential so that students, with the memory of the activity fresh in their minds, can assess their performance.\textsuperscript{54} Also, the feedback must be informative so that students can identify specific performance goals for the future so they can work on addressing their performance errors.\textsuperscript{55}

Some studies also suggest that the most effective feedback may come from an individual’s own insights from witnessing the results of her performance. Ericsson, for example, claims that physicians are most motivated to improve their practice when they see immediate results from their actual diagnoses and treatment.\textsuperscript{56} Apparently, the opportunity to assess one’s own performance provides unique motivation to improve performance. Some of the best feedback, therefore, may not come from the traditional critiques by teachers or coaches, but rather from the results of the activity itself.

4. Motivating Environment

Ericsson observes that “a number of conditions for optimal learning and improvement of performance have been uncovered. The most cited condition concerns the subjects’ motivation to attend to the task and exert effort to improve their performance.”\textsuperscript{57} Obviously, teachers can motivate students in their repeated experiences through the identification of precise goals, the design of exercises that take into account their existing skill sets but offer challenges, and the opportunity for immediate, informative, feedback. But the cognitive science literature suggests that more is needed for optimal learning than the use of particular teaching or coaching techniques.\textsuperscript{58} Individuals must feel motivated to engage in the activity.

\textsuperscript{54} See Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 367
\textsuperscript{55} See id.; Ericsson et al., Expert Performance in Nursing, supra n. 15, at E61.
\textsuperscript{56} Ericsson et al., Deliberate Practice, supra n. 12, at S77; see also Csikszentmihalyi, supra n. 42, at 56 (relating Csikszentmihalyi’s interviews with expert surgeons: “[S]urgeons who love doing operations claim that they wouldn’t switch to internal medicine even if they were paid ten times as much as they are for doing surgery, because an internist never knows exactly how he is doing. In an operation, on the other hand, the status of the patient is almost always clear.”).
\textsuperscript{57} Ericsson et al., Acquisition of Expert Performance, supra n. 12, at 367.
\textsuperscript{58} As Professors Farmer and Williams observe in regard to their use of deliberate practice methods in their skills courses, “We concluded that in order to effectively employ deliberate practice methods, we had to find ways to motivate our students to strive toward the acquisition of target skills rather than to dutifully, but mindlessly, perform deliberate
Flow theory provides some guidance in identifying those circumstances that can motivate students to attend to their tasks and improve performance. As described above, individuals experience flow in an activity when they experience an “order in consciousness . . . so desirable that one wishes to replicate it as often as possible.”59 A key component of this experience is the opportunity to become deeply involved with the activity.60 To achieve such involvement, an individual needs to “find a relatively close mesh between the demands of the environment and one’s capacity to act” and to have the capacity to concentrate without distractions from the task at hand.61

To motivate students to optimal learning in their repeated experiences, therefore, teachers need to design learning environments that give their students the opportunity to become deeply involved in their activities. In structuring these surroundings, teachers should consider how to provide easy access to the information that will help students engage in the particular activity without distraction, ways of providing stimulation from others engaged in similar activities, and surroundings that provide support, the necessary feedback, and the opportunity for fine-tuning performances. The insights from flow theory indicate that students need the opportunity to become immersed in their experiences, not just obedient performers of tasks.

C. Election Day Storytelling and Cognitive Science Theories

Soon after November 4, 2008, we met with most of the students to debrief them in regard to their learning experiences that day. We then conducted in-depth interviews with four of them to probe their impressions of Election Day and to ask them to compare their experiences that day with those in their regular clinic courses. Based on these discussions, it became clear that many of the findings in the cognitive science research on repetitive practice were borne out in our students’ experiences on November 4. The student insights confirmed our impressions that the project we supervised that day could perhaps be an effective alternative model for teaching storytelling.

59. Csikszentmihalyi, supra n. 42, at 29.
60. Csikszentmihalyi, supra n. 43, at 210.
61. Id. at 210–211.
To provide context for the excerpts from our in-depth interviews with four selected students, here are summaries of their clients' stories:

**Diana.** Her client was a pilot for US Airways and a federal air marshal who had just flown in earlier that evening and raced to the polls, only to be turned away. He came directly to the courthouse to vote, and he was adamant that Diana had to win his case because he “wanted to keep Obama out of office.” He had not voted in a presidential election since at least 1980, although he told us he had voted in a local election of some sort in 2000. He offered no evidence that he was registered to vote, so Diana decided to emphasize his service to his country, his patriotism, the faith that the government had placed in him as a federal marshal, and his role in the war on terror.

**Emily.** Her client was one of the final clients of the day, a middle-aged woman who had moved to Nassau County from Georgia in September 2008. She told Emily that she had lived at one address for a month and then, a week before the election, had moved to a new address. After some prodding, she confided to Emily that she initially had lived in County shelter housing, and had recently been placed in more permanent housing within the County. When she went to the polling place for her new residence, she was turned away and sent to the courthouse.

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62. Video footage of the interviews is available at http://videos.studentlegalreasoning.info

63. In describing these clients' stories and the students' experiences preparing and presenting the cases, we have protected the confidentiality of the clients. New York Rule of Professional Conduct 1.6 provides that “A lawyer shall not knowingly reveal confidential information.” We are not revealing the names of the clients, and therefore not directly revealing confidential information. Furthermore, in New York, “[a] lawyer’s use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.” N.Y. R. Prof. Conduct 1.6 cmt. 4. Reading the Rule and the Comment together, we conclude that in this Article there is no revelation of confidential information because there is not a reasonable likelihood that a reader will be able to ascertain the identities of any of our clients. In light of the large numbers of clients represented by each student (and the even higher number represented by each of us), the number of different judges students appeared before, and the abbreviated record-keeping procedures in place on Election Day, we believe that it would require a heroic effort by any reader to determine the identity of any of the clients discussed in this Article. The daunting nature of the difficulty of mounting this effort and the low likelihood of success in any case make it unlikely that an investigation will be undertaken, much less successful. Because identification of our clients is not reasonably likely, we conclude that we are protecting our clients' confidences.
Emily decided to focus on the sympathetic aspect of her client’s experience in the shelter system, frequently moving from place-to-place with no fixed residence during the pre-election period. She intentionally avoided mentioning that her client had not registered to vote because she hoped that the judge would feel that the shelter system should have made more effort to help the client register to vote during multiple and frequent contacts with her.

David. His clients were a married couple who were registered to vote in one village in Nassau County but approximately four or five months prior to Election Day had moved temporarily to another village in the County. They had gone to vote in the village in which they had registered and were rejected, even though they had certificates from the Nassau County Board of Elections saying that they were actively on rolls and that their registration was valid. All of their documentation, including their drivers’ licenses and the voting certificates, had their original address, not the new address.

The clients did not want to talk about the reason they had moved; when David sensed that they were embarrassed about discussing their move, he did not ask them any other questions to determine whether the reasons might have added to the persuasiveness of their story.

Because he believed it might prejudice their case, David initially chose not to bring to the judge’s attention that the source of the clients’ problem was their failure to update their registration when they moved. Once the judge realized the nature of the problem, however, David and a supervising attorney successfully argued that it was a simple procedural oversight and not a fatal defect in their case. The story they ended up telling was a simple one about the clients overlooking a mere technicality.

Dan. His client had been convicted of a felony several years prior to the election, and went through a 90-day “shock program” to complete his sentence. He had left work, during his lunch break, to vote, but was not on the registered voter rolls. After being denied the opportunity to vote, he went to the courthouse, still on his lunch break, with his two little girls. He was especially hopeful that Dan could help him get the right to vote because he wanted to tell his daughters he voted in the historic 2008 election.
By the time he was assigned to this particular client, Dan had started to apply what he described as a “standard form” of questions that allowed him to tease out the facts he needed to tell a client’s story and to determine which facts to include and which to omit to show the judge why the client was sympathetic or why denying the client the right to vote would be an injustice. Dan’s storytelling choices are described more fully in the interview excerpts transcribed below.64

In these interviews, the students’ descriptions of their learning echoed in large part the findings of cognitive science.

1. Precise Goals

In their interviews, several students mentioned the importance of clear goals to their experiences that day. One student, for example, observed how the single goal of the day resulted in her ignoring her own political disposition:

Diana: In that moment, on that particular day, my role as an attorney was to advocate for people who had been denied a right, and that right was to vote. I had staunch beliefs as to who I thought should win the election but in that moment—and I’ll just tell you guys I was an Obama supporter—so in that moment that I had a client who did not like Obama, wanted nothing to do with Obama, and wanted to vote just to take Obama down. I had to separate my personal beliefs; I had to separate my personal sentiments; and in that moment I had to recognize that my client had been denied one of his fundamental rights that are guaranteed to him. So my sole job was not necessarily Obama or was it Bush? I can’t even remember. McCain, sorry. It wasn’t Obama or McCain, but rather it was becoming an advocate to get this man his right to vote. I think that was a very important lesson for me to realize that when it comes to the law, your job is to advocate not on your personal beliefs, not on your sentiments, but advocating on behalf of rights being taken away from this person.

With this precise goal, from their repeat experiences students appeared to acquire schemas for developing stories for their clients:

David: Well the two or three things that I had mentioned earlier about making your client feel comfortable enough, and kind of

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64. See infra pt. II(c)(1).
developing a relationship with a client in a way that allows them to give you all of the information that you’re going to need in order to advocate on their behalf and then once you have that information, if you’re able to do that well, then you can craft an argument that will give all of the information that the judge needs in order to make a decision and will present the equities in a way that really makes it seem that if there’s any question, this should certainly be decided in your client’s favor.

And consistent with the cognitive studies, and much to our pleasure, at least one student, on his own, began to develop his own methods for becoming attuned to the deep structure of a client’s case, to focus on the relevant facts, and to filter out the irrelevant facts:

Dan: We basically had one sheet of paper to put all of the information that he gave us and all of our reasons for what we were going to bring up for the judge—the laws that we might use—on one sheet of paper. I used the top half—usually put down his information—and the bottom half I would use to pick out the facts. I would underline the facts on the top; on the bottom part, I would put what I was going to say, if anything; so I was just looking at the things I was going to say, and I was trying to connect it to the facts that I wanted to use. So just having that immediately available for me so I wouldn’t have to refer back and forth, and then I don’t know I try to tell a story with it. I always feel like I don’t know a rule, it’s just kind of . . . I don’t know it’s a tool but it can also be used as almost like a bridge to bring the facts to why he should do it. And I kind of use the same template every single one of the whenever I went up in front of the judge. I try and say all these factors lead up to this person being here today so that you would grant him the right to vote. That these factors . . . there wasn’t anything preventing him from voting or why he shouldn’t vote but that all these things were just things that had happened leading to the moment where the judge, you, say that he should be allowed to vote or she should be allowed to vote. It kind of just makes sense to me because there’s these laws and there’s these stories but not all of this information is important or relevant, and there’s only a limited amount of time that we can ask questions. I think that everyone during the examples [at the training session] that some people asked a lot of questions or delved into things that I didn’t think were very important so I wanted to make sure I asked for a limited amount of facts so that I could go straight to
the law or the things that would be applicable to the law. Things that would appeal to a judge and make him say yes or no and not want to say no.

2. Repetition and Increased Complexity

In their debriefings, several students mentioned the benefits of having repeat experiences crafting different stories in a particular subject-matter area. Reflecting the boredom/anxiety dichotomy described in the flow scholarship, several students described the increased comfort level they felt as the day progressed.

Emily: In general we learn about [case preparation] in clinic in general as far as the theory of the case and storytelling, but like I said before, you’re able to do it with so many more clients this time, and you’re able to develop a theory and develop a story and themes that are still each very different. And, you know, you have someone who moved and then you have someone who moved from a shelter, so there’s you know kind of the same theories but they’re all very different stories with each individual client. I was definitely more comfortable speaking in front of the judge for the last case and more comfortable developing the story, developing the theory of the case because there were . . . you know I did four previously so I was more comfortable with knowing what direction to take, but you know the last case was more difficult in the fact that it was kind of an iffy argument that we had to make.

It struck us as fascinating that Emily contrasted learning the theory of storytelling in her clinic course with her experience on Election Day. Her comments suggest that the clinic course was helpful in learning storytelling theory. But it was the repetitive practice of Election Day that gave her some facility in crafting narratives for her clients.

Another student made a similar point:

Dan: Yeah I guess the storytelling part of it was nice because this was the first time that we just did it over and over again going in front of the judge. Client to judge; client to judge. Most of the time, or at least in the clinic, we’d get a case, and we’d do the investigation, and then we’d look up the law, prepare motions and we mooted and we’d do all of this stuff. Here, it’s just straight from the client to the judge, to a court of law. The system and the citizen. It was a fun experience for the lawyers and also to be able to talk to the clients that directly, to be able to have their problem
in front of you and then turn it into a solution that quickly. So it was an ego trip, I guess. But it was also educational because we did get to practice over and over again, and there are some skills that you can read the book and you can prepare for it but when you go in front of a judge, blah. You have nothing. You’re looking to do A, B, and C, and I go up there and I did A and X. So there are some things that you just can’t learn until you go up there and do it over and over again. And there are mistakes that you can say that I’m going to watch out for that and that but you’re going to make them. So having that time to be ready for the shock of being in front of a judge that you can’t teach in a class, you can’t replace it.

Given the one-day nature of the Election Day project and the random selection of clients assigned to the students, it is impossible to draw any conclusions about the importance of increased complexity in repetitive practice. But one student mentioned how a particularly difficult case affected his handling of storytelling in subsequent cases. In that difficult case, the student was initially unsuccessful and needed to call upon an experienced attorney, who asked the judge for a rehearing:

David: There’s a learning curve along the way right, so I didn’t always want to just take what they had given me. I needed to ask exactly about the information that I would need to present in front of the judge and I . . . you know after this experience, especially with the supervising attorney who did the rehearing, I realized I needed to have all of the information and give it to the judge immediately. So it really couldn’t be that I was unsure about certain things, and I wouldn’t let the . . . client answer certain questions once they were asked by the judge because that seemed to leave too much open to the judge’s discretion, which I found out could not be relied on. I couldn’t rely on any assumptions in my favor. I was able to learn from the first experience and give the judges everything that they would need in order to make the decision while raising as few questions as possible. It was actually a very controlled study on how I could have done this differently.

In a follow-up interview, David described three things that he had learned to consider by the end of the day: (1) procedural problems, (2) emotional or sympathetic elements, and (3) problems clearly not of the client’s making.

As an example of this process, David described a later client, a firefighter who was informed by the poll workers that he had a
“Code One” noted on his registration. David made sure to focus on the Kafkaesque “Code One” notation—the meaning of which neither David, the client, the County Attorney, nor anyone at the court—understood. David felt that this made the story “even better,” because it was a bureaucratic problem not of the client’s making. David also focused on the client’s occupation even though it had absolutely no bearing on the case, because by that point he “was getting better with the script of [the three] things [he had learned] [and] felt it would be helpful.” By crafting a story of a public servant who was the victim of a bureaucratic problem, David was able to convince the judge to allow his client to vote.

3. Feedback

Nearly all the students we interviewed mentioned the importance of the feedback they received after their hearings. Consistent with the cognitive science theories, it appears that the immediacy of the feedback was very important to them. Interestingly, however, the feedback identified by most students as significant was not from us but from their clients and the judges.

In regard to comfort level as the day progressed, several students referred to the significance of positive feedback from their clients. But for some students this client feedback seemed to be more than just a “feel good” moment. It helped them clarify their goals in the storytelling process. For instance, the student who represented the released felon told us that he considered becoming a doctor but instead decided to go to law school. He continued,

Dan: My goal never shifted, I wanted to help people instead of using a scalpel though, I’m using my voice, talking, and logical law. But things in the law could affect you just as badly as a lost leg or a bad heart. You know, being taken from your job and your family and being put in jail. So I really thought it was important and this kind of reaffirmed that because I actually got to do it and see the effect in person instead of just, you know, document production and sending it out. [The client] told me, “You did a good job.” This was something that I actually got to see somebody’s face change as the experience went along.
And another student recounted the effect of witnessing the response of a daughter of an elderly woman whom the student successfully represented:

[Her mother just got out of the hospital to vote. . . . In the end [the daughter] started crying because she was so relieved that she got her mother to vote. It was really important for her mother to be able to vote in that election. She thought it was going to be the last election that [her mother] could vote in because she had all this heart failure and, you know, other diseases. So, you know, it really hit me.

Likewise, the feedback from the judges apparently helped students in fine tuning their approach to their cases. One student, for example, learned from his mistakes when witnessing a more experienced lawyer’s telling of the same story on a motion for rehearing:

David: The judge didn’t seem to have any kind of set criteria for determining residence, but he did ask the respondent, the county board of elections, what they thought. They said they took no position but that the statute said that it takes, that you have to live in a place for at least thirty days in order to be considered a resident of that village and that residency is based on intent and that in the end it was up to the judge’s discretion. Which is really where the shocking part came in for me because when I heard they took no position and that it was up to the judge’s discretion, I felt as though it was in the interest of allowing people to have their voting rights you would easily decide in our favor. And he actually stated he didn’t see any basis for allowing them to vote anywhere. And then we had to request that he at least allow them to vote in the presidential election only, which the statute clearly doesn’t even give him discretion it mandates that he allow them to do that, and so that was the way at least our first appearance in front of the judge ended with them being denied the right to vote in the general election but the right to vote just in the presidential election.

I was kind of shocked at the outcome, and I went and spoke to another supervising attorney. . . . He immediately brought it back in front of the judge. And I was really impressed with how much command he had of the situation and how much confidence. He kind of . . . it wasn’t really a request for a rehearing. It was kind of a demand for an immediate rehearing of the issue, and the judge deferred to him and his expression of or interpretation of the
law. Although it was questionable to me how accurate that interpretation was, but the supervising attorney presented it with a lot of confidence, and the story that he told was very simple and clear for the judge to understand. You know, ours was a little bit nuanced. There were multiple residences involved; there was a question of the test for residency and what shows someone's intent to live somewhere. So upon hearing this argument from the supervising attorney, the judge said that he would allow them to vote in the general election.

4. Motivation

Finally, the student interviews support the cognitive science findings that motivation to attend to a task is an essential component to acquisition of expertise. In regard to Election Day, a number of students mentioned the significance of their deep involvement in the client representation as a factor in their learning. One student related, for example,

*I was there quite a long time. I was there in the morning, left, and came back, and I was there probably from 3:00 or 4:00 till like 8:30 when I left. Before I can say anything specific, I just want to say that it was so cool—like, I was driving home, and I was talking to my friend, and I just realized that I totally had like the best sort of high—when you're so excited about something. I was like, and I came home and I was like, you know. So I turned on the election and I was so exhausted that I fell asleep before like 11:00. I was like, done.*

And another told a similar story:

*I'm driving home and I call one of my girlfriends, and everything was so politically charged, especially with all my friends. And they're all crazy anyway, and they all want to talk about it and I'm like, "I don't even want to talk about the politics; I don't even want to discuss that. Let me tell you what I did today!"

Surprisingly, while the historical nature of the election may have inspired the students to participate in this project in the first place, at the end of the day what appeared to motivate them was not the election itself but the repeated experiences of telling their clients’ stories of why they had a right to vote.

This deep involvement was also apparently fostered by the learning environment at the courthouse that day. As one student recalled,
Dan: We were ready to do what was needed from us. And even though Steve [the election law expert] did try to give us an idea of what the experience would be like, actually going into it and going in front of the judge, it was still a little bit of a shock going from the clinic where . . . . Here on the election day it was a little more loose, a little more informal so that was still a little bit of a shock even though he had tried to tell us what it would be like.

I guess we were all in the same room so we didn’t have the time to pay attention but we were having that group support. Like if I had a question I could turn over and say, “Hey what are you doing? Can you tell me?” I guess then having all of you there and the election guy, although he didn’t actually help out. I think we actually tried to get him for something else, but he was busy. But yeah, everybody was there for the same reason so it wasn’t anything that had to be hidden, you know, I can’t show this to you. It was more of a community, a neighborhood, law office type of feel, everybody comes in, it’s open to the public, and we’ll solve it, and we’ll help you.

Apparently—and without any conscious intent on our part—the surroundings on that date contributed to the experience of flow. There was easy access to information; Steve, an Election Law expert, was present. There was stimulation from other students and attorneys handling similar cases. And there was an overall sense of community of purpose. As Dan implied, it felt like a neighborhood law office, not like a classroom.

III. SCHOLARSHIP ON STORYTELLING PEDAGOGY

Our students’ rapid improvement in performance, with virtually no instruction in narrative theory or storytelling technique, was unexpected in light of the current body of scholarship addressing pedagogy of storytelling skills. The literature largely shares a common focus: to prepare students for storytelling by giving them extensive exposure to narrative and storytelling the-

65. We included in our review scholarship that focuses on teaching law students to use storytelling, narrative, and “case theory” with a storyline focus. In our review, we also included works on “case theory” such as those of Professor Binny Miller, Miller, supra n. 9, at 295 (“The concept of narrative in legal advocacy is rooted in the idea of case theory.”), and Professor Margaret Moore Jackson, supra n. 9, at 84 (case theory connects facts “through the prism of the client’s story”), because of the intense focus on narrative and storyline in the versions of case theory that they teach.
ories, and models for crafting effective stories. In the words of Ruth Anne Robbins and Brian J. Foley, “So how does one tell a story? The first thing to do is to understand what a story is.” This approach dominates the literature and shapes the regnant pedagogy of storytelling.

A. Learning About Stories

In this model for storytelling pedagogy, the focus is less on telling stories than it is on teaching about stories. This process is best described as deconstructionist: stories are broken down for students to gain the requisite “deep understanding of stories” by observing and discussing the various narrative theories, story elements, and techniques that go into story creation.

Advocates of this pedagogical model suggest using sources such as materials describing elements of an effective story, as well as movies, literature, and journalism to provide models and texts for deconstruction and class discussion. For example, Professor Elyse Pepper watches a particular movie with her students and then leads them through a discussion of cinematic storytelling and its use of character, narrative structure, and


67. See e.g. Philip N. Meyer, Vignettes from a Narrative Primer, 12 Leg. Writing 229, 230 (2006) [hereinafter Meyer, Vignettes] (asserting, “[I]t behooves legal writing professors teaching persuasion, law students who will become attorneys, and attorneys litigating cases, to better understand how stories work, and to develop a narrative tool kit supplementing the analytical skills emphasized in legal writing programs.”); Meyer, supra n. 9, at 913 (observing, “Discussions of plot structure, motive and character are essential to understanding the nature of storytelling.”); Miller, supra n. 9 at 302 (observing, “Understanding case theory as storyline presupposes a deep understanding of stories. It requires deconstructing stories to find storylines, and reconstructing stories to support storylines.”);

68. Miller, supra n. 9, at 302.

Bret Rappaport, Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC, 25 Cooley L. Rev. 267, 269 (2008) (observing literature and its elements, “character, setting, plot, theme and tone” should be taught to students to enhance their storytelling).

69. See Foley & Robbins, supra n 66; Meyer, Vignettes, supra n 67; Pepper supra n 9; Rappaport, supra n 67.

70. See e.g. Meyer, supra n 9; Miller, supra n. 9, at 309; Pepper, supra n 9.

71. See Marcia Canavan, Using Literature to Teach Legal Writing, 23 Quinnipiac L. Rev. 1 (2004); Meyer, Vignettes, supra n 67; Rappaport, supra n 67.

72. Miller, supra n. 9, at 317 (“Journalists, even more than lawyers, appreciate the role of case theory in courtroom advocacy.”).
theme. She argues that students can gain a better understanding of effective methods of persuasion by “[d]econstructing the way in which filmmakers tell” stories about legal themes.

The theory seems to be that through the process of experiencing stories, studying them, and taking them apart, students are able to see how storytelling works in practice. They can focus on individual story elements or applications of narrative theory and gain a fuller understanding of the nuances and complexities of persuasive storytelling.

B. A “Long, Slow Process” Culminating in Telling Stories

Embedded in the deconstructionist methodology is the corollary that understanding narrative theory well enough to use it effectively requires a lengthy apprenticeship and an immersion in theory. It is only through what Professor Binny Miller describes as the “long, slow process of reading and talking about lawyer and client stories”76 that students are able to understand how storytelling can be done effectively. As described in the literature, this process requires multiple class discussions and/or supervisory models and repeated exposure to theories and models. For example, Professor Miller describes how she has focused an entire clinic seminar on “translat[ing] the underlying idea of story and storyline to the clinic classroom.”77 She leads students through progressively more sophisticated uses of storytelling, starting with sequential discussions about movies, fiction, and nonfiction, then moving to simulations, “[a]nd, finally, there is real life law-

73. Pepper, supra n. 9, at 205.
74. Id. Movies are singled out for use as models due to the “similarity between trial and movie storytelling,” Meyer, supra n. 9, at 896, and their ability to “do a markedly better job of telling the client’s story than briefs and opinions,” Pepper, supra n. 9, at 177. In addition, when movies necessarily “dumb down” the law, story elements become much more powerful. Miller, supra n. 9, at 309–314.
75. See e.g. Pepper, supra n. 9, at 187 (arguing that “[b]efore, legal writers can effectively use movies as a model for fact writing, they must first understand the particular narrative structure and cinematic methodology filmmakers employ”); Rappaport, supra n. 67, at 285 (noting, “the discussion of [a particular novel] is the primary means of using storytelling to teach law students about storytelling”).
76. Miller, supra n. 9, at 308.
77. Id. at 301.
78. This gradual increase in degree of difficulty is an element of the optimal learning environment that we describe above. However, while it is likely in this case to help students develop effective schemas for analyzing the stories they experience, it is unlikely to develop skill in telling stories.
yering”—representation of actual clients. This is, obviously, a time-consuming and intensive process.

Another clinic professor describes how she introduces narrative and storytelling theory “in case supervision conferences with groups of two or three students well before formally introducing the concept in a larger classroom setting,” and then teaches a 4-class arc on narrative and follows up in supervision sessions. Another professor has taught an entire storytelling course composed exclusively of reading stories and watching movies. As Professors Foley and Robbins argue, if “the people [such as movie screenwriters] whose job or ambition it is to tell stories recognize that they must study extensively in order to tell stories well or even competently,” it makes sense that lawyers similarly need to recognize the importance of extensive study.

Taken as a whole, the scholarship makes it quite clear that in the standard model for teaching storytelling, lawyers must invest significant time formally studying storytelling and narrative theory and technique.

The culmination of this immersion in theory is the constructionist bookend to the pedagogical process, when students assemble the stories that they will be telling; it is only after learning the theories, after identifying the elements of a story, and after examining and borrowing the techniques of accomplished storytellers, that at last an “advocate can build a convincing narrative.”

C. Theory and Telling Stories

It is true that within the storytelling scholarship there is an acknowledgment of the importance of telling real clients’ stories to learn storytelling. However, even those teachers who use

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79. Miller, supra n. 9, at 309.
80. Jackson, supra n. 9, at 87.
81. Id. at 87–91.
82. Meyer, supra n. 9. This course appears to be unique within the literature because it does not have a practical component.
83. Foley & Robbins, supra n. 66, at 464–465
84. Miller, supra n. 9, at 309.
85. Pepper, supra n. 9, at 190 (“After viewing [Dogville], discussing it, identifying the underlying themes and competing viewpoints, the class will be ready” to do the drafting assignment.).
86. Id. at 172.
87. Miller, supra n. 9, at 296 (observing that classrooms and simulations “cannot pro-
live-client cases or simulations often focus on theory. As one clinical professor describes, “[t]he model I employ for my clinical supervision in criminal advocacy rests on narrative theories, and can best be defined as one constantly directing and sensitizing the students towards competing narratives.”

Even in this context, the emphasis is squarely on teaching the theory about storytelling and use of narrative, rather than on learning from the experience itself. The same focus can be seen in the explanations that scholars give for the use of simulations and live clients: actually representing clients is useful for giving students “a concrete understanding” of the narrative model, and “[o]nly through working with actual case scenarios, either real or simulated, do students begin to understand both the theory and how it can be used effectively.” In the current scholarship, theory reigns supreme as the most important element of teaching storytelling.

D. Cause for Re-evaluation

The dominant pedagogy we have described does not have any serious challengers in the academic literature, but our experience on Election Day has caused us to re-evaluate this orthodoxy. Cognitive science findings raise some serious questions about the efficacy of relying almost exclusively on theory and technique as the building blocks of storytelling pedagogy. The extreme focus on theory in the literature is not consistent with the optimal learning environment that we described in Part II, and the dominant methodology alone is unlikely to produce students who are skilled storytellers.

1. Lack of Clear, Focused Goals

As we discussed in Part II, cognitive science research shows that a clearly articulated and focused goal is important for learning: a student who is pursuing multiple or uncertain goals is less able to develop schemas, benefit from repeat experiences, or become immersed in a task. However, the literature’s preoccupation

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89. Id. at 108.
90. Jackson, supra n. 9, at 86.
with giving an extensive foundation in narrative and storytelling theory and technique provides a multiplicity of broad and often murky goals for storytellers, which actually distracts from the learning experience. It is impossible for students to achieve complete involvement in a flow experience if they are preoccupied with figuring out the nature of their goals rather than attempting to achieve them.

Furthermore, cognitive load theory argues that there are limits to the cognitive resources that students can draw on as they learn, and any demand on cognitive resources that does not directly further pedagogical goals reduces the efficiency of learning. The extreme emphasis placed on understanding theory and technique in storytelling and narrative creates significant demands on cognitive resources simply to keep theory in mind when actually telling a story. For example, a student focusing on what Professors Foley and Robbins describe as “only the most important” elements of storytelling would be juggling “character, conflict, resolution, organization and point-of-view.” As we discussed above, focusing on so many things at once leads to cognitive overload. Resources are not available for schema creation or otherwise for learning from the storytelling experience because students are preoccupied with theoretical elements of storytelling. As a result, they are not able to learn efficiently from their experiences; instead, they are likely to become overwhelmed by the process and disengage. This effect could be amplified by intensive and lengthy classroom focus on storytelling methods and theories, with attendant increased cognitive load for beginning storytellers.

2. **Lack of a Motivating Environment**

Optimal learning occurs when a student has the opportunity to become deeply involved with a task and experience total immersion in the activity. Creating an environment that will lead to flow is a crucial part of experiential learning. A focus on theory, however, does not necessarily lend itself to flow. The multiple and complex elements of narrative and storytelling theory present novices with the formidable task of keeping them all in mind

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92. Foley & Robbins, *supra* n. 67, at 466.
93. See *supra* nn. 26–28 and accompanying text.
when crafting a story; rather than becoming consumed by the experience, the student is likely to be distracted from the actual experience of storytelling by the effort of keeping theoretical considerations in mind, and, therefore, unlikely to achieve a state of flow that could lead to rapid and efficient learning.

In addition, an over-reliance on theory and technique can deter spontaneity and creativity, which are important aspects of experiential learning in general and of storytelling in particular. When a student is concerned with formal structures and elements of persuasive narrative, there is limited room for experimentation of the sort we saw from some of our students on Election Day.

3. Lack of Repetition

Finally, the approach advocated in the literature is inconsistent with the crucial need for repeated opportunities to practice a skill targeted for learning. Although there is no necessary incompatibility with emphasizing theory and creating opportunities for repetition, in the legal education context there is the practical question of limited resources. The literature is largely restricted to a discussion of teaching storytelling within the confines of traditional legal writing and clinical courses, where students typically have only a small number of chances to perform any particular skill, including storytelling, and, therefore, have limited opportunities to reflect on their experiences and fine-tune their performances accordingly. This is obviously not consistent with cognitive science findings discussed above on the role of repetition in schema development.

Of course, we are not arguing that there is no value to teaching students theory. Students need a base level of competence in

95. Professors Jackson, Miller, and Mitchell focus on teaching storytelling in their traditional clinical courses. See Jackson, supra n. 9; Miller, supra n. 9; Mitchell, supra n. 9. Professors Pepper, Canavan, and Rappaport focus on the traditional legal writing class as the primary venue for storytelling training. See Canavan, supra n. 71; Pepper, supra n. 9; Rappaport, supra n. 67. Professors Robbins, Foley, and Meyer are legal writing professors whose articles discuss teaching storytelling in traditional law school writing courses as well as to practitioners. See Foley & Robbins, supra n. 66; Meyer, Vignettes, supra n. 67. Professor Meyer provides the only serious departure from the focus on clinics and legal writing courses when he describes teaching storytelling in a decidedly non-traditional course that is a classroom course using only movies and novels as its texts, but this course did not have any practical element and, therefore, also fails to address our concerns about limitations on opportunities to tell stories. See Meyer, supra n. 9.
and comprehension of storytelling’s purposes and processes if they are to be able to actually do it effectively. But we believe that the current dominant pedagogy may take this notion well beyond the point of necessity or helpfulness. Our experiences on Election Day lent support to the insights from cognitive science literature; a more efficient way to teach storytelling is to provide the bare minimum of a theoretical foundation, and then give students the chance to tell stories. And keep telling them. Rather than wait until they have studied extensively, they should be encouraged at a very early stage in their study of storytelling to start telling stories within a supportive and motivating environment and learn from the process. This is, of course, easier said than done. In Part IV, we discuss ways that these concepts might be implemented in practice.

IV. IMPLICATIONS OF ELECTION DAY EXPERIENCE TO TEACHING STORYTELLING

After considering the experiences on November 4, 2008, the obvious question is whether our students’ experiences on Election Day could ever be replicated. As we mentioned before, we are the first to acknowledge that the experiences on that date were significantly influenced by the historic nature of the election. Everyone involved—from the clients to the judges to the clerks—approached these cases knowing full well that November 4, 2008 would be an important day in the history books. But, as our interviews with students indicated, as the day progressed, the ultimate outcome of the election became a secondary issue for many of them. Something about their representation of clients on that day—especially their repetitive storytelling—seemed to result in the students’ acquisition of new, and perhaps, transferable skills. By the end of just one day, some students showed a marked improvement in their storytelling abilities.

A. Design of Election Day Program

In retrospect, the design of the program on Election Day was a perfect venue for such learning. We believe four components of this design were crucial to its success.
1. **Limited Issues and Repetitive Experiences**

The substantive legal issues were very limited. All the cases arose pursuant to one statutory scheme (the New York Election Law), under which the court has very broad discretion. This context gave students the chance to focus on a single goal: crafting the facts elicited in the client interview into a persuasive narrative. And the opportunity for students to engage in the storytelling process for a number of clients helped them develop, in just a few hours, rudimentary schemas for filtering out irrelevant facts and focusing on relevant evidence. Moreover, the different factual situations of each case, as well as the differing degrees of complexity of the cases, prevented these experiences from becoming boring, humdrum exercises.

2. **Minimal Procedural and Evidentiary Distractions.**

These cases also raised few technical procedural or evidentiary issues. As one student, Dan, said in our interview with him, the proceedings were simply, “Client to judge; client to judge.” The paperwork was minimal: an affidavit setting forth the grounds in support of the client’s petition. There was no formal pleading requirement. The hearing consisted of the student’s narration of the story, the County’s response, and questions from the judge to the student and, in some cases, the client. Although the court swore in the petitioner, the student was not required to formally examine the witness. And while exhibits were marked for the record, judges did not adhere rigorously to the rules of evidence. Without these procedural and evidentiary distractions and the anxiety of juggling many tasks at the same time, students could focus on the task at hand: telling a persuasive story.

3. **Cases Challenging Injustice**

Putting aside the historic nature of November 4, 2008, our experience on that date leads us to believe that not every kind of case will create the same kind of rich context for storytelling as those that the students handled on Election Day. Students became deeply involved in these cases and in the storytelling process for their clients because they felt that their clients had been unjustly denied the right to vote. In this context, Edmond Cahn’s observations about our concept of justice seem on point:
Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism . . . organization. . . . Justice, as we shall use the term, means the active process of remedying or preventing what would arouse the sense of injustice. 96

It is that sense of injustice, we believe, that motivated one of our students, a staunch Obama supporter, to ignore her own political beliefs and zealously advocate for her Obama-hating client. To paraphrase Cahn, on Election Day, the courthouse was alive with movement and warmth in our attempts to challenge the injustice of the County’s denial of our clients’ right to vote.

4. Supportive Environment

The final component that we believe was essential to the learning experience created on Election Day was the supportive environment at the courthouse. Students had easy access to copies of the relevant provisions of the Election Law, 97 and an expert in the area was available to answer unusually difficult questions. While neither of us has expertise in election law, our mere presence seemed to have a beneficial effect. After students interviewed clients, they met with us, often very briefly. We tried to help them develop follow-up questions for the clients, parse the language of the statute, fine-tune language in the affidavit, or address ethical issues. Although often we gave very little advice, this collaborative process created a sense that we were all in this enterprise together. And the repeated experiences, along with the feedback from judges and clients, and stimulation of other students and attorneys engaged in the same process, appeared to provide an incentive for students to work on addressing errors in their development of stories. What could have been merely some useful pro bono exercises morphed into deliberate practice and flow.

96. Edmond Cahn, The Sense of Injustice: An Anthropocentric View of Law 13–14 (Ind. U. Press 1964); see Amsterdam & Bruner, supra n. 8, at 46–47 (discussing the importance of “trouble in storytelling”).

97. Surprisingly for students who are often attached at the hip to their laptops during law school classes, these students fended very well for themselves merely using the books.
B. Possible Examples for Replication

The issue of replication, then, boils down to the ability to design a course focusing on developing storytelling skills that incorporates all four of these components: repetitive experiences with limited goals; minimal distractions; cases challenging perceived injustice; and supportive environments.

1. Simulations

From the outset, it appears that it would be difficult to replicate the Election Day experiences with repeat storytelling exercises in simulated cases. While simulations can easily be designed to limit the substantive issues and minimize procedural and evidentiary distractions, the sense of injustice that pervaded the Election Day program would be hard to duplicate without real clients facing actual deprivations of rights. Moreover, without the feedback from actual clients and judges, the motivation for improving performance is not as intense as that experienced by students on November 4. Professors Larry Farmer and Gerald Williams tout the use of repetitive simulations in skills courses using deliberate practice pedagogy (well-defined tasks fashioned to the knowledge base of the students and use of immediate feedback) but identify motivation methods that do not appear to be very effective, at least in the context of teaching storytelling.98 These methods include teaching the students about the benefits of deliberate practice theory, giving them a clear sense of direction for the development of their skills, and pervasive video recording and post-performance evaluation.99 While we have no doubt that students can be motivated somewhat by a clear sense of direction and a desire to improve their performance, the experience of crafting stories to challenge an injustice and receiving feedback in the process from clients and judges is significantly different. Stories in law cases develop from the “troubles” faced by actual clients.100 In our opinion, the best way to motivate students to give voice to these troubles is through repetitive storytelling experiences in actual cases.101 Some of the benefits of our experience, however,
can be obtained through well-designed simulation exercises. As is generally recognized,

Good simulations need to be designed with a realistic context which will both involve the students and make what they learn transferable to a wide variety of lawyering circumstances. The closer to reality the problem is, the more likely the student will behave as if she is dealing with an actual problem for actual clients. In turn, the student is more likely to appreciate that both the indeterminacy of facts and the reality of professional and human issues are an integral part of being a lawyer.

This need for verisimilitude is especially important in crafting exercises for repeated storytelling experiences. If the simulations appear too artificial or unrealistic, student performances will become nothing more than “cut and paste” jobs. The exercises need to provide students with the motivation to continue to fine-tune their performances. In this context, several factors should be considered in designing storytelling simulations.

First, like the Election Day Program, the exercises should concern areas of the law that have minimal procedural and evidentiary distractions, have rich factual contexts, raise few substantive issues, and challenge injustices in the clients’ lives. Many small administrative law cases are ideal vehicles for such exercises. In cases in areas such as public housing termination hearings; Medicaid denials; unemployment compensation disputes; public utility terminations; or denials of veterans’ disability benefits, students can handle simulations of cases that have significant impact on their “clients’” housing or subsistence. These cases are often fact-intensive, and the clients’ stories can easily be

thing in a simulation except for the feeling, the real feeling, of the last 200 feet of landing.”
Pauline W. Chen, Practicing on Patients, Real and Otherwise, N.Y. Times D6 (Feb. 2, 2010).

103. See e.g. James C. May, Hard Cases from Easy Cases: In Defense of the Fact—and Law-Intensive Administrative Law Case, 32 John Marshall L. Rev. 87 (1998) (touting the value of administrative law cases for clinical cases for many of the reasons discussed in the text). James May goes further, however, and argues that in addition to these benefits, small cases may “ripen” into hard cases and may provide sufficiently difficult material to challenge both students and faculty. Id. at 92–97. In the context of teaching storytelling through repeat experiences, these concerns are not relevant.
crafted for different levels of complexity and factual context. In most of these administrative fora, few procedural and evidentiary rules apply, the cases can be designed to involve only one or two substantive legal issues, and the role of the hearing examiner or administrative law judge is to assess credibility and fairness issues. Effective storytelling becomes the primary objective.

To develop exercises of varying complexity for these kinds of issues, we suggest that teachers review files of attorneys who have practiced in the particular area or, if accessible, files from friendly agency staff members. Obviously, the facts of more complex cases can be tweaked to limit the issues for the particular simulation. Such files reflect actual situations, not contrivances by law professors. Based on these files, teachers can craft detailed scripts for the “clients” that describe not only the facts of their cases but also the persona of the clients, adversaries, and other third parties.

Second, to increase the realism of the simulations, actors should be used for the simulated clients, and actual hearing examiners or practicing attorneys should adjudicate the cases. As we discussed previously, feedback from clients and judges was an important part of the learning experience on Election Day.\(^{104}\) Feedback from other students performing as clients or instructors acting as hearing examiners likely will have much less impact than assessments from unknown third parties. While it has become fairly common for skills-based courses to use actors for simulations,\(^{105}\) little empirical data exist as to the particular benefits of such a practice. In one study in the health professions, however, the researchers compared students performing a nursing skill with a mannequin, a real patient, and an actor.\(^{106}\) They found that students who practiced with a mannequin did not master the skill, but students who practiced with an actor-patient mastered the skill most quickly.\(^{107}\) The researchers concluded that students

\(^{104}\) Supra pt. II(C)3.


\(^{107}\) Id. The subjects who practiced with actual patients performed less effectively than those who worked with actors, perhaps, the researchers surmise, because of the stress they
who practiced with actors preferred learning in an environment with purpose and authenticity. For storytelling simulations to replicate in any way Election Day, students will need to experience a purpose and authenticity from the exercise aside from the usual requirements of a law school assignment. Incorporating actors who are given carefully drafted scripts and who are trained to portray complex characters, as well as actual hearing examiners or attorneys acting as fact finders, simulated exercises have the potential to provide students with an environment that encourages learning storytelling from experience.

Finally, to reproduce the conditions of the Election Day project, we suggest the use of a “real-time lawyering process.” Instead of teaching students the law and storytelling theory over the course of several weeks, the instructor should have students experience practice in real time. Preferably with a practitioner in the area, the teacher should hold a short training session on the applicable law. At this meeting, students can engage in mini-simulations to get a feel of the process. Then, a few days later, the students should meet their clients and, over the course of only one or two days, prepare their cases and represent their clients at hearings. This short time span should motivate them to become deeply engaged with their cases. Ideally, with a cadre of actors, students could then replicate the experience two or three times over a period of several weeks. With exercises of increasing complexity, optimal learning can be achieved through repetitive practice, feedback, and the ability to fine-tune their skills.

2. Traditional Clinics

Although we strongly believe that storytelling can best be learned by representing real clients in real situations, the traditional model for clinical education is not designed to teach storytelling skills in an optimal way.

We know from experience that students in a clinic are highly motivated by the responsibility of representing live clients and

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108. The concept for this approach was developed by Professor Barbara Barron at Hofstra School of Law. She has prepared materials for “real-time lawyering” mini-courses in which students represent clients either in a proceeding to obtain a temporary restraining order or in a negotiation with a creditor before bankruptcy, handling the cases in real time.
can get caught up in the representation of their clients, and as professors we provide a helpful environment and expert guidance. However, clinics are slow and inefficient by design, with students representing a few clients (in some cases a single client) throughout their time in the clinic. As a result, there is usually very limited opportunity for repeated storytelling experiences. Feedback from courts and administrative bodies—and even from clients—about the stories students tell is generally not immediate. In fact, in many clinics it may not come during the student’s tenure in the clinic at all. Goals come from the clients, and are therefore not guaranteed or even likely to be narrow or clearly defined. In addition, where live clients are involved, there are competing concerns that make choices about which goals are pursued messy and imprecise. Even clinics with a very narrow subject-matter focus are not likely to present the kind of controlled environment that is necessary for effective deliberate practice.

We are both clinicians who generally use a fairly standard model for clinical teaching, and it is not our desire here to completely renounce that approach. However, we were made aware of the sharp contrast between “regular” clinical work and the Election Day experience in our discussions with students following Election Day. Students observed that the “slow motion” process that we use in our clinics at Hofstra was starkly different from the high-speed, high-volume practice that emerged on Election Day. By freeing our students from the confines of the prevailing clinical model, we gave them the opportunity to refine their skills in a wholly new and unexpected way.

In fact, on Election Day, we basically threw the clinical model out the window. We could hardly have come up with a less standard clinical model had we tried. We had students with highly condensed training representing multiple clients in a single day, repeating activities in rapid succession, and getting instant feedback. To a certain degree, we simply let the students go and hoped for the best. For many of them, this was the first time they had the chance to appear in court or represent a client in front of a judge. We ended up with an experience that was almost completely controlled by the students’ ability to gather facts and then extract relevant elements to present a persuasive story to the judges. By (unintentionally) stripping away all of the other elements of clinic—or, indeed, typical “real world” practice—we gave our students the opportunity to practice one or two skills over and
over in a controlled environment. We were frankly a bit worried by the unorthodoxy of our project because the clinical model that we generally use does not contemplate educational methods like those we found ourselves using on Election Day.

This is not to suggest, however, that a clinical setting could not be created to teach storytelling skills more effectively. While the literature on other attempts to teach skills such as storytelling through repetitive practice in actual cases is sparse, it appears that several clinics have had success with this method for many of the same reasons that our Election Day program was effective. Ian Weinstein, for example, writes about the effective learning experience in a clinic in which students represent clients in violation and misdemeanor cases in a high-volume court in New York City.\textsuperscript{109} Many of the virtues he identifies about his clinic are very similar to those we found on Election Day: (1) in his clinic, students work on “small, predictable cases . . . that . . . require a relatively small set of simple schema”;\textsuperscript{110} (2) the cases “provide . . . manageable legal puzzles whose solutions are usually well understood”;\textsuperscript{111} (3) the cases are “complex enough to offer a wonderful learning opportunity, but simple enough so that almost all of our students are able to develop useful cognitive models or schema”;\textsuperscript{112} and (4) students are motivated by the knowledge that they are making a difference in their client’s lives.\textsuperscript{113} Indeed, Weinstein relates storytelling experiences that sound a bit like ours on November 4:

\begin{quote}
In our cases, bail arguments are good teaching and learning tools because they are small in scope, controlled by a detailed statute, based on rich facts to which we usually have very good access (our clients know a good deal about themselves), well understood by the teachers, and can make a real difference in our cases . . . . The arguments are typically brief, lasting one to three minutes and including roughly three points: strong community ties, weak prosecution case, and minimal prior court history are typical. These arguments can be polished into shining little gems which can mo-
\end{quote}

\textsuperscript{110} \textit{Id.} at 584.
\textsuperscript{111} \textit{Id.} at 577.
\textsuperscript{112} \textit{Id.} at 585.
\textsuperscript{113} \textit{See id.} at 576–577.
tivate, serve as models, and make a real difference to our clients.\textsuperscript{114}

In a similar vein, Kimberly Thomas describes her clinic focused on representation of actual clients in sentencing proceedings in misdemeanor cases.\textsuperscript{115} She contends that such proceedings are conducive to teaching the skill of crafting case theory in large part because in many lower courts the sentencing law system is not complex; evidentiary rules are relaxed in these proceedings; the factual development of the case will usually have occurred prior to sentencing; these hearings are often good fora for using stock images and stories from popular culture; and the decisions at these hearings are critical to the client and may affect future decisions made at probation and parole hearings.\textsuperscript{116} And similar to our experience, she observes that the multiplicity of differing narratives that can be told in these cases furnishes a rich context for teaching students the craft of case theory development.\textsuperscript{117}

Besides small criminal cases and sentencing hearings, a number of other clinical caseloads potentially could provide storytelling experiences similar to our Election Day program. As discussed above,\textsuperscript{118} small administrative cases could provide excellent opportunities for repetitive practice in the clinical setting. Unemployment compensation hearings, for example, usually raise fairly limited substantive law issues, are informal proceedings, concern issues of perceived injustice, and generally provide the students with feedback from the hearing officer. In regard to storytelling skills, they give students the opportunity for crafting rich stories in repeat cases. Likewise, small claims cases may be conducive to effective repetitive practice, especially if the clinic caseload is focused on a particular type of case, for example, warranty of habitability claims by tenants. By limiting the cases to those with a common substantive legal theory, as well as a claim of injustice, students have the opportunity to craft their stories without the distractions of formal court procedures.

\textsuperscript{114} Id. at 587.
\textsuperscript{116} Id. at 206–209.
\textsuperscript{117} Id. at 199–200.
\textsuperscript{118} Supra n. 98 and accompanying text.
CONCLUSION

Election Day 2008 was an unforgettable day for all of us, but we are well aware that it was not an empirical study or even consciously designed, and we do not pretend that our observations of rapid student progress can be taken as conclusive evidence that it is the ideal model for teaching storytelling. Nevertheless, our experiences have some important implications for teaching storytelling to law students.

The first implication is the need to reassess the dominant pedagogy in this area. It is an essentially unchallenged article of faith in the scholarship that extensive training in theory is the best—and perhaps the only—path to proficiency as a storyteller. However, our students’ rapid progress in storytelling ability despite receiving almost no training in storytelling theory suggested that immersion in theory was not crucial to learning this skill. While we do not discount the importance of some training in narrative theory as part of the curriculum in teaching storytelling, our experiences highlight the need to evaluate and question the dominant pedagogical model.

A second and related implication is that cognitive science research should play a role in the design and implementation of storytelling teaching methods and, for that matter, other areas of skills training. Much of the scholarship on the teaching of storytelling is based on the personal experience and preference of the instructors. Cognitive science research expands our understanding of the learning process and demonstrates the importance of repetition, feedback, motivation and flow when creating optimal learning environments and raises serious questions about the methods now being used to teach skills such as storytelling.

Finally, our experiences on November 4, 2008 invite further research into effective storytelling pedagogy to test our observations and expand on them. Such research might evaluate additional naturally occurring situations like Election Day or other supportive and repetitive learning environments crafted by creative teachers. An intriguing issue is whether students can transfer the skills they learned in contexts such as the Election Day project into other arenas, especially those involving more complex legal and factual issues. While this is not an insignificant challenge, we have highlighted some clinical programs that are hav-
ing success with the repetitive environment we have discussed, and we believe that it can be replicated in other areas as well.
WHEN THE TRUTH AND THE STORY COLLIDE: WHAT LEGAL WRITERS CAN LEARN FROM THE EXPERIENCE OF NON-FICTION WRITERS ABOUT THE LIMITS OF LEGAL STORYTELLING

Jeanne M. Kaiser

In Chechovian drama, chest pains are followed by heart attacks, coughs by consumption, life insurance policies by murders, telephone rings by dramatic messages. In real life, most chest pains are indigestion, coughs are colds, insurance policies are followed by years of premium payments, and telephone calls are from marketing services.¹

With these words, the never-retchent Alan Dershowitz throws cold water on the legal storytelling movement. According to Dershowitz, “life is not a dramatic narrative.”² Indeed, such was the title of his article criticizing legal storytelling.³ And the problem with lawyers, he thinks, is not that they do not make a sufficient effort to tell a legal story. Rather, the problem is that they confuse the canons of literature with real life.⁴

The literature⁵ emphasizes the many values of using the techniques of story and narrative when teaching and practicing

². See generally id.
³. Id.
⁴. Id. at 102.
⁵. There has been at least one law review symposium issue devoted to legal storytelling. “Chapter One” of the Legal Writing Institute’s conference on this issue was held in London in 2007 and was commemorated in Volume 14 of Legal Writing: The Journal of the Legal Writing Institute. Symposium, Applied Legal Storytelling, 14 Leg. Writing 3 (2009); see e.g. Symposium, Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law, 18 Vt. L. Rev. 565 (1994). Nineteen essays and comments on the use of story in legal writing and argument are collected in the book, Law’s Stories: Narrative and Rhetoric in the Law (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996). A number of academic articles have been pub-
legal writing. But Professor Dershowitz’s point should be well-taken. Life is not a dramatic narrative. Indeed, sometimes our clients’ real-life stories do not jive at all well with the conventions of such narratives. This can be particularly true when we try, as has been suggested, to tell our clients’ stories using the forms of myth and archetype. As valuable as those paradigms can be to legal writing, we must always be aware that sometimes the demands of truth and demands of story can collide.

In facing the dangers of such a collision, we can learn from our predecessors in adopting the techniques of fiction and narrative when telling a true story: the New Journalists. After Truman Capote published In Cold Blood in 1965, he was heralded for writing a “non-fiction novel”: a book that told a true story while brilliantly using the techniques of fiction. Capote, along with a number of other “New Journalists,” launched a new movement in non-fiction writing that remains both influential and controversial today. While this movement was praised for bringing a literary quality to non-fiction work, its members were also accused of believing that “fiction is the only shape we can give to facts.”

As legal writers, we must be vigilant in assuring we keep what is best about storytelling, while avoiding the criticisms writers like Capote faced about shaping the facts to meet their literary goals. Legal writers have a professional and ethical obliga-


12. See e.g. Phillip K. Tompkins, In Cold Fact, Esquire Mag. (June 1966) (reviewing
tion to be wholly factual in their written work. But equally important, we should not discount the other powerful tools at our disposal—precedent, reason, and analysis—while working too hard to shape our legal writing into stories. A too-enthusiastic embrace of the power of storytelling might cause us to walk too close to the line between brief writing and fiction, while at the same time failing to capitalize on the other potent weapons in our legal arsenal. In short, we should not succumb to believing that “fiction is the only shape we can give to facts.”

With this in mind, this essay examines what can be gained and what can be lost by using storytelling in legal writing. After reviewing some basic principles of legal storytelling, the essay reviews some lessons that can be learned from the experience of the New Journalists who adopted literary techniques in their non-fiction work. In the end, the essay concludes that while there is much value in using the tools of fiction in legal writing, it is only with a blend of narrative and analysis that we most successfully do our jobs as lawyers.

I. STORYTELLING: THE BASICS

The basic concept of storytelling in legal writing is to turn the client/plaintiff/defendant into the main character of a story with a

the many factual inaccuracies in Capote's book and suggesting these inaccuracies existed to serve Capote's desired plot and character development).

13. Model R. Prof. Conduct 3.3(a)(1) (ABA 2009) (providing that a lawyer may not knowingly make a false statement of fact to a tribunal); Model R. Prof. Conduct 4.1(a) (ABA 2009) (providing that in the course of representing a client, a lawyer shall not knowingly make a false statement of fact to a third party).

14. The exact location of that line is also of interest to fiction writers. When writing this essay, this Author was struck by the irony that at the same time that the legal academy has been so interested in molding factual accounts into the form of fictional stories, fiction writers are preoccupied with the blurriness of the line between fact and fiction. In the course of the last year, this Author has read a number of novels that involve the line between story and truth and that contain endings that leave the reader in serious doubt about what “really” happened. These novels include the classic of its kind, Ian McEwan's *Atonement*, as well as Charles Baxter’s *The Soul Thief*, and P. F. Kluge’s *Gone Tomorrow*. An author even recently had great success with a mystery novel in which the central mystery was left unsolved. See Tana French, *In the Woods* (Penguin Bks. 2007).

In addition, this urge to capture reality in fictional forms has spread to television. After eight years, the HBO show *The Sopranos* failed to present a clear cut ending to the show. The final episode famously cut to black as Tony Soprano and family sat down to dinner, creating uncertainty as to whether Tony survived the meal. *The Sopranos* (HBO June 10, 2007) (TV series).

15. See Wood, supra n. 11.
compelling plotline.\textsuperscript{16} There has been a fascination with this type of legal storytelling among a segment of the academy for some time now.\textsuperscript{17} The fundamental principle espoused by most of these scholars is that there is a power in stories that lawyers should harness in their advocacy. Those promoting storytelling in the law contend that well-constructed stories have as much power to persuade as well-developed and well-reasoned legal arguments that rely on logic and precedent.\textsuperscript{18} In view of this, proponents of legal storytelling contend that lawyers should learn to use the common story elements of character, conflict, resolution, organization, and point-of-view.\textsuperscript{19} Indeed, proponents argue, failure to use these components of storytelling leaves a fertile means of persuasion unexploited. This is particularly true because lawsuits, unlike novels and short stories, have no pre-determined ending. This lack of resolution places the judge or other fact-finder in the position to create the ending to the story. Accordingly, when lawyers tell an effective story, they empower the fact-finder to choose the most satisfying resolution to the tale.\textsuperscript{20}

This mode of thinking has found a home in the legal writing classroom. Most legal writing texts, at a minimum, encourage students to present the facts from their clients’ point of view; to emphasize positive facts; and to make an emotional appeal where appropriate.\textsuperscript{21} But some texts more explicitly encourage storytelling. For instance, in their book for first-year law students, \textit{Legal


\textsuperscript{17} See supra n. 5.

\textsuperscript{18} See Chestek, supra n. 5, at 134 (stating that “fiction writing is not so different from brief writing” because they share the traits of plausibility, readability and “most importantly both evoke an emotional response from the reader”); Foley & Robbins, supra n. 5, at 465 (asserting that “[t]he most powerful tool for persuasion may be the story” (emphasis in original)); Rideout, supra n. 5, at 60–62.

\textsuperscript{19} Chestek, supra n. 5, at 138–150 (explaining how the techniques of storytelling such as setting, character, plot, and theme can be used in brief writing); Foley & Robbins, supra n. 5, at 466.

\textsuperscript{20} Foley & Robbins, supra n. 5, at 467.

Writing, authors Richard Neumann, Jr. and Shelia Simon encourage students to “build” a story when writing a brief. They assert that most stories start in a state of equilibrium. Then, “bad things happen to disrupt the equilibrium.” The story continues as the client, or protagonist, struggles to restore matters to their rightful place. When the story is presented in this way, the authors assert, the judge will naturally want to restore equilibrium by deciding the case in the favor of the client/protagonist. Some legal writing professionals have encouraged legal writers to employ even more sophisticated literary techniques in their efforts to persuade. For instance, Michael Smith, in his book Advanced Legal Writing, explores the use of metaphor and literary allusion as persuasion techniques.

Going even one step further, Ruth Anne Robbins has suggested that the legal writer can and should intentionally affect the subconscious desires of the decision maker. She asserts that lawyers should not only use the techniques of plot and character in legal writing; they should also seek to transform the client’s story to an archetypal journey. Robbins argues that “[b]ecause people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately . . . subtly portray[ ] their . . . clients as heroes on a particular life path.” She emphasizes that this is not simply a means to make the client’s legal matter more interesting to the judge. Rather, it is a means to “influence the judge at the unconscious level.”

This encouragement to target the subconscious impulses of the judge appears to move legal writers beyond providing a well-told story from the perspective of their client. Attorneys have traditionally viewed themselves as using the dispassionate tools

23. Id.
24. Id.
25. Id.
26. Id. at 202.
28. Robbins, supra n. 6, at 769.
29. Id.
30. Id. at 768–769.
31. Id. at 769.
of logic, reason, and precedent to make their cases in court. The suggestion that a lawyer should supplement those tools by seeking to manipulate the subconscious impulses of a judge is an interesting one, and it is perhaps debatable whether lawyers should even make the attempt. Nonetheless, the question addressed here is whether, in the attempt to craft a story that conforms to the conventions of myth and archetype, the legal writer runs the risk of elevating the needs of the story over the details of the legal problem. Here, it can be helpful to look at the quandaries faced by the New Journalists who tried to weave the techniques of fiction into traditional reporting without sacrificing what was important about their message in the first place.

II. LESSONS FROM THE NON-FICTION WORLD

The journalist and novelist Tom Wolfe popularized the term New Journalism when he released an anthology in 1973 of works that he believed reflected a new movement in non-fiction writing. The New Journalism can be distinguished from the old journalism by the use of four literary techniques in the creation of non-fiction pieces: (1) scene-by-scene construction as opposed to historical narrative; (2) large amounts of dialogue in the story; (3) recording “status details” or pattern of behavior and possessions; and (4) a marked point of view within the story.

Included in Wolfe’s anthology of the New Journalism is an excerpt from Truman Capote’s In Cold Blood. Capote’s work

32. Chestek, supra n. 5, at 135. The public debate over the nomination of Justice Sonia Sotomayor to the United States Supreme Court was to some extent a contest of the value of story versus the value of pure reasoning. In a comprehensive review of the nomination and confirmation process, Lauren Collins noted the ways in which the proponents of Justice Sotomayor’s nomination emphasized her compelling life story over explanation of her judicial philosophy. Lauren Collins, Number Nine: Sonia Sotomayor’s High-Profile Debut, New Yorker (Jan. 11, 2010). This contrasted with the view of judge as umpire merely calling balls and strikes that Chief Justice Roberts promoted during his own nomination process. Jeffrey Toobin, No More Mr. Nice Guy: The Supreme Court’s Stealth Hard-Liner, New Yorker (May 25, 2009). In these statements, opponents ignored the fact that there was no single way to apply the law in the cases before the Court—and that indeed the most common reason a case lands before the Supreme Court is because there has been disagreement on how the existing law applies to a particular factual scenario.


34. Hollowell, supra n. 8, at 25 (citing Tom Wolfe’s description of what separates the New Journalism from the old).

35. See Capote, supra n. 7.
crystallizes the considerable advantages, along with the serious pitfalls, of using fictional devices in non-fiction work, be it the story of a murder or a legal brief on behalf of a murder defendant. Truman Capote characterized his book about the murder of the Clutter family in Holcomb, Nebraska in 1959 as a “non-fiction novel.” Capote’s use of the term “novel” for In Cold Blood was not meant to imply that there was anything fictional about the book. He was not, for instance, asserting that it was like historical fiction—based on the truth, but not true in every detail. To the contrary, in the preface of the book Capote vouched for the accuracy of his book:

[all the material in this book not derived from my own observations is either taken from official records or is the result of interviews with the persons directly concerned, more often than not numerous interviews conducted over a considerable period of time.]

Capote’s use of the term “novel” was instead based on the style and presentation of a non-fiction story. The book reads like a novel, and a good one at that, because of its expert use of setting, point of view, re-created dialogue, and character development. Impressively, Capote, using the techniques of a novelist, is able to build a level of suspense both when leading up to the murder of the Clutter family and to the execution of the killers, even though presumably most readers know that both events had happened before even opening the book.

There is no question that Capote’s book works from a storytelling standpoint. In fact, Capote was successful at creating a myth out of archetypal characters in the way that legal writers have been encouraged to tell their clients’ stories. In the view of John Hollowell, Capote worked a myth from a “passionless” recitation of facts. According to Hollowell,

despite Capote’s relentless care to present only the facts and his reluctance to impose a too easy moral, his story achieves in the end a kind of mythic significance. The destiny of an

36. Hollowell, supra n. 8, at 64.
37. Capote, supra n. 7, at Acknowledgments page.
38. Hollowell, supra n. 8, at 63.
39. See generally Robbins, supra n. 6.
40. Hollowell, supra n. 8, at 79.
archetypal American family crosses paths with warped killers whose vengeance is portrayed more as the result of fate than of human motivation.  

In essence, Capote achieved the creation of a mythic story out of bare facts in the way that legal writers have been encouraged to shape the stories of their clients.  

But although there is little dispute that *In Cold Blood* is a successful work of art, is it a successful piece of factual journalism? Capote’s success here is far less clear. Capote’s assertion that every word that he wrote was true has not held up well under exacting scrutiny.  

In a 1966 Esquire magazine article, Phillip Tompkins undertook a painstaking fact-check of *In Cold Blood* and found it wanting in many respects. Some of Capote’s factual inaccuracies, Tompkins admits, are not important. For instance, it is relatively inconsequential that one of the murder victim’s horses sold for much more money at an auction than Capote reported in the book. What is crucially important, however, are the questions surrounding a focal point of the book, Capote’s portrayal of one of the killers, Perry Smith. As Tompkins demonstrates, it is difficult, if not impossible, to determine exactly what happened in the Clutter household on the night of the killings from Smith’s various and contradictory retelling of the events. What is clear, however, is that Capote reported just one version of Smith’s story in the book. Even more problematic is that this version of the story was heard only by Capote, who did not take notes in his meetings with Smith, but rather wrote up the conversations within hours of returning to his room after their meetings.  

41. *Id.*  
42. See *Robbins, supra* n. 6, at 768–769.  
44. See Tompkins, *supra* n. 12.  
45. *Id.* at 127.  
46. *Id.* at 166–170.  
47. *Id.* at 170.
report of his conversations with Smith was corroborated by no one and contains significant contradictions to the verbatim transcripts of Smith’s conversations with the police.48

In Tompkins’s view, Capote’s motivation to use the account that only he had heard, as opposed to a prior account, or even reporting Smith’s several accounts of the murder, was clear. The “novel” Capote was writing needed “a dramatic climax, a moment of truth.”49 Because of this need, “there followed a subtle but significant alteration of the facts to fit a preconception of the novelistic, transforming an unexciting confession into a theatrical catharsis.”50 As Tompkins saw it, in order to fit his needs as a novelist, Capote transformed Perry Smith, who most evidence showed was a cold, unrepentant, premeditated murderer, into a man who killed in the grip of a “brain explosion”51 and who cried at the end of his life and felt shame at what he had done.52 It is, Tompkins says, a “moving portrait” but not the portrait of Perry Smith as he actually existed.53

What this means for the reader of In Cold Blood depends on the needs of the individual reader. Capote provides a convincing depiction of a spree killer.54 Some readers may not care very much that this depiction is not an absolutely accurate one, nor that the words that Capote put in Smith’s mouth may not be exactly what he said. Because the desire to get into the mind of such a killer is a primary reason we read the book (and is indeed the same reason we might read a high quality novel on the same subject), our goal as a reader is satisfied despite questions about the literal truth.

Capote’s methods may have indeed created a work of art. But legal writers do not have the luxury of being able to be selective about the details of their cases to achieve storytelling goals. When we as lawyers represent a spree killer, we represent a par-

48. See id. at 166–170.
49. Id. at 170.
50. Id.
51. Id. at 171.
52. Id.
53. Id.
54. One reviewer said that Capote’s interpretation of the facts made the reader see Smith and his co-defendant not as “illiterate, cold-blooded murderers” but as “literate, psychopathic heroes.” Hollowell, supra n. 8, at 74 (citing Sol Yurick, Sob-Sister Gothic, in Truman Capote’s In Cold Blood: A Critical Handbook 76, 80 (Irving Malin ed., Wadsworth Publg. Co. 1968)).
meric spree killer, not an archetypal one. The facts and the argument must of necessity focus on what really happened, no matter how prosaic, and not a “theatrical catharsis.”  

It is at this point that the legal writer must be very cautious about attempts to build mythic stories out of archetypal characters in the attempt to affect the subconscious of the decision maker. The legal writer, like Capote, may have a story that he or she wants to tell about the client. But the legal writer may also face the same problem as Capote—the story is not precisely true. In such circumstances, the temptation to tell an archetypal story, on the theory that this story is an effective means of persuasion and will place the judge in the position to provide an emotionally satisfying resolution, must be resisted—not encouraged.

III. AN EXAMPLE FROM LEGAL PRACTICE

The warning about truth-telling in legal stories may seem as self-evident as to go without saying. But the attractions of telling a tightly constructed and forceful story may at times have a subtle pull on the legal writer that could work to blur the line between good storytelling technique and complete accuracy.

This enticement can arise in an area in which this Author practices—appeals of child protection cases. A lawyer representing children in these cases may find the encouragement to present legal stories in the form of myth and archetypes, or stories that allow the judge to side with the hero, very attractive because these cases at their simplest level seem tailor-made for presentation in the form of a classic fairy tale. Specifically, the “plot” could revolve around the child who is cruelly abused or neglected. As the action unfolds, the lawyer could portray the child as facing danger and deprivation. However, the lawyer would have a hero, in the form of the state child protection agency, at the lawyer’s disposal to swoop in to protect the child. New heroes could then appear in the form of selfless foster parents who step in to provide love, care, and protection. The lawyer could next portray a struggle in which the villainous parents attempt to regain custody of the child. Then, according to at least one theory of

55. See Tompkins, supra n. 12.
56. See supra nn. 16–20 and accompanying text.
57. See Robbins, supra n. 6, at 768–769; Neumann & Simon, supra n. 22, at § 28.3.
legal storytelling, at the culmination of the appellate case, the court will naturally want to assume the role of the latest hero in the story by affirming the trial court’s decision to terminate the bad parents’ rights and allow the child to be adopted by the foster parents. In short, everyone lives happily ever after.

However attractive it is to tell the story of a child protection case in this manner, it likely is simply a fairly tale and not the real story. This Author’s own experience has shown that it is extremely common for children to remain strongly and stubbornly attached to their natural parents and to long to return to their original homes. Thus, although to outsiders, the natural parents may appear to be the villains in the story, the children themselves have placed the state in that role. In addition, the foster parents identified by the state may not be the paragons of generosity and affection that a fairy tale requires. Instead, the foster parents may be considerably flawed themselves and have questionable motivations for wanting to adopt the child. The reconstituted family may be facing years of struggle and, in some cases, even dissolution.

The struggle, therefore, for the legal storyteller is not to tell the story that seems most satisfying for the court to resolve or the one that conforms to an archetype. Rather, the legal storyteller must shape a more complex story where the choice between natural parent and foster parent is unclear; the state agency is more of a faceless bureaucracy rather than a heroic character; and the child’s fate is uncertain no matter what decision the factfinder makes. This is a story that is far more likely to send a judge home troubled by doubts about his or her decision than with a sense of deep satisfaction at playing the hero. This is not to say that there is no role for narrative techniques in telling the story of the client. However, the story may be more complicated than the archetypal story with a clear-cut ending. In other words, the legal writer should make the choice that Truman Capote did not make in In Cold Blood and present the story in all its complexity instead of choosing the plot and characterizations to serve the needs of a pre-determined narrative.

58. See Neumann & Simon, supra n. 22, at § 28.3.
59. See supra nn. 35–53 and accompanying text.
A. Another Plot Problem—Reality Intrudes

Another roadblock in storytelling can occur when the story one wants to tell is basically true, but there are inconvenient detours along the way that complicate the narrative. The New York Times media writer, David Carr, recently wrote a memoir that epitomizes this scenario. He wrote a “junkie memoir,” one of the many books in recent years that recount the author’s story of addiction and recovery. Carr at first assumed that his memoir would have the typical arc of the genre: he was a talented, but troubled professional; he succumbed to the temptations of drugs; he engaged in despicable but extremely interesting behavior while in the throes of addiction; he had an epiphany; and then he triumphed over the addiction. Before writing this story, Carr, perhaps in order to distinguish his book from others of the same genre, or to assure the unassailability of the truth of his story, decided to use his professional skills as a reporter to investigate his own life story.

What he found, by his account, surprised him. The basic arc of his story fit the traditional junkie memoir narrative. He was a promising young writer, who succumbed to drug addiction, lived a life of depravity, ultimately cleaned up after his twin daughters were born, and became a successful reporter and father. At the outset he assumed that his story was the stuff of “a Joseph Campbell monomyth in which our hero embraces his road of trials, begins to attain his new goals, and hotfoots it back to the normal world.” In other words, Carr believed he had the raw material for the type of mythical story that theoretically could serve not just the needs of the memoirist but also the legal writer.

61. Id. at 22–25.
62. Id. at 25–27. Carr provides a cautionary tale for those who seek to make their stories too much like fiction. He wrote that before embarking on his own project he “read some of the classics of the genre” and was immediately skeptical. Id. at 25. “After reading four pages of continuous ten-year-old dialogue magically recalled by someone who was in the throes of alcohol withdrawal at the time, I wondered how he did it. No I didn’t. I knew he made it up.” Id.
63. See generally id.
64. Id. at 167.
65. See Robbins, supra n. 6, at 768–769.
Nonetheless, by investigating his own past, Carr discovered that his life story was indeed “a myth, but not the kind Joseph Campbell had in mind.”\textsuperscript{66} Or, in other words, Carr had the material for the type of myth no legal writer should create.\textsuperscript{67} One myth punctured by his reporting was that he quickly sobered up after his twins were born. Carr determined that even after his twins were born, he continued to use drugs for eight months before he took his first stab at a rehabilitation program. During this period, he repeatedly placed the children in danger, at one point leaving them alone in a car when they were only a few months old, while he spent at least an hour of that winter night in Minnesota inside an apartment too seedy to bring the twins into, buying and using drugs.\textsuperscript{68} Carr also was disabused of his conviction that when he was released from rehab his lawyer viewed him as a man on a mission to regain custody of his children.\textsuperscript{69} To the contrary, his lawyer thought he appeared to be so dysfunctional she wondered whether this was a “realistic goal.”\textsuperscript{70} In other words, Carr’s redemption story had elements of truth, but it also had many inconvenient details and detours.

In short, Carr’s story could take the general form of a heroic myth, but to be accurate it had to incorporate the unsavory details as well. Lawyers are frequently faced with this dilemma: the essence of their clients’ stories allows them to be cast in the role of hero, but the detours are significant. For lawyers, however, the choice is not as simple as it was for Carr, who merely needed to come up with a different way to pitch his book—one that probably made it more interesting and marketable.

\textsuperscript{66} Carr, supra n. 60, at 167.
\textsuperscript{67} Of course, the ultimate lesson to be learned from non-fiction writers is that it is incumbent on legal writers not to transform a factual story into fiction, lest they end up in the position of memoirist James Frey. Frey famously converted his true, but fairly prosaic story of drug addiction, into a false, but dramatic, tale of crime, punishment, and dental surgery without anesthesia in his book, \textit{A Million Little Pieces} (Anchor Bks. 2003). Frey succumbed to the temptation to elevate the needs of the story over the need for a memoir that at least attempted to approximate the truth. As a consequence, he went from being the author of an Oprah-endorsed best-seller to being humiliated on Oprah’s couch. See Edward Wyatt, \textit{Author Is Kicked Out of Oprah Winfrey’s Bookclub}, N.Y. Times (Jan. 27, 2006) (available at www.nytimes.com/2006/01/27/books/27oprah.html). None of us wants to go through the lawyer-equivalent of Frey’s journey by elevating the needs of a narrative over the particulars of our case.
\textsuperscript{68} Carr, supra n. 60, at 162–167.
\textsuperscript{69} Id. at 239–240.
\textsuperscript{70} Id. at 240.
This Author recently dealt with this type of narrative problem in a case on appeal to the Massachusetts Supreme Judicial Court. The basic narrative arc was a story of redemption. But the devil was in the details.

At the time the story began, the Author’s client was the father in a house with three young children and his baby daughter. While removing one of his many guns from underneath his bed, he accidentally shot his eighteen-month-old daughter. (She recovered.) The father served four years in prison for offenses related to the shooting and drug charges. During this period, his three-year-old son was placed in a series of foster homes. The son did not find a permanent home in any of these placements. During the trial in which both of his parents’ parental rights were terminated, which did not occur until he was nine years old, the child’s fourth placement disrupted, and he was once again left without any prospects for permanency. Throughout all of this time, the child continued to have visits with the father.

It was these visits that were the question on appeal before the Supreme Judicial Court. Although there was little question that the father would not be a good custodial parent for the child, there was substantial evidence that visits with the father were crucial to the psychological well-being of the child. In short, although the father was clearly a flawed character, his redeeming feature was the role he played in his son’s life.

It would have been helpful in writing the brief on this matter if the story followed the arc of a typical redemption story: the hero-father starts out as a troubled individual; makes a terrible mistake; is forced to atone; and then achieves redemption by being the loving father his troubled son needs. But the story did not take that exact route. At trial, the father continued to minimize his responsibility for the shooting. He also provided contradictory testimony about his current relationship with the child’s moth-

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71. Adoption of Rico, 905 N.E.2d 552, 554 (Mass. 2009).
72. Id.
73. Id.
74. Id.
75. Id. at 554–555.
76. As David Carr notes, the theme “of abasement followed by salvation is a durable device in literature” but does not have much to do with how things really happen. Carr, supra n. 60, at 9.
er. The evidence showed that he loved the child, but did not know many of the details of the child’s life, including where he went to school, what grade he was in, or whether he had special educational needs. The father did not comply with any of the tasks on his service plan other than visitation.

In short, it was hard to find an archetypal story here. Instead, there was a sad story of a parent who was responsible for many of the blows and disruptions that affected his child’s short life. Ensuring that the child had continued contact with his loving, but deeply imperfect biological father, did not place the court in the position of creating a happy ending. The hero-father was still flawed, and the child still faced an uphill struggle. All the court could do was hope that permitting the father to have continued visits with the child would provide him with a modicum of continuity while the father continued on the path of redemption.

As Alan Dershowitz asserts, “life is not a dramatic narrative.” Nonetheless, this does not mean that we should consequently abandon the goals and practices of legal storytelling. Instead, there is a middle ground between abandoning the principles of narrative for cold hard facts and logic and trying to shoe-horn our clients’ real-life stories into archetype, myth, and heroic journeys. Here again, the critique of the New Journalism provides valuable lessons about storytelling in legal writing.

B. New Journalism or Just Good Journalism?

In reviewing Tom Wolfe’s anthology, The New Journalism, New York Times critic Michael Wood questioned whether Wolfe had correctly identified the ways in which the New Journalism differed from the old. He concluded that the real preoccupation of the New Journalists was not a matter of technique as expressed in Wolfe’s four guiding principles but rather “its insistence on the resemblances between fact and fiction.” He notes that while the New Journalists were adamant that their work

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78. Id.
79. Id.
80. See Dershowitz, supra n. 1.
81. See Wood, supra n. 11.
82. Wolfe, supra n. 33.
83. Wood, supra n. 11.
was factually true, they were highly dependent on the techniques of fiction because they believed that only fictional forms permitted them to effectively craft the facts.84 We can certainly hear the echoes of that preoccupation in the scholarship of legal storytelling, which suggests that life can best be understood if packaged in the form of a well-told story.85

Unraveling the question of whether the forms and devices of fiction are the only effective way to shape facts is difficult both for journalists and legal writers. But the question has less to do with whether legal writers employ the forms of story or myth than with what they do with the raw materials of a legal case. Wood was not convinced that the works anthologized in Wolfe’s book genuinely constituted a new genre, but he was convinced that “[t]he writing is remarkable, . . . and if this is the New Journalism, one can hardly be against it.”86

Legal writers, like the New Journalist, can strive to make their writing “remarkable” and they do not necessarily have to conform to the conventions of myths, fables, and other stories to achieve this result. This point can be gleaned from reading Philip N. Meyer’s article, Are the Characters in a Death Penalty Brief Like the Characters in a Movie?87 In this article, Meyer made an exhaustive comparison between the classic movie High Noon and the brief written on behalf of the defendant in Atkins v. Virginia.88 In Atkins, the United States Supreme Court outlawed the death penalty for mentally retarded individuals on the ground that it constituted cruel and unusual punishment.89

Curious about the question posed in Meyer’s title, this Author read the petitioner’s brief in Atkins.90 The answer to the question was—no, not really.91 That aside, the Atkins brief is an outstand-

84. Id. Wood theorized that the thin line between fact and fiction was sometimes alarming to the New Journalists. He noted that when the New Journalists came “close to the universe of myth and fable,” they became so unsettled that they “rushed out into the real world again,” . . . to be reassured by the tangible, shapeless, incontrovertible facts of motiveless murder and random war.” Id.
85. See supra nn. 16–31 and accompanying text.
86. Gutkind, supra n. 10.
89. Id. at 321.
91. Meyer himself concluded that the answer to the question is “[i]n some ways, yes; in many ways, no.” Meyer, supra n. 87, at 916.
ing piece of legal advocacy. While Meyer’s cinematic comparisons can be quibbled with, he precisely identified some of the literary techniques employed in the brief that helped make it so successful. It is these qualities, discussed below, that seem far more valuable to us as legal writers than artificial attempts to conform legal stories into myth or fable.

By way of example, the brief demonstrates that an overarching theme is as important to a persuasively written brief as it is to a classic movie. The reverberating theme of the petitioner’s brief in *Atkins* is that it is of highly questionable morality to execute a mentally retarded individual for a crime. This theme permeates all sections of the brief and not just the Statement of the Case.92

The brief further borrowed from techniques of fiction in several ways.93 First, it featured many quotes (or in fiction parlance, dialogue). The use of direct quotations was far more effective in demonstrating Atkins’s limitations than declaratory statements about his IQ or record of impairment would have been. Atkins’s words, which are marked by a limited vocabulary and improper grammar, established convincingly his intellectual shortcomings.94 Then, using a technique that is highly effective, but was probably difficult to execute, the brief intertwined Atkins’s words with the story told by his friend, Jones, who was indisputably involved in the kidnapping of the victim, but claimed that Atkins pulled the trigger.95 This technique was effective because the jux-


93. Using techniques of fiction can be difficult in legal writing, if only because of the raw materials involved. For instance, the fact sections of appellate briefs are constrained by the requirement that only information contained in the record can be relayed in the brief. *See* e.g. Fed. R. App. P. 28(a)(7), 28(e). Thus, unlike fiction writers, legal writers are limited by the material contained in depositions, answers to interrogatories and documents—sometimes very dry documents—submitted in response to requests for production. The material contained in deposition or trial transcripts is similarly difficult to transform into sparkling dialogue. For tactical reasons, trial lawyers often encourage their witnesses to answer questions with “yes” or “no” whenever possible and to restrain themselves from lengthy, detailed explanations of events and behavior. Thus, the material contained in the record is rarely the stuff of myth or a character-driven story.

94. The brief quoted Atkins’s statement regarding the kidnapping and murder for which he received the death penalty at some length. At one point, Atkins said, “Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun.” Br. of Petr., 2001 WL 1663817 at *3. Later, Atkins described driving the victim to an automatic teller machine so he could use his “credit card” to withdraw money. *Id.* at *5.

95. *Id.* at *6.
tapposition of Jones’s relatively more articulate speech with the unsophisticated speech of Atkins highlighted his impaired intelligence.96

The brief used another technique of fiction—the use of the telling detail—when establishing Atkins’s diagnosis of mental retardation. Rather than stating that Atkins had serious academic difficulties, the brief noted that Atkins “flunked second grade.”97 It then described Atkins’s high school career, during which his ninth grade average of D+ fell to D- the “first time” he attended tenth grade.98 The brief quoted the psychologist who evaluated Atkins on the effects of mental retardation on daily life. The psychologist testified that people who are mentally retarded are more likely to be involved with group offenses because they are followers.99 He also explained that for people with mental retardation it is harder for them to succeed in school and they are quicker to get frustrated. It means it’s harder for them to do just about anything in life, whether it’s to get a job or work out a relationship, benefit from the feedback of a supervisor or the teacher, and they just don’t get as far.100

Regarding Atkins, the psychologist said he showed “a lack of success in pretty much every domain of his life.”101

96. In this excerpt from the brief, in which both Jones and Atkins describe the shooting of the victim, Jones says,

Mr. Atkins got out. He directed Mr. Nesbitt out. . . . As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started. . . . I had rolled down the window . . . and jumped out . . . [o]n my hands and knees. [Jones then went to the back of the truck][t]o get the gun away from Mr. Atkins . . . [t]o stop him from killing [Mr. Nesbitt].

See id. at *6. In contrast, Atkins is quoted as saying,

[jones] told me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand—he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt . . . . And then he backed up, parked the car, and he opened up the door. . . . He told Eric Nesbitt to get out . . . . Eric Nesbitt got out. . . . He—Eric Nesbitt bend over and William Jones told him to get up. And he didn’t get up. And then the shooting started.

Id. at **6-7.

97. Id. at *11.
98. Id.
99. Id. at *11.
100. Id. at **16-17.
101. Id. at *15.
None of this portion of the brief reads like a plot-driven story such as *High Noon*. Indeed, the extensive citation to the record and periodic footnotes insured that the fact this is a legal brief is never far from the reader’s mind. Nonetheless, the quotations and the descriptions of Atkin’s life-long inability to function successfully created a clear picture of a limited, even pathetic individual, who could elicit the reader’s sympathy despite his participation in a brutal murder. In this way, the *Atkins* brief shares much with Capote’s description of Perry Smith, whose experiences were described in exacting detail, often in Smith’s own words.

According to Meyer, the *Atkins* brief does not lose its similarity to *High Noon* once it reaches the argument section. Instead, in his view, the argument assumes the form of a classic melodrama that pits good against evil. In his view, “The forces of antagonism are aligned against Atkins. The Supreme Court is called upon to intervene heroically and save Atkins and similarly situated defendants from their fate—the doom that awaits them.” However, this is not the only way to read the argument section of the *Atkins* brief. Instead, it can be read as a highly organized, well-researched, clearly reasoned legal argument. At the same time, the argument skillfully contrasted the inability of retarded individuals to develop a sense of morality with the moral implications of executing such individuals for their crimes. To paraphrase Michael Wood’s comments on the New Journalism, the legal writing in the petitioner’s brief is remarkable, and if this is legal storytelling, one can hardly be against it.

Thus, the question of whether the *Atkins* brief cast the Supreme Court in the same role as Gary Cooper in *High Noon*—“to civilize the primitive and violent landscape under a new rule of law that brings peace and order”—does not seem so important.

102. Indeed, the brief used footnotes as a means to de-emphasize some of the more unattractive facts about Atkins. Most of the information about Atkins’s prior criminal history, for instance, is relegated to a footnote. *See id.* at *14 n. 20.

103. *See Capote, supra* n. 7. In addition to quoting Smith extensively about the events surrounding the murder of the Clutter family, Capote devotes a large portion of the book to Smith’s life leading up to the murders, citing family letters, his father’s report to the parole board, and Smith’s diaries. *See id.* at 123–147.

104. *See Meyer, supra* n. 87, at 910.

105. *Id.*

106. Wood, *supra* n. 11.

The decision to keep the moral conflict front and center for the Justices, while at the same time providing arguments of compelling logic, analysis and precedent, made it possible for the Court to overturn precedent and decide that execution of the mentally retarded is cruel and unusual punishment. That level of success for our clients should be the goal of all legal writing.

IV. CONCLUSION

One premise of the legal storytelling movement is that lawyers ignore the story for the sake of emphasis on logic and reason. This is a point well taken. Too often, we forget that our cases involve the flesh and blood, true-life stories of real people. It is our job to make those stories come alive, and we should use all the tools at our disposal, including ones taken from the world of fiction and storytelling. Nonetheless, in our enthusiasm to adopt the conventions of storytelling, we should remember that the value we, as good lawyers, bring to a legal case is not just the ability to tell a captivating tale. Good lawyers also bring the skillful use of logical argument to the case—a skill that even the best storytellers may not value or possess: “[P]ersuasion . . . relies on two strands—one strand of narrative and one of logical argument—related to each other like a twisting double helix that forms a lawyer’s theory of the case.”108 Perhaps we have sacrificed the first strand for the sake of the latter in the practice of law. But we should not make the mistake of elevating the goal of a good story over the goal of successful legal argument. Instead, we should make it just one of the many tools at our disposal.

PERSUADING JUDGES:

AN EMPIRICAL ANALYSIS OF WRITING STYLE, PERSUASION, AND THE USE OF PLAIN ENGLISH

Sean Flammer

INTRODUCTION

A litigator’s objective is to persuade judges. With oral arguments occurring at a steadily decreasing frequency and with full trials becoming a rarer occurrence, judges increasingly make their decisions based on the litigator’s written work-product.¹ Hence, as a lawyer, persuasiveness of your writing is, therefore, paramount to your success. And although the legal merits of an argument ultimately persuade—not your writing style—this fact should not fool you into thinking that your choice of writing style is unimportant.² Writing style is important. How you choose to

¹ Jeffrey O. Cooper & Douglas A. Berman, Passive Virtues and Casual Vices in the Federal Courts of Appeals, 66 Brook. L. Rev. 685, 700 (2001) (noting that federal appellate courts “have cut back dramatically on oral argument,” deciding nearly 60 percent of cases without oral argument); Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1340 (1994) (stating that only 7 percent of cases go to trial).

² This Article does not support the proposition that a litigator’s writing style will make up for a meritless argument. Several judges in this study noted that the argument’s merits persuade, not writing style. For example, after indicating her preference and commenting on the use of contractions in a legal brief, one judge noted,

Let me also say that the style of the writing is unlikely to “persuade” me. The outcome depends on the merits, entirely. It is easier, however, to sell the arguments
deliver your message affects whether you are effective at communicating the merits. Indeed, a well-written pleading accurately conveys the argument’s merits without frustrating the reader with superfluous words or distractions. But a poorly-written pleading can lose or frustrate its reader. Whether a lost reader re-reads the pleading or simply gives up, the author has at best frustrated the judge and at worst so alienated the judge that the author’s arguments go unread or misunderstood. That cannot be persuasive. Thus, you may have the better legal argument, but if you fail to effectively communicate that merit, you may lose. Or, moreover, if your opponent has the superior legal position but she fails to highlight it effectively, you may win both because the judge understands your argument and your opponent did such a poor job of communicating that she failed to convey the merits on her side.

So what is the best way to highlight your argument’s merit? Obviously, this is a difficult question and the answer will depend upon the circumstances unique to each case. Much has been written about the order of arguments, the use of authority, etc. This Article does not deal with those issues; this Article is about writing style. While much has been written on writing style, little empirical data exist to support what style best delivers the author’s intended message.³

So what writing style is most effective? In recent decades, academics and some judges have urged the legal community to write in Plain English.⁴

³. This Article assumes that the attorney has a choice in writing style. While some lawyers may not have the skill necessary to choose their writing style, most do.

⁴. See Bryan A. Garner, Judges on Effective Writing: The Importance of Plain Language, 84 Mich. B.J. 44 (Feb. 2005); Joseph Kimble, The Elements of Plain Language, 81
But does Plain English work? Does it help litigators persuade judges?

This Article attempts to answer that question. I sent surveys and writing samples to 800 judges across the country asking which of the samples was most persuasive. The survey also asked about the judges’ gender, age, years of experience in law, years on the bench, and whether the judges sat in rural or urban districts.

Part I of this Article discusses what Plain English is and what it is not. Part II discusses the existing empirical data relating to Plain English. Part III discusses the methodology of the survey, and Part IV discusses the survey’s results. Finally, Part V concludes and addresses how this study should influence future writing-style decision-making.

I. WHAT PLAIN ENGLISH IS AND WHAT IT IS NOT

The Plain English movement can be traced back to at least David Mellinkoff’s 1963 classic The Language of the Law. In the 1970s, several state legislatures began requiring companies to write consumer contracts in Plain English and President Carter issued an executive order directing federal regulators to draft rules using language “as simple and clear as possible.” The movement encouraged lawyers to draft not only consumer documents in Plain English but also pleadings to the court. But what is Plain English?

Like many legal terms, “Plain English” is vague and difficult to define. Although there are guidelines, Plain English allows for situational decision-making, leaving the author to use his or her best judgment. The basic idea behind it is to make the document as reader-friendly as possible to get the message across. Joseph Kimble provided the most comprehensive and specific instructions.

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7. See generally id.
8. Id. at 14. Bryan Garner has written, “Some have tried to reduce ‘plain language’ to a mathematical formula, but any such attempt is doomed to failure. . . . ‘Like so many legal terms, it is inherently and appropriately vague.” Bryan A. Garner, Garner on Language and Writing 295 (ABA 2009) (quoting Kimble, supra n. 6, at 14).
9. See Kimble, supra n. 6, at 18.
for how to write in Plain English in 1992. Kimble writes, “As the starting point and at every point, design and write the document in a way that best serves the reader. Your main goal is to convey your ideas with the greatest possible clarity.” He goes on to name specific techniques an attorney can use to increase readability. They include the use of headings; topic sentences to summarize the main idea of paragraphs; short, direct sentences; the active voice; lists and bullet points; familiar voice and familiar words (usually shorter words); and the omission of unnecessary facts or details. The more complex the idea, the greater the need for a shorter sentence. But brevity is not the goal. The goal is to communicate effectively. Plain English advocates do not seek brevity at the expense of “substance, accuracy, or clarity.” Sentences sometimes have to be long to be clear, accurate, and easy to understand. But legal writers often overestimate this need.

Plain English is not baby talk or a “simplified version of the English language.” Plain English advocates promote writing that is “as simple and direct as the circumstances allow. Not simplistic or simple-minded. Not Dick-and-Jane. Not street talk or slang. But the style you would use if your readers were sitting across the table, and you wanted to make sure they understood.”

Plain English can often be defined by its opposite—stilted, formalistic writing known as “Legalese.” Legalese uses long words and long sentences containing multiple ideas. It uses archaic words and passive voice, and it often has illogical ordering

10. Id. at 2; see also id. at 44.
11. Id. at 44.
12. Id. at 44–45.
13. Id.
16. See id. at 64–65 (stating that the desire for brevity is often sacrificed to ensure accuracy, clarity, and ease for the reader).
18. Id. at 19.
20. Id. at 523–525.
of ideas.\textsuperscript{21} It has the appearance of extreme precision but often results in confusion, instead of precision.\textsuperscript{22}

Some would argue that it is obvious that Plain English is more persuasive than Legalese. But as this study will indicate, many people still prefer the Legalese style.\textsuperscript{23} Perhaps some judges prefer Legalese because they have been trained since entering law school to prefer it. Law students spend three years reading court opinions written in Legalese\textsuperscript{24} and thus become accustomed to its tone and style and believe that is the way lawyers must write. Or perhaps lawyers prefer Legalese because they want their writing to sound worthy of the $300 an hour they charge their clients.\textsuperscript{25} After all—as some lawyers will state—if a client can understand the lawyer’s written work product and thinks he can do the job himself, the client will be less likely to hire the attorney again.

\textbf{II. EXISTING EMPIRICAL SCHOLARSHIP COMPARING PLAIN ENGLISH TO LEGALESE}

Only a few researchers have empirically investigated with writing samples whether judges prefer Plain English to Legalese. Each study found that judges prefer Plain English.\textsuperscript{26}

In 1987, Steve Harrington and Joseph Kimble sent surveys to 300 judges and 500 lawyers in Michigan.\textsuperscript{27} The surveys asked the respondents to indicate their preferences between six pairs of legal passages; each pair contained a passage in Plain English and
passage in Legalese. The passages were brief (sometimes only a sentence long) and were not in the context of a legal document. Indeed, all six passage-pairs fit onto one piece of paper. Sixty percent of the judges and forty-nine percent of the lawyers responded to the survey. Nowhere in the cover letter or in the survey did the words “Plain English” appear; the cover letter stated that the survey was part of a student research project. The study’s results showed that judges preferred the Plain English passages by a wide margin. On average, the judges preferred the Plain English passage to the Legalese passage 85 to 15 percent.

In 1990, Joseph Kimble and Joseph A. Prokop, Jr. published the results of similar studies done in Florida and Louisiana. The researchers sent the same survey and passage-pairings used in the Michigan study to a larger, more geographically diverse respondent pool. The surveys were sent to 558 judges and 558 lawyers in Florida and 247 judges in Louisiana. The results in both states were similar to the Michigan results—judges in Florida and Louisiana preferred the Plain English passages 86 percent and 82 percent of the time, respectively.

But the Michigan, Florida, and Louisiana studies are more than twenty years old. Additionally, because the surveys used a one-page, six-question stimulus, the respondents had to state their preferences outside the context of a legal document. Thus, the studies only show which sentence or group of sentences judges preferred. The studies did not purport to be a direct measure of the persuasiveness of Plain English.

Most importantly, though, because these studies asked the respondents to state their preferences outside the context of a le-
gal document and in the context of a passage-by-passage comparison, the respondents had to think objectively about which passages they preferred. When a judge reads a pleading, the judge does not go through that same process. Instead, the judge reads the pleading and determines whether the argument is persuasive. Thus, if we truly want to know whether judges find Plain English more persuasive, the samples we provide to them must be pleadings, and we need to ask them explicitly which is more persuasive.

Robert W. Benson and Joan B. Kessler conducted the only other study that attempted to determine if judges prefer Plain English to Legalese.41 In that study, an extern at the California Court of Appeals, Second District, in Los Angeles surveyed thirty-three research attorneys and ten judges.42 The extern gave the participants two different one-paragraph passages excerpted from two separate briefs.43 These constituted the Legalese excerpts.44 Other participants were given the same two one-paragraph passages rewritten in Plain English.45 Participants were asked to fill out a twenty-two question survey, and the researchers then compared the responses of those who read the Legalese passages to the responses of those who read the Plain English passages.46 The survey asked about persuasiveness, but it also asked about content and the writer’s credibility, credentials, and qualifications.47 The results indicate that the participants found the Legalese passage to be less persuasive than the Plain English version.48 The respondents also believed the Plain English author was more believable, well-educated, and worked for a prestigious law firm.49

Although this study added to the literature in a meaningful way, the study’s results are open to some potential criticisms. First, the majority of the respondents were not judges (over 75 percent of those surveyed were research attorneys).50 Second, the

41. Benson & Kessler, supra n. 2.
42. Id. at 305.
43. Id. at 306–309.
44. Id. at 306.
45. Id.
46. Id. at 311–313.
47. Id. at 316.
48. Id. at 313–314.
49. Id.
50. Id. at 305.
number of judges surveyed was small—the study only surveyed ten judges.\textsuperscript{51} Thus, a one- or two-judge swing could have dramatically changed the results. Third, the sample was chosen from a single court in one of the biggest, most cosmopolitan cities in the country.\textsuperscript{52} The study is open to the criticism that its findings about a Los Angeles litigator—making the decision about what writing style to use in a brief—might not readily apply to a court outside of Los Angeles. One might argue that even if a lawyer wants to write in Plain English, judges in Little Rock or Lancaster—for example—might prefer Legalese and, thus, the results of a study conducted in Los Angeles cannot automatically be applied to other areas. Lastly, the passages were, once again, short excerpts.\textsuperscript{53} Pleadings are usually not short—they are certainly not one paragraph. One reason why Plain English advocates promote Plain English is that Legalese’s unnecessary complexity will sometimes lose the reader, making the document less clear and, thus, less effective at communicating ideas.\textsuperscript{54} If the respondents see a short excerpt, they are less likely to get lost in the complexity and more likely to focus on the argument’s merit than they would if they were reading a longer document. Thus, a study that uses short excerpts might not measure Plain English’s effectiveness as accurately as a study that uses longer, legal documents.

My research attempts to build on this existing scholarship in a new, more comprehensive study.

\textbf{III. METHODOLOGY}

\textbf{A. General Methodology}

My goal was to determine if judges found Plain English more persuasive than Legalese. A lawyer’s objective is to persuade; therefore, the most important question is whether the use of Plain English will help the lawyer achieve that objective. I sent 800 surveys to judges across the United States. I sent 200 surveys to each of four different cohorts:

- (1) federal trial judges;
- (2) federal appellate judges;

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.} at 306–311.

\textsuperscript{54} Ruth Bader Ginsburg, \textit{Foreword,} in Garner, \textit{supra} n. 8, at xiii.
(3) state trial judges; and
(4) state appellate judges.

Each judge received two excerpts from a potential pleading (the “writing samples”\textsuperscript{55}), a cover letter, a survey, and a self-addressed, stamped envelope. Half of each cohort received a Plain English sample and a Legalese sample and the other half received an Informal sample\textsuperscript{56} and a Legalese sample. The argument in each sample was essentially the same. The surveys asked the judges to indicate which of the two writing samples they thought was more persuasive.

Asking the judges which writing sample is more persuasive is better than asking a series of pointed questions, detailing the “elements”\textsuperscript{57} of Plain English. First, it addresses the ultimate question we want answered. Second, asking a series of questions requires the survey respondent to objectively and independently consider which of the Plain English “elements” the respondent prefers out of context. But persuasion is a subtle process, and what judges say persuades them out of context might not be what actually persuades them.\textsuperscript{58} Third, from a practical perspective, asking one question instead of a series of questions is better because it keeps the survey short, ensuring the response rate will not suffer because of a lengthy questionnaire.\textsuperscript{59}

It is also important to ask judges to indicate their preference in the proper context. Rather than providing the judges with several isolated sentences or groups of sentences (as in the Michigan, Florida, and Louisiana surveys)\textsuperscript{60}, I wanted to simulate a pleading.

\textsuperscript{55} See apps. 1–6.

\textsuperscript{56} “Informal” refers to a sample written in Plain English taken to an extreme. See infra sec. III(C).

\textsuperscript{57} For example, asking, “Do you prefer the use of the active or passive voice? Do you prefer complex language or simple language? What do you think about using the first person in a pleading?” See Kimble, supra n. 6, at 44–45.

\textsuperscript{58} As Benson and Kessler point out, there is good reason to believe that judges may say they prefer one thing but actually prefer another—teachers do. See Benson, supra n. 2, at 303 n. 22 (citing Rosemary L. Hake & Joseph M. Williams, Style and Its Consequences: Do As I Do, Not As I Say, 43 College English 433 (1981)). Benson and Kessler state that Hake and Williams found in their studies that “a group of college English teachers gave higher grades to papers with syntactically complex writing than to papers written simply.” Id.

\textsuperscript{59} It is certainly possible, however, that only asking which sample is more persuasive may be too general a question. Still, for the reasons above, I thought it better to ask that question rather than any alternative.

\textsuperscript{60} See supra nn. 27–40 and accompanying text (arguing that asking judges to choose between two cohesive pleadings is a better indicator of persuasiveness than asking them to
ing as much as possible by giving the judges excerpts of potential court filings. I also wanted the surveys to be large enough so that the results would not be criticized for being too reliant upon one group of judges or one geographic area (unlike the Benson and Kessler survey, which only surveyed ten judges in a California appellate court).

More than all this, though, I wanted to be more comprehensive both in the number and variety of respondents, the kinds of writing I sent them, and the data I collected. The 800 judges were asked about their age, years of judicial experience, years of legal experience, gender, and whether they sit in a rural or urban district. I also compared the data between state and federal judges and between trial and appellate judges.

Most importantly, though, I wanted to test the limits of what was generally acceptable: I wanted one of the writing samples to be as conversational as possible—I wanted to use contractions and begin sentences with conjunctions, and I wanted to use the most informal language I could without slipping into slang.

B. Survey Recipients

I picked the survey recipients by using a simple random sample. Using the databases of judges on Leadership Library Online, I created computer-generated simple random samples to compile the survey recipient lists for the federal judges (both trial and appellate) and the state appellate judges. I could not find a

choose between two groups of text—either one sentence or only a few sentences in length—and indicating which they find more persuasive).

61. None of the sample sizes is large enough to be statistically significant with a ninety-five percent confidence interval and a five percent margin of error. Nonetheless, because all the cohorts show about the same preference rate, we can infer that a randomly selected group of judges would indicate their preferences at about the same rate as the judges in this study did.

62. See supra nn. 41–52 and accompanying text.

63. To ensure that the group of judges that received surveys was a fair cross-section of the judge population, I used a simple random sample. A simple random sample ensures that every judge had an equal chance in receiving a survey and, thus, reduces bias. See e.g. David S. Moore, The Basic Practice of Statistics 170–171 (2d ed., W. H. Freeman & Co. 2000).


65. The population of federal appellate judges was 293 (combining both civil and bankruptcy judges), with 1544 federal trial judges (combining district court judges, magistrate judges, and bankruptcy judges), and 989 state appellate judges.
database of state trial judges, so I had to compile that sample myself. I used a random number-table and a judicial directory\(^{66}\) to choose the state trial judges.\(^{67}\)

Because I chose the recipients by a simple random sample, the samples of judges from the various cohorts represent a fair cross-section of the population of judges.\(^{68}\) No geographic area was preferred—the survey reached judges in all fifty states. Seniority or status was not a factor either. Nor was gender, race, ethnicity, or age.

As with any statistical study calling for a voluntary response, the data are limited to those who responded to the survey.\(^{69}\) But there is no reason to believe that those who responded to the survey have significant differences in preference to those that did not respond.

C. The Writing Samples

Three different writing samples were distributed—a Legalese piece,\(^{70}\) a Plain English piece,\(^{71}\) and a piece that takes Plain English to an extreme—a piece I call the “Informal” piece.\(^{72}\) To ensure that the samples’ subject matter did not influence the results, all three samples made the same argument regarding a boring procedural subject matter—a response to a request for stay in a bankruptcy proceeding.

1. Legalese Sample Versus the Plain English Sample

The Legalese sample is an excerpt from an original court filing.\(^{73}\) The writing samples use the same argument and cite to the same cases. They differ in the following ways:

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67. The population of state trial judges was 9,929. (This figure was produced by adding together the number of judges in every state including the District of Columbia and Puerto Rico. An e-mail is on file with the Author for a more detailed breakdown.)
68. See Moore, *supra* n. 63, at 170–171.
69. See id. at 169 (discussing “a voluntary response sample, ‘which consists of people who choose themselves by responding to a general appeal’”).
70. See app. 1.
71. See app. 2.
72. See app. 3.
73. The names were changed and a few substantive changes were made.
1. **Title.** The title in both the Legalese and the Plain English samples are unnecessarily long but traditional. The only difference I made to the Plain English version was to rearrange the wording. Instead of “Response of X to Y”, I wrote “X’s response to Y’s . . . ”.

2. **Opening.** The Legalese sample begins with a traditional “COMES NOW” opening paragraph. It contains Legalese such as the capitalized “COMES NOW” and the couplet “by and through.” Plain English proponents suggest deleting this opening paragraph entirely.\(^{74}\) I considered deleting it, but I thought doing so was too drastic of a change for the motion’s opening. I was concerned that some survey respondents would make their decisions based upon the existence or non-existence of the opening. There were too many variables that I thought were more subtle in the Plain English version, and I wanted to test them as well. I retained the opening but made it more concise and deleted the legalese “COMES NOW” and “by and through” language.

3. **Headings.** The Legalese sample uses headings for organizational purposes. But the headings are both underlined and are in all capital letters. The Plain English version does not use the underlining and takes away the all-caps format.

4. **Unnecessary words.** Many of the sentences in the Legalese argument sections use unnecessary words and phrases. The Plain English version deletes them. It also deletes an entire paragraph.

5. **Use of lists.** The Legalese version tells the court that there are four reasons why the court should deny the motion for stay. In doing so, the Legalese version embeds a list within a textual sentence.

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The Plain English version retains the important four-element test, but it uses a tabulated list.

6. **Passive versus active voice.** The Legalese version uses the passive voice more than the Plain English version.\(^75\) (Still, though, the Legalese version is not primarily written in passive voice.\(^76\))

7. **Multiple thoughts in the same sentence.** The Legalese sample has more sentences that contain multiple ideas.

8. **Topic sentences.** The topic sentences in the Plain English version do a better job of laying out the paragraphs’ purposes.

9. **Overall conciseness and clarity.** The Plain English version seeks to convey ideas using fewer words than the Legalese version uses. For example, the Plain English version uses the phrase “the court’s decision” instead of “the decision of the court.” Additionally, the organization of the Plain English sample eliminates multiple sentences by rewording others.

10. **Sentence length.** The Plain English sample uses shorter sentences than the Legalese sample uses. The average sentence length in the Plain English sample is 17.8 words; the average sentence length in the Legalese sample is 25.2 words.

2. **Informal Sample Versus Legalese Sample**

Joseph Kimble states in *The Elements of Plain Language* that the writer should “[r]esist the urge to sound formal”; the writer should “[r]elax and be natural (but not too informal).”\(^77\) I wanted to know if informal writing was, indeed, unpersuasive. The changes I made to the Plain English version made the argument

\(^75\) Microsoft Word breaks it down to 6 percent for the Plain English and 8 percent for the Legalese.

\(^76\) Passive voice only occurs at an 8 percent rate.

\(^77\) See Kimble, *supra* n. 6, at 44.
simpler and deleted some of the traditional style and tone, but I wanted the Informal sample to go a little further. The Informal sample is different from the Plain English sample in the following ways:

1. **Title.** The Informal version is extremely succinct in its title. Instead of a standard title in bold all-caps, such as the Plain English’s “TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC’S RESPONSE TO HENRY H. HINEMAN’S MOTION FOR STAY PENDING APPEAL,” the Informal version titles the document, “Plaintiffs’ Response to Defendant’s Motion for Stay Pending Appeal.”

2. **Opening.** The Informal version deletes the opening altogether and begins with an introduction.

3. **Contractions.** The Informal sample uses contractions, including six in the introduction alone.

4. **But.** On two occasions, the Informal sample uses the conjunction “but” to begin a sentence.78

5. **First person.** In the Informal sample’s introduction, the author uses the first person. The author states the four criteria for granting a stay and writes, “My analysis addresses [all four issues].”79

6. **Conversational in tone.** When I wrote the Informal sample, the idea in my mind was to be as conversational as possible. In addition to the abundant use of contractions and the use of “but” to start two sentences, the informal document also uses “What’s more” as an introductory phrase instead of a more formal “furthermore” or “additionally.”

7. **Sentence length.** The Informal sample has an average sentence length of 16.3 words compared to

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79. See app. 3.
17.8 in the Plain English sample and 25.2 in the Legalese sample.

3. What the Judges Saw

The Legalese sample is 3¼ pages long, the Plain English is 2½ pages, and the Informal is 2 pages long.80 I was concerned that if I sent three writing samples to every potential respondent, the response rate would be low because judges would not have the time to read all three samples; I was already asking a lot of the judges by giving them six or seven pages of text. So within each cohort of 200 survey recipients, 100 received the Legalese and the Plain English samples and 100 received the Legalese and the Informal samples.

The order in which respondents view stimuli can influence their preferences.81 To ensure against any bias, therefore, half of each sub-cohort of 100 saw the two samples in one order while the other half of the sub-cohort saw the samples in the reverse order. (Of course, I named those samples differently depending on which order they appeared.82)

Each cohort of 200 samples was divided in the following way:

• Fifty saw the Plain English (marked “Sample X”) followed by the Legalese (marked “Sample Y”);
• Fifty saw the Legalese (marked “Sample A”) followed by the Plain English (marked “Sample B”);
• Fifty saw the Legalese (marked “Sample 1”) followed by the Informal (marked “Sample 2”); and
• Fifty saw the Informal (marked “Sample 3”) followed by the Legalese (marked “Sample 4”).

D. The Survey

Each of the 800 recipients received two writing samples (either a Legalese sample and a Plain English sample or a Legalese

80. See apps. 1–3.
82. Otherwise, the survey recipient might rearrange the papers and put them in the correct order or just assume a document labeled “1” should be read before document “2.”
sample and an Informal sample); a cover letter;\textsuperscript{83} a questionnaire; and a self-addressed, stamped envelope. The cover letter stated that I was doing research on legal writing and that I hoped to have the results published. Nowhere did I use the words “Plain English” or “Legalese.”

Each judge received a brief one-page questionnaire.\textsuperscript{84} The most important question on the survey was which of the two writing samples the judge found most persuasive.\textsuperscript{85} But I also wanted to know whether a judge’s preference for Plain English was in any way correlated with age, years of judicial experience, or years of experience in the legal profession. And I wanted to learn whether federal or state judges differed in their preferences or whether appellate or trial judges did. Lastly, I wanted to know if a judge’s gender was correlated with a Plain English preference\textsuperscript{86} or whether judges in rural or urban districts differed in what persuaded them.\textsuperscript{87}

I also left room on the questionnaire for judges to make comments if they wished.

\textbf{IV. THE RESULTS}

\textbf{A. The Response Rate}

Of the 800 judges, 292 completed and returned the surveys, for a response rate of 37 percent. Figure 4.1 shows the response rate for each cohort of 200 judges.

\textbf{Figure 4.1: Response Rate for Each Cohort of Judges}

\begin{tabular}{|c|c|c|}
\hline
\textbf{Cohort} & \textbf{Number of Responses} & \textbf{Response Rate} \\
\hline
Federal Trial Judges & 79 & 40\% \\
\hline
\end{tabular}

\textsuperscript{83} See app. 6.
\textsuperscript{84} See apps. 4, 5.
\textsuperscript{85} See supra Sec. III(A) (discussing why asking the judges which sample is more persuasive is better than asking a series of questions).
\textsuperscript{86} Some respondents appeared offended that I would even ask their gender—several refused to answer; a few asserted something to the effect that “it doesn’t matter.”
\textsuperscript{87} I did not ask the appellate judges this question because appellate judges cover a larger jurisdiction that is almost always a combination of rural and urban areas; thus, asking appellate judges this question would provide little help in determining whether urban judges find Plain English more persuasive than rural judges do, or vice versa.
The study revealed that judges prefer Plain English to traditional Legalese 66 percent to 34 percent. Moreover, each cohort of judges preferred Plain English to Legalese. Whether a judge practiced in a rural or urban area had no correlation with whether judges preferred Plain English. State and federal judges preferred Plain English at about the same rate, and so did trial and appellate judges. A judge’s age, years of experience as a judge, years of experience in the legal profession, or gender was not correlated with whether a judge preferred Plain English or Legalese.

Moreover, judges also preferred the Informal sample—sprinkled with contractions and a conversational tone—to Legalese. Each cohort but one preferred the Informal sample to Legalese though by a narrower margin than they preferred the Plain English sample. Both state and federal judges preferred the Informal sample at about the same rate, but appellate judges were 23 percent more likely to prefer the Informal sample than trial judges were. Female judges overwhelmingly preferred the Informal sample: they preferred it 83 percent of the time. Rural trial judges, however, were the only group in the entire survey to prefer Legalese more than another writing style. Judges who preferred the Informal style were slightly younger and had slightly fewer years of experience both on the bench and in the legal profession.

B. Plain English Versus Legalese

The data show that judges prefer Plain English to Legalese; all four cohorts of judges preferred Plain English. I sent 400 Plain English/Legalese surveys to judges across the country; 153 judges returned them, for a response rate of 38 percent. Of the judges who stated a preference between the Plain English and

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<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Federal Appellate Judges</td>
<td>59</td>
<td>30%</td>
</tr>
<tr>
<td>State Trial Judges</td>
<td>77</td>
<td>39%</td>
</tr>
<tr>
<td>State Appellate Judges</td>
<td>77</td>
<td>39%</td>
</tr>
</tbody>
</table>

88. See fig. 4.3.
89. “Plain English/Legalese” means that the survey recipients received one writing sample in Plain English and one sample in Legalese; “Informal/Legalese” means that the recipients received one Informal sample and one Legalese sample.
Legalese writing samples, 66 percent preferred the Plain English style. The preference was greatest for federal appellate judges, while federal trial judges favored Plain English just slightly more than they preferred Legalese.

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90. One-hundred fifty-three judges returned Legalese/Plain English surveys. Four of those judges did not state a preference. Therefore, I based my analysis on the 149 surveys that stated a preference. See fig. 4.2.
The data shows that both appellate and trial judges prefer Plain English at nearly the same rate; state and federal judges prefer Plain English at nearly the same rate as well. Appellate judges preferred Plain English 68 percent of the time while the trial judges preferred Plain English at a rate of 63 percent (see figure 4.4). State court judges preferred Plain English 68 percent of the time while federal judges preferred it at a rate of 62 percent (see figure 4.5).
Further, the judge’s age, years of judicial experience, or years of legal experience played no role in whether a judge preferred Plain English or Legalese. Respondents ranged in age from 27 to 86, ranged in judicial experience from less than a year on the bench to over 41 years, and ranged in legal experience from 1 year to 58 years. Figure 4.6 shows that the judges who preferred Plain
English were approximately the same age and had the same number of years of experience as judges who preferred Legalese.

Figure 4.6: Age and Experience

<table>
<thead>
<tr>
<th>Style Preferred</th>
<th>Median Age</th>
<th>Median Years in Legal Profession</th>
<th>Median Years as a Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain English</td>
<td>58</td>
<td>31</td>
<td>15</td>
</tr>
<tr>
<td>Legalese</td>
<td>56</td>
<td>30.5</td>
<td>15</td>
</tr>
</tbody>
</table>

Similarly, gender is not correlated with whether judges prefer Plain English to Legalese. One-hundred forty-five respondents who received the Plain English/Legalese surveys both stated a preference and stated their gender (109 men and 36 women). Of those who preferred Plain English, 77 percent were male and 23 percent were female. Of those who preferred the Legalese, 75 percent were male and 25 percent were female. Males preferred the Plain English only slightly more than their female counterparts: males preferred the Plain English at a rate of 67 percent while females preferred it at a rate of 61 percent.

Whether a trial judge’s district is rural or urban has little bearing on whether the judge will prefer Plain English or Legalese; both rural and urban judges prefer Plain English. Of the 62 judges who stated a preference and stated whether their district is rural or urban, 40 classified themselves in urban districts while 22 classified their districts as rural. Rural judges preferred the Plain English at a 73 percent rate while the urban judges preferred the Plain English at a 63 percent rate.

In short, the data conclusively show that judges prefer Plain English to Legalese. All four cohorts preferred Plain English. The judge’s age, number of years spent in the judiciary, number of years spent in the legal profession, and gender had no correlation with whether the judge preferred Plain English or Legalese. Further, whether the trial judge was from a rural or urban district did not matter. Even more telling than the empirical data, though, are some of the comments that judges wrote on their surveys.

91. As discussed in Section II(D), *supra*, I did not ask appellate judges if they sit in rural or urban areas.
Several judges commented that the Plain English sample was more persuasive because of the succinctness of the argument. One state appellate judge wrote, “[The Plain English version] is easier to understand, more clear and straightforward, [and] therefore, more persuasive.” Another judge commented that the Plain English version is “simpler, more direct prose. Getting to the point trumps pontificating any day.” Another judge wrote, “[The Plain English sample] is easy reading. It goes directly to the point.” A few judges commented on the brevity of the Plain English samples, and several commented on the use of the lists and the deletion of the opening paragraph’s gobbledygook language as contributing to their preference for the Plain English sample. The general theme of the comments was that the judges found the Plain English sample to be “cleaner, leaner, and more effective and understandable.”

A few judges commented that legal writing does not demand that the author “sound like a lawyer.” A state trial judge from Georgia wrote, “Thinking and writing like a lawyer does not require arcane, stilted language. [The Legalese sample] is typical diction. [The Plain English sample] does the highlighting with form.” Another judge wrote, “My first impression on [the Legalese sample] was negative with the first word. . . . After that . . . it read like someone trying to ‘sound’ like an attorney. The convoluted style led me to skimming for its essence.” This was not the only judge who stated that the writing style in the Legalese sample inspired him to pay little attention to the document’s logical intricacies. These comments make clear that an indirect and convoluted writing style is likely to make the document go unread. An unread document cannot be persuasive.

Some judges, however, preferred the Legalese. One stated that while she appreciated the brevity of the Plain English version, she characterized the Legalese as “more polished.” Another indicated that he preferred the “formal” writing in the Legalese. One judge even wrote that the Legalese was “easier to read.” But these comments were in the minority.

While the vast majority preferred the Plain English version and some noted that the decision was “obvious,” a handful of judges wanted more. They commented that both the Plain English and Legalese samples were “too wordy.” One judge seemed angered by the samples; he graded them both with a large “F” and berated me for sending him such poor writing. Another judge
noted that both samples were “too verbose and filled with [formal] legalese.” Other judges wrote that the samples were “not punchy enough” and that both could be “more succinct.”

But could a litigator take this advice too far? Put another way, in the Legalese-Plain English continuum, is it possible to be too informal? I attempt to answer this question in the next section.

C. Informal Versus Legalese

The conventional wisdom is that legal writing must be formal—that judges do not want informality in their courtrooms or in pleadings. The Plain English movement is moving legal writing from a stilted, formalistic style to one that is more direct and “plain.” This Article will hopefully continue to shift legal writing in that direction. But can this shift from formality to informality go too far? The data show that judges—as a group—would much rather have an attorney err on the side of informality than err on the side of being too stilted and formal.

Judges would rather read informal (yet direct and to the point) pleadings than Legalese. Of the 400 Informal/Legalese surveys I sent, 139 judges returned completed surveys, for a response rate of 35 percent. Of those 139 judges, 58 percent stated a preference for the Informal sample over the Legalese. Moreover, nearly every cohort preferred the Informal sample (though not to the extent that they preferred Plain English to Legalese).

92. A fair criticism of this Plain English sample is that it does not go far enough in incorporating Plain English and, as this judge pointed out, remains “too wordy.” See Burlingame, supra n. 74, at 42.
93. Kimble, supra n. 6, at 27.
94. See fig. 4.8.
95. See figs. 4.2, 4.7.
Appellate judges preferred the Informal sample by a substantially wider margin than trial judges did. Appellate judges preferred the Informal sample by a margin of 64 percent to 35 percent; trial judges preferred the Informal writing style at a much lower rate—they preferred it 53 percent to 47 percent. Appellate judges were, therefore, 23 percent more likely to prefer the Informal sample than trial judges were.

Figure 4.9: Appellate Judges v. Trial Judges

96. See fig. 4.9.
State and federal judges preferred the Informal sample at nearly the same rate. Of the 139 judges who returned an Informal/Legalese survey, 70 were state judges and 69 were federal judges. State judges preferred the Informal sample 61 percent of the time while federal judges preferred it at a rate of 55 percent.\textsuperscript{97}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Appellate_Judges_v._Trial_Judges}
\caption{Appellate Judges v. Trial Judges}
\end{figure}

\textsuperscript{97} See fig. 4.10.
Female judges are much more likely to be persuaded by an informal pleading than male judges are. Of the 138 judges who both received the Informal and Legalese samples and stated their gender, 29 were women, and 109 were men. Female judges preferred the Informal sample by a rate of 83 percent while the males only preferred it 51 percent of the time. Only 9 percent of the judges who preferred the Legalese were female while 30 percent of the judges who preferred the Informal were female. This finding is consistent with a prior study that indicated women tend to write more informally than men do—it follows that they would be open to be persuaded by informal writing as well.99

98. See fig. 4.11.
99. See Shlomo Argamon et al., Gender, Genre, and Writing Style in Formal Written Texts, 23 Text 321, 332–333 (2003) (stating that the results of an empirical study show that women tend to use the first person and contractions at a higher rate than men in formal written texts).
While age, years of judicial experience, and years of experience in the legal profession had no relationship with whether a judge preferred Plain English to Legalese, those factors were slightly correlated with whether a judge preferred the Informal sample to the Legalese. The 139 respondents ranged in age from 42 to 86; in years on the bench, they ranged from less than 1 year to over 40 years; in years of experience in the legal profession, they ranged from 15 years to 53 years. The median in all three categories was slightly lower for the Informal respondents than it was for the Legalese respondents.

Figure 4.12: Age and Experience

<table>
<thead>
<tr>
<th>Style Preferred</th>
<th>Median Age</th>
<th>Median Years in Legal Profession</th>
<th>Median Years as a Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Informal</td>
<td>59</td>
<td>32</td>
<td>13</td>
</tr>
<tr>
<td>Legalese</td>
<td>60</td>
<td>34.5</td>
<td>17</td>
</tr>
</tbody>
</table>

100. See supra fig. 4.6; supra sec. IV(B).
101. See fig. 4.12.
While urban trial judges preferred the Informal sample by a 59 percent margin, rural trial judges preferred the Legalese sample at a rate of 55 percent. Rural trial judges were the only category of judges who preferred the Legalese sample to the Informal sample.102

Just as the judges’ comments in Part IV(B) helped to explain the judges’ preferences for Plain English over Legalese, the judges’ comments regarding their preference for the Informal sample are telling as well. A few judges commented that the choice was not “even close,” and that they preferred the Informal sample by a wide margin. Several judges who preferred the Informal sample indicated that they liked the use of lists, active voice, simple sentence structure, the direct language, and the brevity and succinct language in the Informal sample. One state trial judge wrote, “Short and direct is almost always more persuasive.”

Additionally, several judges applauded the elimination of the introductory paragraph that traditionally contains the phrase “Comes Now,” identifies the parties, and states that the party submitting the motion “will show as follows.” One such judge noted that he recently gave a presentation to his former law firm on effective writing and entitled his accompanying presentation, “Comes Now the Idiot,” in the hopes that the lawyers would stop inserting the useless language into pleadings. These “Comes Now” paragraphs usually identify the parties by stating “Defendant Hineman,” “Plaintiff TSC Operating, Inc.,” etc. Observing that the plaintiffs and defendants are identified in the caption on every pleading’s first page, one apparently frustrated appellate judge wrote, “Who else would Hineman be?” after crossing out the paragraph with this language. Indeed, his point is well-taken. While one could imagine a scenario where this paragraph might offer some utility, it is useless in the vast majority of instances. Following the same logic behind the elimination of this “Comes Now” paragraph, I would guess that the “To the Honorable Court” language that is also prevalent would yield the same response had I included it in this survey. To paraphrase one appellate judge, “Who else would the pleading be submitted to?”

102. Only 20 of the 139 judges declared that they sat in rural districts. Eleven of the judges preferred the Legalese while nine preferred the Informal. Thus, a two-person swing could have changed the result. Further study is necessary to determine how reliable this result is.
Still, despite the high marks the Informal sample received, the Informal sample drew heavy criticism for its use of contractions. Several judges who preferred the Informal sample commented that the use of contractions was too much. One judge wrote, “I found [the Informal sample] more persuasive than [the Legalese]. It is more didactic and somewhat easier to read. But its use of contractions and colloquial terms weakens the presentation.” Several judges who preferred the Legalese stated that even though they liked the informality and directness of the Informal sample, it went too far. One judge wrote, “Although [the Informal sample] is very ‘readable’—and I am not a slave to formality or stilted prose—[the Informal sample] is too loose, too informal, and too casual—excessive contractions (if any) have no place in formal pleadings, briefs, etc. Simple and direct is good, but there [is a limit].” Another judge wrote, “I like the more informal style of [the Informal sample] but it goes too far. I don’t like contractions and the tone distracts from the seriousness of the matter.” One judge wrote, “Some use of contractions is fine [but] this is too much.” Others found that the use of contractions was not “polite.” A couple of judges referred to the use of contractions as “slang.”

However, despite several judges’ hesitation to use the informal style, most judges preferred the conversational style and tone of the Informal sample. One federal appellate judge wrote, “[The Informal sample] may be a bit too informal, but as compared with the stilted tone of [the Legalese sample], it is certainly preferable.”

V. CONCLUSION

The results are clear: judges prefer Plain English to Legalese. Whether a judge is an appellate or trial judge or a federal or state judge plays no role in whether the judge prefers Plain English. Nor does the judge’s gender, age, years of judicial experience, or years of experience in the legal profession. Whether a judge’s district is rural or urban plays no role, either. Judges—by a two-thirds margin—find Plain English more persuasive than Legalese. Thus, it is in the litigator’s interest to submit pleadings in Plain English.
Judges prefer the Plain English style so much that they would rather have litigants submit informal pleadings, filled with contractions and first person, than formal Legalese. Thus, when making a writing-style decision, it is probably better to err on the side of informality and clarity than formal Legalese. Still—as the data indicate—pleadings should not be too informal. The lawyerly instinct, therefore, to use all-caps, “COMES NOW”-type language, for example, and all the other legalese common in pleadings should be avoided. There is simply no reason to think that “judges want it” or “that’s the way it should be done.” It is not the way judges want it.

103. More judges preferred the Informal sample than the Legalese sample. See supra Sec. IV(C).
APPENDIX 1: LEGALESE SAMPLE

(caption omitted)

RESPONSE OF TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC TO MOTION OF HENRY H. HINEMAN FOR STAY PENDING APPEAL

COMES NOW the Plaintiffs, TSC Operating Limited Partnership (hereinafter “TSC”) and Littus LLC (“Littus”), by and through their attorneys of record and file this, TSC and Littus's Response of TSC Operating Limited Partnership and Littus, LLC to Motion of Henry H. Hineman for Stay Pending Appeal and would respectfully show unto the court as follows:

INTRODUCTION

Defendant Hineman is attempting to stay the force and effect of the remand orders entered by this court on February 25, 2004 (hereinafter the "Remand Orders") under Federal Rule of Bankruptcy Procedure 8005 governing stays pending appeal because he believes that he will likely succeed on appeal to the District Court. Hineman, unlikely to prevail on appeal, cannot meet Rule 8005's threshold inquiry which is a “strong showing” of the likelihood of success, and is, thus, incorrect in his analysis under Rule 8005. Furthermore, Hineman cannot make appropriate showings on the other three inquiries under the Rule: whether appellant will suffer irreparable injury absent a stay; whether a stay would substantially harm other parties in the litigation; and whether a stay is in the public interest. Hineman fails on all counts, and the request for stay must be denied.

ANALYSIS

Under Federal Rule of Bankruptcy Procedure 8005, the court should consider (1) the likelihood of success on the appeal, (2) whether the appellant will suffer irreparable harm absent a stay, (3) whether a stay would harm other parties to the litigation, and (4) whether a stay would harm the public interest. In re Forty-Eight Insulations, Inc. 115 F.3d 1294, 1300 (7th Cir. 1997). The decision of a court to deny a Rule 8005 stay is highly discretionary, and the likelihood of success is the threshold inquiry in this analysis, which Hineman must meet. In re 203 North LaSalle Street Partnership, 190 B.R. 595, 596 (N.D. Ill. 1995);
Forty-Eight Insulations v. Smith, 115 F.3d 1301, 1304 (N.D. Ill 2000). If the threshold burden is not met, the court should not consider the other stay factors. Forty-Eight Insulations, 115 F.3d at 1304.

A. It Is Unlikely That Hineman Will Succeed on the Merits.

Hineman’s Notice of Appeal asks the District Court to overturn the Remand Orders. Hineman erroneously applies the preliminary injunction definition of “likelihood of success” and argues that the “likelihood of success” showing only requires him to show that his chances of success on appeal are “better than negligible” instead of the standard required by Rule 8005. (Hineman Motion at 4.) In the context of a stay pending appeal, where the arguments of the movant have already been evaluated on a success scale, the applicant must make a stronger threshold showing of the likelihood of success to meet his burden. In re Forty-Eight Insulations, Inc., 115 F.3d at 1300. While Hineman cites the Forty-Eight Insulations case, which supplies the “stronger showing” threshold that Hineman must make, he ignores its standard, instead citing a string of preliminary injunction cases that do not apply to the case at bar.

Moreover, the likelihood of success standard on a stay motion pending appeal requires the movant to demonstrate a "substantial showing" of the likelihood of success, "not merely the possibility of success." Id. at 1295, citing Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991) (concluding that a stay movant must raise "serious questions going to the merits"). This is because he must convince the reviewing court that the lower court, after having the benefit of evaluating the relevant evidence, has likely committed reversible error. Forty-Eight Insulations at 1295. See also, Adams v. Walker, 488 F.2d 1064, 1065 (7th Cir. 1973) (requiring a stay movant to make a “strong” and “substantial” showing of likelihood of success before a reviewing court should intrude on the ordinary process of judicial administration); In re Beswick, 98 B.R. 905, 906 (N.D. Ill. 1989) (denying a Rule 8005 Motion where movant’s main argument was that certain other alternatives should have been explored by the court).

Additionally, Hineman’s analysis on likelihood of success addresses only the jurisdictional issue. Hineman believes that he can better argue “related to” jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 Cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge informed the parties that he had read and considered all the papers, that the parties’ filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. at 2, 26.) Hineman’s showing on the likelihood of success in the jurisdictional issue does not rise to the “strong showing” required by the Seventh Circuit.
Also, Hineman does not offer any analysis in his “likelihood of success” consideration as to how he will overcome the late filing of the removal papers. Therefore, on its face, Hineman’s likelihood of success analysis in the removal papers issue fails, and no stay should issue.
APPENDIX 2: PLAIN ENGLISH SAMPLE

TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC’S RESPONSE TO HENRY H. HINEMAN’S MOTION FOR STAY PENDING APPEAL

Plaintiffs, TSC Operating Limited Partnership (“TSC”) and Littus LLC (“Littus”), by their attorneys, Greg West, Joseph Rhound and Danika Wells, state as follows in response to Defendant Henry H. Hineman’s (“Hineman”) motion for stay pending appeal:

INTRODUCTION

This is a response to Defendant Hineman’s motion for stay pending appeal. Hineman seeks to stay the effect of the remand orders this court entered on February 25, 2004. Hineman is incorrect, however, in his analysis under Rule 8005 and he is unlikely to prevail on appeal for four reasons:

1. He has not met and cannot meet the "strong showing" of likely success threshold required under Rule 8005;
2. He cannot show that he will suffer irreparable injury absent a stay;
3. A stay could substantially harm other parties in the litigation; and
4. He cannot show that stay is in the public interest.

A court’s decision to deny a Rule 8005 stay is discretionary. In re 203 North LaSalle Street Partnership, 190 B.R. 595, 596 (N.D. Ill. 1995). The first item, the likelihood of success, is a threshold inquiry, and if the threshold burden is not met, the court should not consider the other stay factors. Forty-Eight Insulations v. Smith, 115 F.3d 1301, 1304 (N.D. Ill 2000). This analysis addresses the threshold burden as well as the other three factors.

A. It is unlikely that Hineman will succeed on the merits.

Hineman’s Notice of Appeal misinterprets the law. Hineman argues that the “likelihood of success” showing only requires him to show that his chances of success on appeal are "better than negligible." (Hineman Motion at 4.) The “better than negligible” standard, however, is the standard for a preliminary injunction—not for a stay. A Rule
8005 “likelihood of success” standard is a much greater burden to meet. In Adams v. Walker, 488 F.2d 1064, 1065 (7th Cir. 1973), the reviewing court required a stay movant to make a “strong” and “substantial” showing of likelihood of success before it would intrude on the ordinary process of judicial administration. The court requires this greater burden because the movant must convince the reviewing court that the lower court, after evaluating the relevant evidence, likely committed reversible error. Forty-Eight Insulations at 1295. In In re Beswick, 98 B.R. 905, 906 (N.D. Ill. 1989), the court denied a Rule 8005 Motion in which the movant’s main argument was that the court should have explored other alternatives.

Further, Hineman’s argument fails because his analysis only addresses one of the two issues in this case; his analysis of the issue he does address is not persuasive. Hineman’s Notice of Appeal only addresses the jurisdictional issue—he does not address how he will overcome the late filing of the removal papers. Hineman believes that he can better argue “related to” jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge informed the parties that he had read and considered all the papers, that the parties’ filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. At 2, 26.) Hineman relies on the court’s compliments to argue that he has a “likelihood of success” on appeal. A court’s compliments do not rise to the “strong showing” required by the Seventh Circuit.
Hineman seeks to stay the effect of the remand orders this court entered on February 25, 2004. But Hineman is incorrect in his analysis under Rule 8005 and is unlikely to prevail on appeal for four reasons:

1. He hasn’t met and can’t meet the "strong showing" of likely success threshold required under Rule 8005;
2. He can’t show that he will suffer irreparable injury absent a stay;
3. A stay could substantially harm other parties in the litigation; and
4. He can’t show that stay is in the public interest.

A court’s decision to deny a Rule 8005 stay is discretionary. In re 203 North LaSalle Street Partnership, 190 B.R. 595, 596 (N.D. Ill. 1995). The first item, the likelihood of success, is a threshold inquiry, and if Hineman doesn’t meet the threshold burden, the court shouldn’t consider the other stay factors. Forty-Eight Insulations v. Smith, 115 F.3d 1301, 1304 (N.D. Ill 2000). My analysis addresses the threshold burden as well as the other three factors.

A. It is unlikely that Hineman will succeed on the merits

Hineman’s Notice of Appeal misinterprets the law. He argues that the "likelihood of success" showing requires him to show only that his chances of success on appeal are "better than negligible." (Hineman Motion at 4.) But the “better than negligible” standard is the standard for a preliminary injunction—not for a stay. A Rule 8005 “likelihood of success” standard is a much greater burden to meet. Courts require that stay movants make a “strong” and “substantial” showing of likelihood of success before granting a stay. Adams v. Walker, 488 F.2d 1064, 1065 (7th Cir. 1973). Courts require this greater burden because the movant must convince the reviewing court that the lower court, after evaluating the relevant evidence, likely committed reversible error. Forty-Eight Insulations at 1295. For example, in In re Beswick, 98 B.R. 905, 906 (N.D. Ill. 1989), the court denied a Rule 8005 Motion in
which the movant’s main argument was that the court should have explored other alternatives.

What’s more, Hineman’s argument fails because his analysis addresses only one of the two issues in this case. And his analysis of the issue he does address is not persuasive. Hineman’s Notice of Appeal addresses only the jurisdictional issue—he does not say how he will overcome the late filing of the removal papers. Hineman believes that he can better argue “related to” jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge told the parties that he had read and considered all the papers, that the parties’ filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. At 2, 26.) Hineman relies on the court’s compliments to argue that he has a “likelihood of success” on appeal. But a court’s compliments do not rise to the “strong showing” required by the Seventh Circuit.
APPENDIX 4

Survey

1. Which writing sample is more likely to persuade you? _________

2. Your age _________

3. Your gender _________

4. Years as a judge_________

5. Years in legal profession_________

6. Would you describe your district as rural or urban?__________

Comments (optional):

APPENDIX 5

Survey

1. Which writing sample is more likely to persuade you? _________

2. Your age _________

3. Your gender _________

4. Years as a judge_________

5. Years in legal profession_________

Comments (optional):
November 4, 2005

Your Honor,

I am a member of the Texas Law Review at the University of Texas at Austin School of Law and I am conducting research on persuasive legal writing. It is my hope and expectation that the study’s findings will result in publication. I am writing to kindly request your participation in a brief survey.

If you choose to participate, it will take no more than 5 minutes of your time. Your responses are anonymous.

Enclosed are a brief survey and two excerpts from potential court filings. Please read each sample and answer the questions on the Survey Sheet entitled, “Survey.” When you are finished with the Survey, please use the self-addressed stamped envelope to mail your Survey by December 12th. You only need to mail the Survey; you can discard this letter and the writing samples.

Your participation in this survey is invaluable to the project’s success and is greatly appreciated. You may direct any questions to me at flammer@mail.utexas.edu.

Thank you for your participation.

Sincerely yours,

Sean Flammer
Legal Writing Project
Texas Law Review
727 East Dean Keeton Street
Austin, TX 78705
BEGINNING LEGAL WRITERS IN THEIR OWN WORDS: WHY THE FIRST WEEKS OF LEGAL WRITING ARE SO TOUGH AND WHAT WE CAN DO ABOUT IT

Miriam E. Felsenburg and Laura P. Graham*

I. INTRODUCTION

As long-time legal writing professors, we have observed anecdotally that many of the first-year students in our legal writing classes, although typically bright and hard-working, struggle to effectively grasp the fundamental skills of legal analysis and legal writing. This struggle manifests itself especially clearly during the first few weeks of legal writing instruction and often leads to

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* © 2010, Miriam E. Felsenburg and Laura P. Graham. All rights reserved. Associate Professors of Legal Writing, Wake Forest University School of Law. The Authors wish to express their deepest gratitude to the following persons, without whose assistance this project would not have been possible: Blake Morant, Dean and Professor; Ann P. Gibbs, Associate Dean, Administrative & Student Services; Professor Miles Foy, former Executive Associate Dean for Academic Affairs; Professor Ron Wright, Executive Associate Dean for Academic Affairs; and Professor Sid Shapiro, Associate Dean for Research and Development, all from the Wake Forest University School of Law, for supporting our scholarship by awarding us a research grant to fund our study and by providing valuable insights into our study procedures and results; the Legal Writing Institute, and especially the facilitators of the 2009 LWI Writers Workshop, Professors Steve Johansen, J. Christopher Rideout, Ruth Anne Robbins, and Lou Sirico, whose suggestions for improving our Article and advice about publishing it have been instrumental; Professor Christine N. Coughlin, Director of Legal Research & Writing, Wake Forest University School of Law, and our colleagues on the Wake Forest legal writing faculty, for being wonderful “sounding boards” for us throughout this process; Professor Ananda Mitra, Ph.D., Chair of the Communications Department, Wake Forest University, whose expertise in designing surveys and interpreting data was invaluable; KC Barner and Kris Wampler, our very able research assistants; Ed Raliski, Arlene McClannon, and Trevor Hughes from the Information Services Department at Wake Forest University School of Law, who helped us distribute our surveys and compile data; Professor Brenda Gibson, a gracious legal writing colleague and supporter of our study; the many students at Schools X and Y who were first-year students in the fall of 2007 and took time out of their busy schedules to complete our surveys; and last but certainly not least, our families, who have patiently and enthusiastically supported us over the two years it has taken to bring this project to fruition.  
1. See Brook K. Baker, Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice, 23 Wm. Mitchell L. Rev. 491, 497 (1997) (“Students entering law school are prototypical examples of novices enter-
a high frustration level that tends to persist throughout the first year of legal writing (and indeed may never be overcome). With these students in mind, we undertook a research project designed to help us better understand the nature of, and the reasons for, their struggles in these first few weeks of legal writing.

We chose to focus our attention on students’ experiences during the first eight weeks of legal writing instruction because this period is a critical one in students’ legal education. Early legal writing classes often give students their first exposure to the key skills they must develop to succeed as law students and as lawyers. For example, legal writing classes often give students their first glimpse into how the United States legal system works, the hierarchy of United States courts, and the differences between mandatory and persuasive authority. These aspects of early instruction are crucial in preparing students to understand how the cases they will be reading came about. Many students read their first cases in early legal writing classes, and their legal writing professors first instruct them on how to begin analyzing those cases—for example, how to extract a rule from a case and how to differentiate between a rule and a holding. Their legal writing professors also first outline for them the basic templates for writing about legal analysis.


3. As we will discuss more fully, our study included a series of surveys administered to School X and School Y students during their first year of law school. In the second survey, administered after approximately eight weeks of law school, we asked students to rate how helpful legal writing had been to their learning in other law school classes. Almost 75 percent of the surveyed students at School X rated legal writing as “moderately,” “very,” or “extremely” helpful in their other courses. One student wrote, “LRW helped [me] to learn how to read cases and understand what they are trying to convey.” Another student wrote, “Legal writing has helped me to analyze cases more efficiently. Particularly, the process of writing memos has enabled me to hone [sic] in on what issues/facts are most important.” One particularly direct student wrote, “Absent legal writing, it would be impossible to brief a case, extract a rule, or analyze multiple cases on one subject.”

4. At both School X and School Y, whose students we surveyed, students have a full week of legal research and writing classes (approximately twelve hours of instruction) before they begin their doctrinal classes. Topics typically covered in this week include an introduction to the United States legal system, an overview of the sources of the law (statutory and common law), how to read cases, how to brief cases, and the IRAC paradigm (or a similar paradigm) for legal analysis and legal writing. The IRAC paradigm is explained...
We hoped that by gathering information about beginning legal writing students’ experiences during these critical early weeks, we could develop some “interventions” to help us, and our colleagues in the legal writing academy, ease our students’ transition into the difficult but crucial realm of legal writing.\(^5\) We therefore sought to gather data that would help explain why so many students encounter a “world of trouble” when they begin to learn legal writing. We administered three surveys to students entering law school in August 2007 at two diverse law schools, identified in this Article as School X and School Y.\(^6\) Included in these two groups of students were students who were diverse racially and ethnically,\(^7\) who covered a wide range of ages,\(^8\) and who

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\(^5\) In two landmark empirical studies in 2004 and 2007, Kennon M. Sheldon and Lawrence S. Krieger documented the widely-held belief that “law school has a corrosive effect on the well-being, values, and motivation of students.” Kennon M. Sheldon \& Lawrence S. Krieger, Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory, 33 Pers. \& Soc. Psych. Bull. 883, 883 (2007) [hereinafter Sheldon \& Krieger, Understanding the Negative Effects]; see also Kennon M. Sheldon \& Lawrence S. Krieger, Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being, 22 Behav. Sci. L. 261, 262–263 (2004) [hereinafter Sheldon \& Krieger, Does Legal Education Have Undermining Effects?]. These studies are widely cited by proponents of the Humanizing Legal Education movement, who advocate that “law schools need to identify negative stressors in the law school environment, reduce or eliminate those as much as possible, and help the students to manage those that cannot be eliminated.” Barbara Glesner-Fines, Fundamental Principles and Challenges of Humanizing Legal Education, 47 Washburn L.J. 313, 314 (2008); see also Michael Hunter Schwartz, Humanizing Legal Education: An Introduction to a Symposium Whose Time Came, 47 Washburn L.J. 255, 255–256 (2008) (noting that the AALS recently established a Balance in Legal Education section to address humanizing issues and that leading publications, including William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass 2007), and Stuckey et al., supra n. 2, make “numerous references to humanizing concerns and principles”). While further elaboration on the humanizing movement is beyond the scope of this Article, we think that our data, and the conclusions and recommendations drawn from it, are fully consistent with the need to make law school a less stressful, more satisfying experience for our students, and we believe that the proposals we make here will help accomplish that goal, at least in the legal writing classroom.

\(^6\) We have designated the schools as “School X” and “School Y” rather than naming them in order to further protect the anonymity of both the programs and the students who responded. School X is located in a medium-sized city, is private, and accepts only full-time students. School Y is in a larger, more urban area, is publicly supported, and accepts both full-time and part-time students.

\(^7\) Survey 1 contained no questions pertaining to the respondents’ race or ethnicity. The characterization of the participants as racially and ethnically diverse is based on the authors’ knowledge of the institutions’ specific location and profiles. In the interest of maintaining the institutions’ anonymity, the authors have chosen not to provide further specific information in this regard.

\(^8\) For the ages of School X and School Y students, see infra fig. 2.
came from varying backgrounds. For example, some entered law school straight out of college while others had been working for many years; some were full-time law students while others were attending law school part-time.9

The first survey, taken before the students began law school, measured their readiness for learning legal writing based on their experiences, writing habits, and present attitudes toward writing. The second survey gathered data from many of these same students about their experiences in legal writing during the first eight weeks of law school. The third survey, done near the end of the students’ first year of law school, revisited key questions about the students’ legal writing experiences over the course of their first year.10 Because this Article focuses on students’ experiences in the first few weeks of legal writing instruction, it covers only the Survey 1 and Survey 2 results.

Based on the data we collected from these two surveys, we arrived at four major findings that are consistent with our experience and anecdotal observations:

(1) Many of the students we surveyed were not familiar with the professional requirements of being a lawyer. Therefore, these students had no context in which to place the skills that their legal writing professors were teaching.

(2) Many of the students we surveyed believed that they would be taught a step-by-step approach to legal writing and tended to resist the difficult “inside-out,” critical thinking that is integral to effective legal analysis and writing.

(3) Many of the students we surveyed experienced a counterproductive plummet in their confidence levels when they realized that learning legal writing would be much more difficult than they had expected.

9. More than ninety of the School X students and more than 100 of the School Y students listed some work experience after graduating from college. The student body at School X is primarily composed of upper-middle class students, most of whom are recent college graduates, while the student body at School Y is more diverse.

10. We surveyed these same students in March 2010, as they prepared to graduate, to assess how their experiences since the 2007–2008 survey altered their understanding of the value and effectiveness of their first-year legal writing instruction. The results of this survey will be reported in a future article.
(4) Many of the students we surveyed incorrectly believed that their prior strengths and weaknesses as writers would transfer directly to legal writing. In some cases, this mistaken belief interfered with their ability to adjust smoothly to the new demands of legal writing.

We believe that the challenge posed by these findings is to help our students “recast” their understandings and expectations regarding what legal writing is and how it is learned, from the very outset of the course. Based on our data, we have concluded that this “recasting” may be accomplished by making modest adjustments in two key areas. First, we need to orient our students sooner to the crucial role that legal writing plays in “the real world” and to the needs and expectations of the legal reader for whom they are learning to write: we need to give them a new context in which to work. Second, we need to help our students better manage their own expectations about learning legal writing and to better adapt their prior strengths and weaknesses to the task of legal writing without counterproductively eroding their confidence. If we can develop strategies for implementing these changes from the very beginning of our students’ legal writing instruction, we will likely see less frustration, less trauma, and more success among our students.

In this Article, we first describe the methodology of our study, including general data about the study participants and report the results. We then explore each of our major conclusions in more detail. Finally, we suggest some modest steps to help our students take charge of their own legal writing success—that is, to recognize and embrace their role as novices in the legal writing discourse community and to actively move themselves forward in their learning.

II. THE STUDY DESIGN

A. Instrumentation

The questions on the first survey were developed using input from two focus group meetings, one consisting of School X law faculty who teach a wide range of courses, and the other consisting of second- and third-year School X law students. The first
survey was sent via e-mail to the admitted students at Schools X and Y, approximately one week before they began their law school classes. Our purpose in studying the students before they attended their first law school classes was to obtain “pure” information about (1) their education and experiences prior to entering law school, with an emphasis on those aspects of their education and experiences that bore directly on their preparation for learning legal writing, and (2) their understanding of what learning law and legal writing would include.

One group of questions on this survey covered demographic information such as undergraduate major, undergraduate GPA, graduate degrees earned, LSAT score, age, and jobs held. A second group of questions dealt with the students’ prior writing experiences and their writing habits. A third group of questions pertained to what the students thought the study of law involved, what they thought the study of legal writing involved, what they thought were important aspects of good legal writing, and what they considered to be their strengths and weaknesses as writers.

On the second survey, administered in mid-October to students who responded to Survey 1, we omitted the demographic questions and the specific questions about the students’ prior writing experiences. We retained some questions from Survey 1, including those that addressed what the students thought the study of law involved, what they thought the study of legal writing involved, what they thought were important aspects of good legal writing, and what they considered to be their strengths and weaknesses as writers. We added several questions designed to assess how the students felt about their progress in legal writing.

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11. Survey 1 is reprinted in Appendix A to this Article. The appearance of Survey 1 in Appendix A differs slightly from the appearance of the online version; the content is identical. This survey and all other components of our study were approved by the Institutional Review Board of Wake Forest University, Reynolda Campus.


13. See id. at questions 1–3, 7.

14. See id. at questions 4–6, 8–11.

15. Survey 2 is reprinted in Appendix B to this Article. The appearance of Survey 2 in Appendix B differs slightly from the appearance of the online version; the content is identical.

16. We were able to track the responses of the survey participants through their unique identifiers and to confirm that although the number of respondents dropped off for Survey 2, those students who did respond were demographically similar percentage-wise to the larger Survey 1 population in terms of their age range, their undergraduate GPAs, and their LSAT scores.
up to that point: Were they feeling more confident or less confident in their legal writing ability? In what particular areas were they struggling? What particular instructional methods had been most effective?

B. Data Collection

Approximately one week before they began their law school classes, all incoming first-year law students at the two participating schools received an e-mail invitation with a live link to complete Survey 1 by accessing a website address. Each student was assigned a unique identifier, which enabled our survey consultant to track individual responses while preserving the anonymity of the students. The students were required to complete the survey in one session.17 During the week-long period when the survey was open, we sent two e-mail reminders to students who had not yet responded. On Survey 1, we obtained 144 responses out of 164 first-year students at School X and 121 responses out of 261 first-year students at School Y, representing an 87.8 percent and a 46.3 percent response rate, respectively.

This same process was repeated for Survey 2, with e-mail invitations being sent to only those students who responded to the Survey 1. Survey 2 was open for a week-long period in mid-October, after the students had completed their first two months of legal writing instruction. Out of the 265 students who received invitations to complete Survey 2, 125 responded (83 from School X and 42 from School Y).18

17. This requirement was designed to prevent students from “researching” their answers through online or other sources.
18. We anticipated this drop in participation due to the increasingly busy schedules of first-year law students. Because Survey 2 was administered before students had received a final grade for the semester, it is impossible to determine whether the students who chose to respond to Survey 2 were performing better or worse than those students who did not respond. We recognize that students’ overall feelings about their legal writing experiences might have played some part in their decision about whether to participate, and that, theoretically, it is possible that the students who responded to Survey 2 were those who were happier overall with their early legal writing experience. However, the Survey 2 responses as a whole did not reflect such a skew; in fact, many respondents openly articulated the struggles and frustrations they were experiencing, as will be discussed more fully infra at Part V.
III. DESCRIPTION OF SURVEY PARTICIPANTS

As noted previously, we considered it important to learn some basic demographic information about the students we surveyed. We wanted to insure that we were reaching a diverse and representative sample of the first-year law students at Schools X and Y. We also wanted to understand what the students’ educational backgrounds were and how those backgrounds might affect the students’ attitudes toward legal writing.

Not surprisingly, the students who responded to Survey 1 reported a wide array of undergraduate majors.\textsuperscript{19} As the graph below shows, among the listed choices, political science was the most common undergraduate major of entering law students at both Schools X and Y.\textsuperscript{20} Several students also reported that they had obtained graduate degrees, including PhDs, various masters degrees (including MBA, MA, MS, MEd, and MPA), and divinity degrees.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{19} See app. A, at question 12. If a student’s major was in a subject other than those listed, he or she could choose “Other” and write in his or her major.
  \item \textsuperscript{20} Among the majors students reported under “Other” were sociology, religion, education, criminal justice, communications, mathematics, fine arts, Spanish, and computer science.
  \item \textsuperscript{21} See id. at question 13.
\end{itemize}
We also asked students to list the titles of, and to describe, any jobs they had held since graduating from college.\footnote{22} The results reflected quite a variety of work experience among the students who responded. Among the more commonly listed categories of jobs were teaching, health care, engineering, computer programming, and military service. Among the more unusual jobs listed were clergy, plumbing, and chiropraxy.

A number of students did not respond to this question at all, and some who did respond wrote, “None,” indicating that some of the students we surveyed had had no significant post-collegiate employment.\footnote{23} This may be due in part to the young age of many of the students. The chart below represents the age ranges of the students at Schools X and Y.\footnote{24} Most of the respondents were be-

\footnote{22. \textit{Id.} at question 16.}  
\footnote{23. Of the 144 School X students who completed the survey, 32 percent either did not answer this question or wrote “None” or “N/A.” Of the 121 School Y students who completed the survey, 11.5 percent either did not answer this question or wrote “None” or “N/A.” Some students did list such temporary jobs as “lifeguard,” “waiter/waitress,” “retail sales clerk,” and other similar jobs.}  
\footnote{24. \textit{See id.} at question 17.}
tween twenty-one and twenty-six years old, which reflects the expected ages of incoming law students in most United States law schools.\textsuperscript{25} In comparison to School X, a significant percentage of School Y respondents were twenty-seven or older, most likely because School Y has both a part-time and an evening program.

\textbf{FIGURE 2}

\textbf{AGES}

Survey 1, August 2007

We also asked students to report their undergraduate GPAs and their LSAT scores within given ranges. The charts below represent the responses to these questions. As was expected given the diversity of Schools X and Y, the students reported a wide range of GPAs and LSAT scores.\textsuperscript{26}

\textsuperscript{25} While the ABA does not post ages of students on its website, various online “chats” and blogs note that twenty-three to twenty-five is the “average” age of incoming law students. See \textit{e.g.} College Confidential, Law School, Does Anyone Know What Is the Average Age of Graduating JDs (i.e. When They Start Work)? http://talk.collegeconfidential.com/law-school/356439-average-age.html (June 12, 2007, 10:05 a.m. GMT).

The data for Schools X and Y covered these ranges from top to bottom, though School X’s GPAs skewed higher than School Y’s. Similarly, the ILRG’s statistics on LSAT scores for 2007 were measured from a high range of 176 to 149 to a low range of 170 to 143. See id. Internet Leg. Research Group, 2009 Raw Data Law School Rankings: Highest LSAT Score (Descending), http://www.ilrg.com/rankings/law/index.php/4/desc/LSATHigh; Internet Leg. Research Group, 2009 Raw Data Law School Rankings: Highest LSAT Score (Descending), http://www.ilrg.com/rankings/law/index.php/4/desc/LSATLow (accessed Apr. 15, 2010). The students at Schools X and Y also covered a range of LSAT scores, from the high of 170 to the low of 139, though the LSAT scores of School X skewed higher than those of School Y.
However, in spite of the fact that the students we surveyed came from such varied backgrounds and entered law school with such a broad range of GPAs and LSAT scores, their experiences in and their reactions to the first few weeks of legal writing were remarkably similar. The remainder of this Article presents the results of Surveys 1 and 2 and our conclusions about why so many of these bright, successful students felt frustrated and dissatisfied in the first few weeks of legal writing.

IV. DESCRIPTION OF SUBSTANTIVE DATA FROM SURVEYS 1 AND 2

One of the chief goals of our study was to learn about beginning law students’ attitudes and expectations regarding the task that would occupy the next three years of their lives: studying to be a lawyer. We particularly wanted to learn about their atti-
tudes and expectations regarding the legal writing component of
the study of law. We theorized that a large part of the frustration
that many new law students encounter in the first few weeks of
law school stems from a lack of understanding about the nature of
the study of law and the demands of the legal profession, includ-
ing the highly specialized and demanding skills required of the
legal writer.

A. Survey 1

On Survey 1, we asked the students two key, open-ended
questions: "Describe what you think the study of law involves," and
"Describe what you think the study of legal writing in-
volves."28 We reviewed all of the prose responses and identified a
number of common themes among them. We then categorized the
responses accordingly, with some responses falling into more than
one category.29 Figures 5 and 6 below numerate the students’ re-
sponses to these questions.

29. This explains why, on both Figures 5 and 6, the percentages of all responses total
more than 100 percent.
FIGURE 5
DESCRIBE WHAT YOU THINK THE STUDY OF LAW INVOLVES
Survey 1, August 2007
In addition to the purely open-ended questions about their general understanding of the fields of law and legal writing, we also asked students the following more pointed question: “Based on what you know today, how important do you think the following are in good legal writing?” The chart below shows the responses to this question.30 31

30. See id. at question 11.
31. We also included the item “Other.” Three students inserted comments under “Other”: One wrote “Spelling,” one wrote “Formatting,” and one wrote “Accuracy.”
We were interested to learn whether the responses to this question differed between students who reported having some prior legal writing experience and those who did not. The figure below represents the responses of students who reported prior legal writing experience.
The striking similarity between Figures 7 and 8 suggests that self-reported prior legal writing experience had no effect on the students’ perceptions of what is important in good legal writing.

A second chief goal of our study was to measure how students’ confidence levels changed over the course of their early law school experience, especially their early legal writing instruction. Thus, we asked students two questions designed to elicit this data. First, we asked, “Taking into account the writing you have done prior to entering law school, please indicate how confident you are in your writing ability.” Second, we asked, “Select the
response below that best indicates how confident you are about learning legal writing.”32

The data confirmed that the vast majority of the surveyed students entered law school bursting with confidence about their writing ability in general. The dramatic positive skew of the chart below illustrates this finding. Of the 254 students who answered this question, 141 of them (55 percent) were either “extremely” or “very” confident about their general writing ability. An additional 96 students (41 percent) were “moderately” confident. Only 17 students (7 percent) said they were “slightly” or “not at all” confident.

FIGURE 9
CONFIDENCE IN GENERAL WRITING ABILITY
Survey 1, August 2007

The students were even more confident about their ability to learn legal writing. A full 70 percent—183 students—reported that they were “confident” or “very confident” in this regard; only 21 percent—55 students—stated they were “somewhat confident.” Less than 5 percent—12 students—indicated that they were “not at all confident.”

32. See id. at questions 4, 10.
We assumed that one primary reason for these students’ sky-high confidence levels was their past writing successes. To confirm this assumption, we asked several questions on Survey 1 designed to elicit data about the students’ general educational experiences and their specific writing backgrounds. Specifically, we asked, “Which kinds of writing have you done?”\textsuperscript{33} As the table shows, of the 265 students who responded, nearly every single one had written research papers and essays in college, and a large number had written short opinion pieces.\textsuperscript{34}

\textsuperscript{33} See id. at question 1. Students could check more than one answer.  
\textsuperscript{34} All of the numbers drop off significantly for writing done either in graduate school or at work. Referring back to Figure 2, supra, the data showed that a high percentage of entering law students were twenty-three years old or younger. Making a broad assumption, it is likely that those students had not gone to graduate school or done significant professional work at all in their lives to date.
We also asked students who checked “Legal writing” to describe the kind of legal writing they had done. The question, although open-ended, included examples for the students, such as “trial briefs, trial memoranda, case briefs, etc.” Out of the 265 students who completed the survey, 103 of them (39 percent) reported that they had prior legal writing experience; the following bar graph breaks down their responses by category.

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35. See id. at question 2.
36. We constructed the categories listed on this chart after reviewing all of the prose responses. Because some students reported having done more than one kind of legal writing, the responses totaled more than 100 percent.
FIGURE 12
STUDENTS WITH LEGAL WRITING EXPERIENCE AND THE TYPE OF LEGAL WRITING THEY REPORTED THEY HAD DONE
Survey 1, August 2007

A third goal of our study was to assess the students’ perceptions of their writing strengths and weaknesses. On Survey 1, we asked entering law students two related questions: “Describe your strengths as a writer” and “Describe your weaknesses as a writer.”37 The following tables numerate the students’ responses to these questions.

37. See id. at questions 5, 6. These questions were open-ended, and we grouped the
FIGURE 13
SELF-ASSESSMENT OF WRITING STRENGTHS
Survey 1, August 2007

<table>
<thead>
<tr>
<th>STRENGTH</th>
<th>NUMBER OF RESPONSES</th>
<th>PERCENTAGE OF TOTAL RESPONSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization</td>
<td>69</td>
<td>28.6</td>
</tr>
<tr>
<td>Conciseness</td>
<td>61</td>
<td>25.3</td>
</tr>
<tr>
<td>Clarity</td>
<td>57</td>
<td>23.6</td>
</tr>
<tr>
<td>Grammar/Punctuation</td>
<td>40</td>
<td>16.6</td>
</tr>
<tr>
<td>Analysis</td>
<td>32</td>
<td>13.2</td>
</tr>
<tr>
<td>Flow</td>
<td>27</td>
<td>11.2</td>
</tr>
<tr>
<td>Vocabulary</td>
<td>26</td>
<td>10.7</td>
</tr>
<tr>
<td>Style</td>
<td>25</td>
<td>10.3</td>
</tr>
<tr>
<td>Creativity</td>
<td>21</td>
<td>8.7</td>
</tr>
<tr>
<td>Research</td>
<td>17</td>
<td>7.0</td>
</tr>
<tr>
<td>Attention to detail</td>
<td>10</td>
<td>4.1</td>
</tr>
<tr>
<td>Technical Writing</td>
<td>9</td>
<td>3.7</td>
</tr>
<tr>
<td>Editing</td>
<td>8</td>
<td>3.3</td>
</tr>
<tr>
<td>Citation</td>
<td>5</td>
<td>2.0</td>
</tr>
<tr>
<td>Logic</td>
<td>5</td>
<td>2.0</td>
</tr>
<tr>
<td>Speed/Efficiency</td>
<td>3</td>
<td>1.2</td>
</tr>
</tbody>
</table>

Responses into the categories shown on the above graphs. Because some students’ responses fell into more than one category, the responses added up to more than 100 percent.
FIGURE 14
SELF-ASSESSMENT OF WRITING WEAKNESSES
Survey 1, August 2007

<table>
<thead>
<tr>
<th>WEAKNESS</th>
<th>NUMBER OF RESPONSES</th>
<th>PERCENTAGE OF TOTAL RESPONSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verbosity</td>
<td>45</td>
<td>19.1</td>
</tr>
<tr>
<td>Grammar</td>
<td>40</td>
<td>17.0</td>
</tr>
<tr>
<td>Spelling</td>
<td>22</td>
<td>9.3</td>
</tr>
<tr>
<td>Organization</td>
<td>19</td>
<td>8.0</td>
</tr>
<tr>
<td>Style</td>
<td>19</td>
<td>8.0</td>
</tr>
<tr>
<td>Punctuation</td>
<td>18</td>
<td>7.6</td>
</tr>
<tr>
<td>Creativity</td>
<td>16</td>
<td>6.8</td>
</tr>
<tr>
<td>Vocabulary</td>
<td>12</td>
<td>5.1</td>
</tr>
<tr>
<td>Editing</td>
<td>9</td>
<td>3.8</td>
</tr>
<tr>
<td>Repetition</td>
<td>8</td>
<td>3.4</td>
</tr>
<tr>
<td>Complex sentence structure</td>
<td>8</td>
<td>3.4</td>
</tr>
<tr>
<td>Clarity</td>
<td>7</td>
<td>2.9</td>
</tr>
<tr>
<td>Perfectionism</td>
<td>7</td>
<td>2.9</td>
</tr>
<tr>
<td>Flow</td>
<td>7</td>
<td>2.9</td>
</tr>
<tr>
<td>Analysis</td>
<td>6</td>
<td>2.5</td>
</tr>
<tr>
<td>None</td>
<td>6</td>
<td>2.5</td>
</tr>
<tr>
<td>Conciseness</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Focus</td>
<td>5</td>
<td>2.1</td>
</tr>
<tr>
<td>Citation</td>
<td>4</td>
<td>1.7</td>
</tr>
<tr>
<td>Research</td>
<td>2</td>
<td>0.85</td>
</tr>
</tbody>
</table>

In sum, the Survey 1 data provided us with baseline information about students’ perceptions of the journey ahead, their confidence level as they embarked on this journey, and their self-assessments of their writing ability. Overall, the data revealed

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38. We acknowledge that our study as designed had certain limitations. Specifically, we acknowledge that: (1) the results from Schools X and Y may not be generalizable to all law school populations; (2) the self-selection of survey participants may have limited the extent to which the respondents’ answers were representative of the 2007–2008 first-year law school population, both locally at Schools X and Y and nationwide; and (3) there may have been other factors that impacted the respondents’ experiences in legal writing and may have influenced their responses.
that these students entered law school full of optimism and anticipation that they could meet the challenges of learning the law and learning legal writing with great success.

B. Survey 2

Through Survey 2, we sought to confirm and explain our anecdotal observations that in spite of students’ great expectations upon entering law school, the first eight weeks often bring about significant frustration and disappointment for many students. Thus, on Survey 2 we repeated a number of the Survey 1 questions to give us data that would shed light on the sources of these students’ frustration and disappointment.

First, we asked the students whether and how their opinion about what the study of law involves had changed.\textsuperscript{39} As the graph below shows, 46 percent of the students who answered this question said that their opinion had not changed,\textsuperscript{40} while the remaining respondents indicated that their opinion had changed, at least to some degree.\textsuperscript{41}

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\textsuperscript{39} See app. B, at question 5.

\textsuperscript{40} All percentages on this chart are based on the 100 responses received to this question. We categorized the prose responses according to common themes, and some responses fit into more than one category. Thus, the responses added up to more than 100 percent.

\textsuperscript{41} For a full discussion of the likely reasons for these results, see infra Part V.
FIGURE 15
BASED ON YOUR EARLY EXPERIENCES IN LAW SCHOOL, HAVE YOU CHANGED YOUR OPINION AS TO WHAT THE STUDY OF LAW INVOLVES?
Survey 2, October 2007

Second, we asked the students whether and how their opinion about what the study of legal writing involves had changed.42 Again, as the graph below shows, a significant number of students who answered this question (49 percent) said that their opinion had not changed,43 leaving 51 percent who indicated that their opinion had changed.44

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42. See app. B, at question 6.
43. Again, all percentages on this chart are based on the ninety-six responses received to this question. We categorized the prose responses according to common themes, and some responses fit into more than one category. Thus, the responses added up to more than 100 percent. We note that while the categories “More difficult” and “More complex” sound similar, they are intended to represent different responses. In the “More difficult” category, we included responses suggesting that students found the work harder than they thought it would be, while in the “More complex” category, we included responses suggesting that the work was more intricate than they thought it would be—that is, there were “more pieces to the puzzle” than they expected.
44. For our interpretation of these results, see infra Part V.
FIGURE 16
BASED ON YOUR EARLY EXPERIENCES IN LAW SCHOOL, HAVE YOU CHANGED YOUR OPINION AS TO WHAT THE STUDY OF LEGAL WRITING INVOLVES?
Survey 2, October 2007

In addition, we asked two questions designed to elicit information about the students’ current perceptions of what legal readers expect from good legal writing. First, we asked, “Based on your legal writing instruction so far, how important do you think the following [characteristics] are in good legal writing?” Figure 17 below numerates their responses.

Second, we asked specifically, “Describe what you think the ordinary legal reader is looking for in legal writing.” Figure 18 depicts the students’ responses.\footnote{This question was open-ended, and we grouped the responses into the categories shown in Figure 18. Some students’ responses fell into more than one category. Thus, the responses added up to more than 100 percent.}

\footnote{See id. at question 14.}
FIGURE 18
WHAT DO YOU THINK THE ORDINARY LEGAL READER IS LOOKING FOR?
Survey 2, October 2007

We also asked two questions about the students’ reactions to their learning experience in legal writing thus far. First, we asked, “What has been the most difficult aspect of learning legal writing so far?” 48

48. See id. at question 16.
Second, we asked students to identify any teaching methods that they thought their legal writing professor should have used to enhance their early legal writing progress.\footnote{See id. at question 12. This question was open-ended, and we grouped the responses into the categories shown on Figure 20. Some students’ responses fell into more than one category. Thus, the responses added up to more than 100 percent.}
Finally, we asked the students to assess how their confidence at that moment—eight weeks into their legal writing course—differed from their confidence as they entered law school.\textsuperscript{50} A comparison of the students’ responses to this question, as illustrated by Figure 21 below, with their earlier responses\textsuperscript{51} shows a marked difference in their confidence levels at these two stages.

\textsuperscript{50} See \textit{id.} at question 8.

\textsuperscript{51} See \textit{supra} fig. 10. The rather dramatic erosion of the students’ confidence levels after eight weeks of legal writing classes is discussed fully \textit{infra}, in Section V(C).
This dramatic erosion in confidence, though not unexpected, was perhaps the most troubling finding. Figure 21 is a startling visual representation of the importance of trying to pinpoint, as our title says, why beginning legal writing is so tough and what we can do about it.

V. FOUR KEY COMMONALITIES AMONG BEGINNING LEGAL WRITING STUDENTS AT SCHOOLS X AND Y AND HOW THESE COMMONALITIES DRAMATICALLY IMPACTED THEIR EXPERIENCES IN EARLY LEGAL WRITING

In studying the students’ responses to our surveys, we ultimately identified four traits shared by many of the students, all of which were interrelated and all of which appeared to contribute to the fears and frustrations these students experienced in the course of their first-year legal writing classes, especially in the first several weeks. We believe it is likely that these traits may be common to many beginning legal writers, and later, we will explore how the legal writing community can acknowledge and address these commonalities. Here, we explore these four traits...
individually, illustrating how the survey responses supported each one.

A. Many of These Beginning Legal Writers Did Not Have a Professional Context in Which to Place the Skills We Taught Them in the First Few Weeks of Legal Writing.

1. Many Beginning Law Students Have a Very Limited Understanding of What the Study of Law Is.

   Reviewing the Survey 1 answers to the open-ended question about what the study of law involves,52 we were encouraged to see that several foundational elements of legal education—including conducting legal analysis, reading cases and other legal authorities, and researching—each appeared in at least 30 percent of the responses. However, we were discouraged (though not surprised) to note that an alarmingly small percentage of responses mentioned other foundational elements of legal education, including writing, learning advocacy, and conflict resolution, in spite of the increasing emphasis law schools are placing on the teaching of such skills.53

   A sample of the students’ prose responses to this question revealed that many of these entering law students could articulate

52. See supra fig. 5.
53. See John O. Sonsteng et al., A Legal Education Renaissance: A Practical Approach for the Twenty-First Century, 34 Wm. Mitchell L. Rev. 303, 317–318, 322–324 (2007) (recognizing that both the 1992 MacCrate Report and the 2007 Carnegie Foundation Report on the status of legal education emphasized the need to incorporate more practical skills instruction into the traditional curriculum). Just this past March, the accrediting body of the ABA issued a Statement of Principles of Accreditation that recognizes that skills education should be a fundamental goal of legal education. The Standards Review Committee said that legal education program review would include an evaluation of whether the program provides “the essential skills and abilities that graduates need to possess to be competent professionals.” See Stands. Rev. Comm., ABA Sec. Leg. Educ. & Admis. to B., Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education, May 6, 2009, http://www.abanet.org/legaled/committees/comstandards.html (accessed June 23, 2009); see also Stuckey et al., supra n. 2, at 106 (stating that law schools should “follow the lead of other professional schools and transform their programs of instruction so that the entire educational experience is focused on providing opportunities to practice solving problems under supervision in an academic environment. This is the most effective and efficient way to develop professional competence.”); Katherine Mangen, A Plea for Real-World Training in Law Schools, Chron. Higher Educ. A6 (Jan. 19, 2007) (detailing the changes that some law schools have made to their curricula in response to the Carnegie Report’s recommendation that practical skills instruction be increased).
only a vague notion of what the study of law entails. Consider the following responses:

- “Studying what the law is and how to work with it.”
- “The history of law, how it has changed through the years, different outlooks on various laws, examining others’ opinions, and learning the basics of law as it is now.”
- “Learning the principles that support a structured society and how they evolve depending on time and place. Analysis of these rules so as to learn how to apply them or alter them, depending on conditions.”
- “A person’s ability to comprehend and understand all encompassing aspects of the issue at hand.”
- “Understanding and working with the rules that govern our society.”
- “Reading, analyzing, memorizing, repeat.”
- “Learning to identify and interpret specific statements regulating actions and behaviors and the rules or norms of their application.”
- “I think it involves expanding your mind and opening up to new ideas and theories and applying them to life and society.”
- “I have the absolute vaguest idea. I think it is studying how the legal system works and the laws that we will be required to work within. If I am wrong you should probably contact me before the first day of class!”

Further, the first eight weeks of law school seemed to do little to orient these students to the reality of what the law is and how it is learned. A fairly large number of those who completed Sur-

54. It may not be surprising that some students’ responses were far from the mark. Our assumption is that prior to law school, most of the surveyed students had not been exposed to education for a learned profession, in which the ultimate goal is to “practice” the profession. Thus, students who expected to learn to “identify ideas and theories” and learn “legal history” likely based their expectations on prior educational experiences, in which the ultimate goal was mastery of the subject matter. See e.g. James H. Block & Robert B. Burns, Mastery Learning, 4 Rev. Research in Educ. 3, 3–4 (1976) (discussing “mastery learning,” which they define as “an explicit philosophy” asserting that “under appropriate instructional conditions virtually all students can learn well, that is, can ‘master,’ most of what they are taught”). In legal education, however, while mastery of an area of the law may be expected by some professors, the chief aim is to equip students to find, understand, and use the law—that is, to “practice law.”
vey 2—46 out of 100 students who responded to the question—stated that their opinion as to what the study of law involves had not changed. And among the students who said their opinion had changed, a common theme was that the law was not as concrete as they thought. Here are some illustrative responses:

- “Yes, it is researching in order to make an educated guess; the law is not as definite as I thought it would be.”
- “Concepts are much more fluid than I anticipated. I am learning that there are few hard and fast ways to apply the concepts we learn.”
- “Yes. . . . The law itself as a discipline is more subjective and less empirical than I could have imagined.”
- “Yes, there is a great deal of ambiguity and lack of clarity.”

In short, Survey 2 suggested that many of these law students’ early weeks of law school were remarkably similar, and similarly frustrating, regardless of whether they entered law school with a 2.5 or a 4.0 GPA, a 165 or a 139 LSAT, because they were trying to learn the law without an understanding of how the universe of the law operates.

55. See supra fig. 15. Some students’ responses were a bit ambivalent. For example, one student reported, “I wouldn’t say my opinion of what the study of law involves has changed, but I definitely have learned the importance of developing a strong work ethic.”
56. Continued adherence to the Socratic Method may be partially responsible for these students’ inability to concretely define what the study of law entails. In response to the Socratic Method,

[s]tudents tend to memorize portions of the cases so that they can respond when called upon. They do not necessarily see the relationship between parts of the law, or how the elements or rules of a given case interrelate with the law as a whole. Moreover, they fail to see the purpose of the methodology. . . . In part, this failure . . . can be attributed to legal professors’ failure to be explicit about the goals and purpose of their methodology, and their failure to clarify the connections and interrelatedness. As a result, ‘students are often well into their [legal] education before they understand the operation of the legal method,’ and even more disturbing, their analytical skills have not been sharpened in a way that will prepare them to enter the practice of law thinking like lawyers.

57. See supra figs. 3, 4.
2. Many of These Beginning Law Students Had Only a Vague Notion of What the Study of Legal Writing Entails and How Difficult It Would Be.

a. Survey 1

The students’ early frustration described above was magnified when the students entered the skill-based realm of the legal writing class. As with the study of law in general, the students we surveyed began their first year with very little understanding of what the study of legal writing entails.58 In other words, these new law students, for the most part, lacked any context in which to place the fundamental legal writing skills their professors were teaching them.59 Most did not know where or how legal writing fit into the practice of law, or who would be using the writing they produced and for what purpose, much less what specific qualities made legal writing effective.

Our exploration of beginning students’ attitudes and expectations about legal writing proceeded from the common understanding of lawyers generally, and legal writing professionals more specifically, that the central task of the legal writer is to produce a document—a memorandum, a trial brief, or an appellate brief, for example—that effectively communicates a correct, clear, concise answer to a legal problem. The typical readers of the document—those who must use it to make decisions—approach the task of reading the document with a set of well-defined, measurable needs and expectations as to content, structure, and appearance. Good legal writers must take great care to meet the user’s needs and expectations.60

58. See supra fig. 6.
59. See Venter, supra n. 56, at 627 (“Students must understand the conventions and practices of the law and how these are used by lawyers in a variety of contexts before the students can claim to be able to think like lawyers.”). In her important study of Generation X and Millennial law students, Professor Tracy McGaugh suggests that the lack of context is especially problematic to current law students. Generation X students (typically defined as those born between 1961 and 1981) and “Millennials” (typically defined as those born after 1982) tend to approach learning with a “just in time” mindset; “they are inclined to disregard pieces of information they do not currently need or do not see an impending need for.” Tracy McGaugh, Generation X in Law School: The Dying of the Light, or the Dawn of a New Day? 9 Leg. Writing 119, 128 (2003). “Without specific information on what they are trying to accomplish and why, Xers feel as though they are operating in the dark, leading to the ever-constant refrain of ‘you’re hiding the ball.’” Id. at 138.
In terms of **content**, the user needs and expects the document to provide the following: (1) a concise, precise statement of the issue (the legal question being addressed); (2) a clear, precise, correct explanation of the rules of law that govern the resolution of the issue; (3) a thorough, well-reasoned, concise analysis of how the rules apply (or, in the case of a persuasive document, how the rules should apply) to the facts of the case; and (4) a short, helpful conclusion as to how the legal question will likely be, or should be, resolved.61 In terms of **structure**, the user needs and expects each of these elements to be presented in a logical order and appreciates it when the writer takes pains to transition clearly and smoothly from one element to the next.62 In terms of **appearance**, the user needs and expects (1) that the document will conform to the required format, if one is prescribed; (2) that it will contain adequate, correct legal citations; and (3) that it will be free from grammatical, spelling, and typographical errors.63 Thus, the benchmarks of good legal writing include clarity, precision, conciseness, and careful organization.64 When these

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61. This structural paradigm is commonly referred to as IRAC (or some variant such as CREAC or CREXAC or CRuPAC) and is frequently taught to beginning legal writers as a model for writing about legal analysis. See e.g. Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 61–76 (2d ed., Aspen Publishers 2006); Christine Coughlin et al., *A Lawyer Writes: A Practical Guide to Legal Analysis* 81–83 (Carolina Academic Press 2008); Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, & Style* 92–96 (6th ed., Aspen Publishers 2009). Some legal writing professionals believe that IRAC has only limited value because of its rigidity. See e.g. Jane Kent Gionfriddo, *Dangerous! Our Focus Should Be Analysis, Not Formulas Like IRAC*, Second Draft (Bull. of Leg. Writing Inst.) 2 (Nov. 1995) (stating that “[c]omplex legal problems simply don’t break down easily into a statement of a ‘rule’ and a statement of ‘legal reasoning’ or ‘policy’”). However, IRAC remains one of the most widely-used tools for teaching beginning legal writers.

62. Edwards, supra n. 60, at 71 (“Law-trained readers are not comfortable with organizational surprises, and an uncomfortable reader is an unreceptive reader.”); Louis J. Sirico, Jr. & Nancy L. Schultz, *Persuasive Writing for Lawyers and the Legal Profession* 37 (2d ed., LexisNexis 2001) (recognizing that where a brief is badly structured, “[t]he reader must expend so much energy determining the organization of the argument that he or she has no energy with which to consider the argument itself. . . . Do not waste the reader’s energy. To be persuasive, make the argument’s organization easy to understand and encourage the reader to focus on the important points.”).

63. See Beazley, supra n. 61, at 5 (“You must avoid mechanical problems of all types.”). Beazley notes that “you hurt your credibility with the court when you make technical mistakes. . . . Although these errors may not seem legally significant, they waste time and hence annoy the reader.” Id.

64. See Bradley G. Clary & Pamela Lysaght, *Successful Legal Analysis & Writing: The
key characteristics are not present in a document, it becomes more difficult to understand and use the analysis contained in the document. In some cases, a poor job of conveying the correct legal analysis may actually mislead the user, who is relying on the document for guidance in making important decisions about the case.\(^{65}\)

Further, the user may be distracted by certain elements of writing that were often encouraged in law students’ undergraduate experiences, including a varied vocabulary and complex sentence structure. Indeed, most legal writing professors actively discourage students from including these “colorful” elements in their legal writing.\(^{66}\) Moreover, the user may not appreciate “creative writing,” at least in the sense that many beginning students understand that term. While there is certainly a place for creativity in terms of legal thinking and analysis, many legal writing professors typically wait until students are comfortable with both the basic framework for legal analysis and the basic format for writing about it before encouraging students to creatively vary from them.\(^{67}\)

\(^{65}\) Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1, 7 (2002) (quoting the Honorable John M. Duhe Jr. from the Fifth Circuit, who says, “I am a busy judge... Tell me only what I need to know to reach the result you want—and do it in a soundly reasoned manner. . . . The brief-writer is most helpful to me when she tells me not only what decision to reach but how to get there.”); Laurel Currie Oates & Anne Enquist, *Just Memos* 5–6 (2d ed., Aspen Publishers 2007) (“[U]nlike undergraduate research papers, objective memos are not about impressing a professor with how much you know or how much work you did. They are about making sure the readers in one’s own firm have a clear understanding of the case so that they can do whatever comes next, whether it be to advise the client about his or her options, do more discovery, file a motion, or decline to take the case.”).

\(^{66}\) See infra Section V(D) for a more thorough discussion of this point. See also Anne M. Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 3 (2d ed., Aspen Publishers 2005) (“[V]ariety in writing, particularly variety in vocabulary, is not the typical virtue that it is in many other types of writing.”); id. at 159 (“Like artists who try to force themselves to be original, legal writers who try to force themselves to be eloquent will probably end up creating something that is either absurd or monstrous.”).

\(^{67}\) We do not mean to imply that creativity and style can never play a role in legal writing, especially if that term is broadened to include the kinds of writing that are often covered in advanced legal writing courses, such as appellate brief-writing, litigation drafting, and transactional writing. As we have stated, however, our study focused primarily
Given the students’ lack of context in which to learn legal writing, it is not surprising that the number one response to the question of what learning legal writing is about was “Learning proper formatting and technical rules.” 68 This result suggested to us that many of these beginning law students thought that good legal writing is primarily a matter of mechanics, which they were confident they could easily master. 69 In contrast, a much smaller percentage of students recognized that legal analysis would be foundational to the process of learning legal writing. Yet legal analysis is one of the first skills we teach in legal writing classes, and it occupies much of our instructional time in the first few weeks of the course. As with the study of law in general, Survey 1 suggested that these students entered the study of legal writing with only a limited understanding of what legal writing entails and why it would be so critical to their future success as lawyers. 70

The students’ responses to the open-ended question about what they thought legal writing entails before they had any law classes revealed just how amorphous their understanding of the task of the legal writer was at that point:

- “Learning about and practicing various forms of legal writing and research.”
- “Learning to use legal jargon and understand it, formatting a paper to sound official, and learning how to research properly and put the discovered information into a paper.”
- “Legal writing involves putting your interpretations and opinions on paper.”
- “Learning how to craft the language of laws and how to analyze and write arguments.”
- “This is most surely the study of how to use language as it relates to the law.”
- “Being able to articulate laws and express their purpose.”

68. See supra fig. 6.
69. See infra sec. V(C) for a detailed discussion of our research as to students’ confidence levels.
70. Once again, this was true in spite of the broad range of the students’ GPAs, LSAT scores, backgrounds, ages, and experiences. See supra figs. 1–4.
• “Composing a document that only makes sense to lawyers.”
• “I do not know specifically; I just know that it will involve a lot of hard work.”

These typical responses, none of which made any mention of learning how to meet the needs and expectations of the users of legal writing, suggest that some of these beginning law students viewed legal writing as simply an academic exercise, not as an integral skill that they will use daily when they practice law.

The students’ inability to accurately describe what legal writing entails was accompanied by an inability to differentiate between the key substantive elements of legal writing, which are centrally important to the legal reader, and the more mechanical elements. For example, two of the substantive choices—objectivity and synthesis—received only tepid endorsements, although legal writing professionals agree that these are key aspects of good legal writing.71

Strikingly, almost 60 percent of the students ranked the substantive skill of conciseness as “extremely important,” but a comparable number (about 62 percent) also rated the mechanical skill of grammar as “extremely important.” Similarly, 72 percent of the students rated the substantive skill of analysis as “extremely important” to good legal writing,72 which would be encouraging were it not for the fact that nearly an identical percentage (71

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71. See John C. Dernbach et al., A Practical Guide to Legal Writing & Legal Method 205 (3d ed., Aspen Publishers 2007) (“The hallmark of a memo is objectivity.”); Oates & Enquist, supra n. 65, at 6 (noting that the importance of objectivity in legal memos is self-evident from the fact that they are typically referred to as “objective memos”); see also Jane Kent Gionfriddo, Thinking Like A Lawyer: The Heuristics of Case Synthesis, 40 Tex. Tech. L. Rev. 1, 3 (2007) (discussing the importance of case synthesis to the practicing lawyer and suggesting some methodologies for effectively teaching this skill). However, as shown by the number of “do not know” responses for the choice “synthesis,” a fair percentage of students did not understand what this term means in the legal writing context. Gionfriddo noted that even some practicing lawyers “do not intuitively understand how to synthesize cases and have never learned a methodology to do so.” Id. The students’ responses to this choice suggest that legal writing professors need to be sensitive to the terminology they use with their students. Throwing out a term such as “synthesis” might be confusing and even intimidating to beginning legal writers. We wondered whether, if we had used a more explanatory phrase, such as “examining the relationships between cases,” instead of the word “synthesis” on our survey, we would have seen a higher response rate for that item.

72. See supra fig. 7. Contrast this with the responses to the open-ended question about what legal writing entails, in which barely ten percent of the students included “analysis” in their description of what the study of legal writing entails. See supra fig. 6.
percent) rated the mechanical skill of citation as “extremely important.”

We do not mean to suggest that the mechanical skills of legal writing, such as grammar and citation, are unimportant in producing a professional legal writing product. However, we believe strongly that at the beginning of first-year legal writing classes, learning to analyze, organize, and synthesize should take priority. The point we are stressing here is that many of the incoming students we surveyed seemed to recognize no distinction between analytical skills and mechanical skills, leading to a false confidence that mastery of the mechanics would equate to mastery of legal writing.

The fact that students were not able to properly assess the relative importance of these skills when they first began the task of learning legal writing underscores the need for legal writing teachers to spend more time orienting students to the context for legal writing and the requirements of the profession before asking them to put pen to paper.

b. Survey 2

The students’ need for this more focused orientation to the task of the legal writer was confirmed by their responses to the Survey 2, administered after approximately eight weeks of legal writing instruction. To document how the students’ understanding of the task of legal writing had changed during that critical period of early instruction, we followed up on several of the questions we had asked on Survey 1. For example, on Survey 2, we asked the students the following question: “Based on your early experiences in law school, have you changed your opinion of what the study of legal writing involves?”

More than one-third of the students who answered the question said that their opinion had not changed. However, the remainder of the students indicated that they had changed their opinion about legal writing in a number of significant ways.

73. The rankings made by the students who reported having previous legal writing experience were virtually identical to the rankings made by the overall survey population. Compare fig. 7, with fig. 8.
74. See app. B, at question 6; supra fig. 16.
75. Of the ninety-five students who answered this question, thirty-six of them (almost 37 percent) reported no change in their opinion.
Viewed as a whole, the responses across this broad spectrum of students suggested that many were realizing for the first time that legal writing is not merely a mechanical, academic exercise. Rather, legal writing is a complex and often difficult process requiring a whole new skill set, including the key substantive skills of logical reasoning, analysis, synthesis, objectivity, and precision. Here are some of the responses in this vein:

- “Yes, I expected more emphasis on writing mechanics.”
- “I have found that a lot of the assignments . . . are very subjective, and I prefer more of a definite set of instructions, which is what I thought legal writing would consist of.”
- “Prior to law school, I assumed that successful legal writers came up with creative and unique ideas—instead the best legal writers seem to be the ones who apply simple ideas to different fact patterns.”
- “Many of the topics I’m writing about involve very little creativity on my part, so the most important parts usually involve issue spotting, precise writing, and structured explanations.”
- “It is very concise, organized, clear writing. It does not involve particularly beautiful language.”
- “It’s very dense writing. Every sentence should not only be correct but also serve a function within that piece of writing.”
- “It has been more difficult than I thought it would be to learn the structure and language to use in legal writing.”
- “I really had no idea of what legal writing was. I thought it was about drafting complaints and answers and so forth. Now I realize that legal writing is very comprehensive and includes background research, communication among professionals, clients, staff, etc.”
- “I now believe the study of legal writing involves a lot more of [sic] synthesis of the law than I previously did.”
- “Legal writing is much harder and more structured than other writing that I have done.”

76. See supra fig. 16.
We also repeated the question about how important students thought certain characteristics were to good legal writing, using the same list of items and the same response choices as in Survey 1. The responses to this question showed that after eight weeks of learning legal writing, in spite of its newness and difficulty, the students had a better sense of the relative importance of the substantive elements of legal writing as compared to the more mechanical elements. Though there was not a large increase in the percentage of students who recognized the importance of objectivity and synthesis, the data as a whole painted a more hopeful picture.

As Figure 7 showed, the Survey 1 responses revealed that before attending law school, the students ranked all of the items similarly. In contrast, the Survey 2 responses revealed that eight weeks into law school, students gave higher rankings to six substantive choices that many legal writing professors would endorse: analysis, attention to detail, clarity, conciseness, logical reasoning, and organization. In further contrast to Survey 1, where students ranked analysis and citation as nearly equal in importance, the number of students who ranked analysis as “extremely important” on Survey 2 rose to 75 percent, while the number of students who ranked citation as extremely important dropped to only 43 percent. This difference demonstrates that by the eighth week of law school, the students were beginning to understand that it is the difficult substantive skill of sound legal analysis, more than mechanical skills such as citation and grammar, that enables their writing to fully meet the needs and expectations of the legal reader.

This change in the students’ view of legal writing was also reflected in their responses to a different question on Survey 2. We asked students this open-ended question: “Describe what you think the ordinary legal reader is looking for in legal writing.” The responses were what any legal writing teacher would hope for: the top four categories of responses were clarity, conciseness, sound reasoning, and good organization. Here is a representa-

78. *See supra fig. 17.*
79. *Compare fig. 7, with fig. 17.*
80. *See app. B, at question 14; supra fig. 18.*
81. Out of 110 prose responses, 59 responses (53.6 percent) mentioned clarity, 57 responses (51.8 percent) mentioned conciseness, 47 responses (42.7 percent) mentioned
tive response: “[The legal reader is looking for a] well-reasoned, concise argument in a set form with the information in the proper place, [and] correct use of and citation to authority.”

However, the students’ increasing awareness of the skills required for good legal writing and the expectations of the legal reader did not necessarily translate into success in accomplishing these tasks. We asked students, “What has been the most difficult aspect of learning legal writing so far?”82 The students’ responses reflected that some of their greatest struggles involved those very same skills they had just identified as very important to the legal reader or to good legal writing: organization, conciseness, logical reasoning, and clarity.83

Also of concern was the percentage of students who reported having difficulty adjusting to their professor’s grading style; this statistic suggests that some students view legal writing success as dependent on figuring out and then catering to the idiosyncrasies of their professors. As we will explore more fully,84 this is additional proof that legal writing teachers need to do a better job explaining that we stand in the place of the ultimate consumers of their writing and that the skills we teach are not a matter of our individual preferences, but are grounded in the everyday practice of legal professionals.

Overall, then, our study confirmed that these beginning legal writing students, regardless of their backgrounds in writing, their undergraduate majors, or their incoming GPAs or LSAT scores, experienced fear, frustration, and disappointment when legal writing professors asked them to learn specific skills without first assuring that they understood what the task of the legal writer is and why it matters that they perform the task well. They did not know what the law is; they did not know what legal writing is; they did not know how legal writing fits into the practice of law; and they had never been in the role of the “legal reader.” To expect them to sit through eight or ten hours of early legal writing

82. See app. B, at question 16; supra fig. 19.
83. With regard to clarity, our anecdotal experiences suggest that this is one of the hardest skills for students to learn, perhaps in part because they do not fully understand what is meant by the term. The survey results backed this up: On Survey 3, more than 27 percent of School X students and more than 25 percent of School Y students indicated that learning to write clearly had been “very” or “extremely” difficult.
84. See infra sec. V(B).
classes, filled with discussions of IRAC, synthesis, analogical reasoning, rule extraction, and the like, and then somehow be able to deliver a clear, concise, well-reasoned document that meets the needs and expectations of the legal professional, may simply have been asking too much too soon.

B. Many of These Beginning Law Students Were Inexperienced In, and Often Resistant to, the Difficult Analytical Thinking That Is Fundamental to Good Legal Writing.

Our study also revealed that the lack of context that hindered many of these students’ early legal writing progress was compounded by their realization that legal writing cannot be reduced to a step-by-step, “fill-in-the-blanks” process. In the countless hours we have spent conferencing with frustrated students, we have observed that even after several weeks of legal writing instruction, during which we have made every effort to stress the analytical nature of legal writing, many students continue to have difficulty (and in some cases to resist altogether) making the necessary adjustment from the “outside-in” approach to writing they had successfully mastered as undergraduates to the “inside-out” approach to legal writing. We assumed that in the past, these students had demonstrated the ability to master complex material and to describe it in writing with great success. Not surprisingly, our study supported this observation. However, before describing the results of our study in this regard, we will describe what we mean by the “inside-out” approach to legal writing.

Many law school students have been at or near the top of their classes throughout their educational experiences. Their success may have often been largely attributable to their mastery of what we refer to as an “outside-in” learning process. In other words, they excelled at connecting with the professor, learning what the professor was looking for, and competently producing the required work. These students often received high marks on their written work if they (1) demonstrated a mastery of the subject matter, no matter how complex, and (2) recited that mastery,

85. On Survey 1, 90 percent of School X students and 72 percent of School Y students reported an undergraduate GPA of 3.1 or higher; 65 percent of School X students and 46 percent of School Y students reported an undergraduate GPA of 3.4 or higher. See supra fig. 3.
often accompanied by editorial comments and opinions as permitted or required by the professor.

Specifically, many beginning law students have developed certain writing strategies that have worked well for them (they have become “habituated” to these strategies, as one writer has put it).86 Linda Flower, a professor of rhetoric and a leading researcher in the cognitive processes of writing, has identified several commonly (and successfully) used strategies. One strategy is the “gist and list” strategy, in which

\[\text{the writer goes through the text looking for the main points, finds an idea or term that links them, and uses that to organize the text. This familiar strategy, the product of years of paraphrasing, summarizing, and recitation in school, is dominated by the text and fueled by the reading process . . . . It is fast, efficient, and faithful to the source.}\]87

In the legal writing context, “[t]he . . . equivalent of this strategy is selecting only those cases, and those interpretations and applications of cases, that are favorable to one’s client. Such analysis is one-sided, unreliable, and contains many gaps and absences.”88

Another strategy, commonly referred to as TIA—“True, Important, I Agree”—relies on the student’s agreement or disagreement with the text and is “an effective method for selecting the ideas you like, already know, and could write on—and for deleting the rest.”89 This TIA strategy may account in part for the confusion and shock that many novice legal writers experience when they are told that their “opinions” about the cases do not matter to the legal reader.

The result of beginning law students’ successful past use of these strategies is that their default writing plan may often be “simply to report what they now know.”90 The essence of this approach has been captured by Provenzano and Kagan:

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86. Baker, supra n. 1, at 505.
88. Baker, supra n. 1, at 507.
89. Flower, supra n. 87, at 235–236.
90. Baker, supra n. 1, at 508; see also Venter, supra n. 56, at 628 (pointing out that novice law students “do not know how to process the information, they only know they have to report it in some way”).
Novice legal writers . . . tend to view the writing process as linear, cannot remove themselves from their writing, and concentrate on telling what they know, irrespective of their audience’s needs. The result is a “knowledge-telling” document that memorializes the writer’s thought processes but is not of great use to the reader.91

For example, when asked to write about their analysis of cases students have read, “[t]heir predictable reaction is to write out in summary form what is in the decision: it is a way of getting that knowledge under control. But once the writers have filled up a few pages with that summary, it may seem to them that they have completed the assignment.”92 Stated another way, “[O]ne common feature of bad first-year legal writing is predictable: A text that appears to be all summary and no analysis.”93 This knowledge-driven approach to writing, which likely produced “A” papers in college, is “woefully inadequate for the goal-oriented writing of lawyers and judges.”94

In summary, the excellent scholarship about novice legal writers details their often too simplistic view of the process of legal writing, which can be somewhat glibly described as: “I will tell you what I know; just tell me how you want it to look.” This brings us back to our study, where many of the Survey 1 responses to the question “Describe what you think the study of legal

91. Susan E. Provenzano & Lesley S. Kagan, Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing, 39 Loy. U. Chi. L.J. 123, 162 (2007) (internal citations omitted); see also Baker, supra n. 1, at 504 (“[L]egal writing pedagogy’s first task is to help students bridge the gap between their naïve, passive, purposeless reading of legal text and the traditional interpretive purposes of lawyers who read cases and statutes wondering how they might be applied to their client’s problem, favorably and unfavorably.”).


93. Id. By way of contrast, Williams adds that the better writer “will have mastered the content of the decision.” Id. That student’s written product “will not be a running summary of the text of the decision, but rather a memo that uses that decision in the analysis of a problem.” Id.

94. Baker, supra n. 1, at 511. As Baker puts it, legal readers expect more than a dispassionate report of existing legal authority and mechanical, conclusory application of that authority to the facts of a client’s case. Experienced legal supervisors and decision-makers expect young lawyers to use a purposeful knowledge-adaptation strategy to reconstruct pre-existing legal authority in support of a rhetorical purpose, either to predict how a future decision-maker will decide the case or to make persuasive arguments to that decision-maker in order to advance the client’s paramount interests.

Id.
writing involves” reflected this view.\textsuperscript{95} Consider the following responses, with our emphasis added:

- “Being able to concisely and accurately \textit{summarize} cases and statutes pertaining to the issue at hand.”
- “I think it involves \textit{understanding} what you are reading, and being able to \textit{portray} that in writing.”
- “Being able to \textit{articulate} laws and \textit{express their purpose}.”
- “It involves being able to \textit{understand} the content and then \textit{creating a synopsis} based on the case law given.”
- “Legal writing involves how to \textit{relay the information} found in the laws to a given audience in a compact format.”

Because these beginning legal writers often viewed their task as simply reporting information, many of them appeared to believe that their professor’s primary job was to teach them the “magic formula” for conveying this information. Particularly troubling was the impression some students seemed to have that this “magic formula” was a matter of their professor’s preferences. When asked on Survey 2 what had been the most difficult part of learning legal writing in the first eight weeks, the highest percentage of responses—more than 25 percent—fell under the category “Professor (Grading/Style).”\textsuperscript{96} Here are three examples:

- “Learning teacher’s more preferable writing style.”
- “Adhering to the professor’s standards of organization.”
- “The policy over practice. Instead of realizing that two sentences mean the same thing, our professor often refuses to accept sentences that do not follow the specific format that he/she believes in.”\textsuperscript{97}

\textsuperscript{95} \textit{See app. A, at question 9; supra} fig. 6.

\textsuperscript{96} \textit{See supra} fig. 19.

\textsuperscript{97} This comment may be reflective of a common attitude among Generation X and Millennial law students, who are less likely than their predecessors to view their professors as fundamentally different from themselves in terms of intelligence or moral authority. McGaugh, \textit{supra n. 59}, at 130. Because these students tend to see the playing field as more level, they are “much more likely to communicate with teachers and supervisors in a way that is considered challenging or confrontational.” \textit{Id.} McGaugh notes that this characteristic suggests that law professors need to be generous but gentle in giving students feedback, operating more as coaches or colleagues than as superiors. \textit{Id.} at 139.
We interpret these responses as supporting our anecdotal experience that many students view successful legal writing not as a matter of producing careful, well-written analysis that will meet their reader’s needs, but as a matter of satisfying their professors’ perceived “idiosyncrasies” about what makes legal writing effective.

Another manifestation of the students’ search for a “step-by-step” model for good legal writing was their repeated plea for more examples of good legal writing. For instance, on Survey 2, we asked, “What other instructional methods do you think your legal writing professor should use to enhance your early legal writing education?” Fifteen of the forty students (37.5 percent) who listed one or more specific suggestions said that they would have liked to see more examples of good legal writing. Here are a few actual responses in this vein:

- “I wish that we had some real-world examples of what our writing should look like that had been vetted by the professor to be sure that they adhered to the standards that she sets. I also think it would be helpful to see other students’ work. I always feel like I’m writing, but I’m not sure how it is supposed to look in the end.”
- “More examples of well-written pieces.”
- “Examples of good legal writing. A better idea of what to aspire to.”

We believe that these students’ desire for examples of good writing they could emulate resulted in part from their desire to be able to fit legal writing into a formula that would correspond to

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98. The wisdom of providing samples of actual legal writing (both good and bad) as a teaching tool is the subject of ongoing debate in the legal education community in general and in the legal writing community in particular. See Christine N. Coughlin et al., See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in Law School Curriculum, 26 Ga. St. L. Rev. 361 (2010) (reviewing the current debate on the use of samples in legal education and suggesting some strategies for successful use of samples in this context).

99. See app. B, at question 12; supra fig. 20.

100. In one unusual response, a student wrote, “Maybe give us more examples of different variation so we don’t get into a habit of using the same format every time we write.” This response is particularly revealing, and particularly troubling, because it suggests that there are students who, after eight weeks, have not yet understood that the legal reader needs and expects a document with predictable structure and format and is, in fact, distracted and frustrated by “variations” to the expected structure and format.
their formerly successful “outside-in” approach and produce successful results each and every time.

Interestingly, the results of Survey 2 indicated that, in fact, many of these students were being exposed to examples of good legal writing in the first few weeks of the class. Of the 125 students who responded to Survey 2, 87 of them (70 percent) said that their professor had “frequently” or “sometimes” given them examples of legal writing as part of his or her teaching strategy, and the majority of them (68 percent) rated this teaching method as “extremely effective” or “very effective.” However, by March of the students’ first year, when we administered Survey 3, a full 40 percent of the surveyed School X students (all of whom by definition had also responded to Survey 2) said that studying examples of legal writing had been only “moderately” effective, and almost 13 percent said that it was “slightly” or “not at all” effective.101 One student wrote, “Reading others’ work seemed merely to offer a template. It didn’t aid in how one puts their [sic] own ideas together and transcribes them.”

Taken as a whole, the data from Surveys 1 and 2 confirm that many beginning legal writers are shocked and dismayed when it dawns on them that the “read and regurgitate” method of writing, so useful to them in the past, is of no use whatsoever in the realm of legal writing. The realization that effective legal writing requires sound legal analysis—which simply cannot be learned from the “outside-in”—is painfully reflected in many students’ responses to the Survey 2 question asking whether they had changed their opinion of what the study of legal writing involves.102 Here are some examples:

- “Yes, I had no idea how to analyze a fact set based on precedent [sic] and using the reasoning of the court [to] figure out how a jury might decide.”
- “Legal writing is highly analytical.”
- “Yes, I now have a better understanding of the importance of analysis and what it entails.”
- “More step by step analysis and less conclusion.”

101. The numbers from School Y were considerably higher on this point, with 69.6 percent responding that studying examples of legal writing was “very” or “extremely” effective.
102. See app. B, at question 6; supra fig. 16.
However, with this new awareness often came added frustration when these students were not able to master the “inside-out” process quickly or easily. On Survey 2, when asked what had been most difficult about learning legal writing, responses such as the following suggest the difficulty some students were experiencing:

- “Learning the TREAC system.”
- “Determining what the reasoning of the court was.”
- “What analysis is to [sic] conclusory.”
- “Being able to synthesize concepts in a concise way.”
- “Synthesis.”
- “Applying the rule to the case at hand after figuring out what the rule is.”
- “The Rule paragraph, and figuring out what I am looking for in the cases.”

Moreover, this difficulty often continued through the first semester and well into the second. For example, on Survey 3, several of the students’ responses to this same question mentioned their realization that legal writing was much harder than they had thought it would be. Here are a few responses reflecting how the students’ opinions of what the study of legal writing involves had changed:

- “[Legal writing] is much harder and much different than any other writing I have ever done.”
- “Much more rigorous than I expected. Cannot just rely on being a good writer in the past.”
- “Legal writing is a little more difficult than I anticipated, but I think I am beginning to get the hang of it” (emphasis added).

To summarize, our study confirmed that many of the beginning law students we surveyed were predictably, and understandably, resistant to the difficult process of learning to write

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103. See app. B, at question 16; supra fig. 19.
104. TREAC is a variant of the IRAC paradigm for legal analysis, discussed supra n. 61.
about the law from the “inside-out.” Moreover, some legal writing professors may unwittingly delay the transition to “inside-out” writing by focusing heavily in the first few weeks on what has been described as “genre based” teaching: “teaching the format of the memo, how to write the facts objectively, and how to CREAC.”

Our study suggests that our students would be better served if we focused instead on the thinking skills required to transform their writing from “knowledge telling” to “knowledge transforming.”

C. Many of These Beginning Legal Writers Faced Eroding Confidence When They Realized That Their Previous Successes in Other Disciplines Did Not Guarantee Quick Mastery of Legal Writing.

As our survey revealed, one possible detour on the road from “outside-in” thinking and writing to “inside-out” thinking and writing was the remarkable level of confidence that many of these beginning law students expressed in both their general writing ability and their ability to learn legal writing in particular. A certain level of self-confidence is a common trait of successful students (and successful lawyers); indeed, the students we surveyed were extremely optimistic about their future success in legal writing. However, a seemingly inevitable plummet in confidence occurred as they realized just how difficult legal writing is, and this plummeting confidence very likely became an obstacle to their progress.

We theorized that if we could find ways to prevent, or

106. Venter, supra n. 56, at 639.
107. Id. Venter writes, In legal writing, the act of writing an office memo should be viewed as a knowledge transforming task, but all too often, it is not because students are unclear about precisely what is being required of them. Because parts of the memo, such as describing the facts of the case and describing the fact patterns and holdings of similar cases, seem to be knowledge telling tasks, rather than knowledge transforming tasks, students mistakenly think that memo-writing is formulaic—merely plugging in the facts, CREAC/IRAC, and the student is finished. Students need to be taught more precise thinking strategies for each part of the memo, so they come to see the memo as knowledge transforming and begin to see themselves as legal authors who contribute to the ongoing development of the law.

at least ameliorate, this crisis of confidence, we could offer our students a better early legal writing experience. Therefore, one goal of our study was to document just how confident the entering students were and what happened to that confidence as they made their way through their early legal writing instruction.

As Figure 9 illustrates, the beginning students we surveyed were, as a whole, remarkably confident in themselves as writers. Only about 7 percent expressed any reservations about their general writing ability, and well over half were either “extremely” or “very” confident about it.

We suspected, and Survey 1 confirmed, that these results were largely due to the sheer volume of writing that the students had done earlier. Of the 265 students who responded to Survey 1, nearly every single one had written research papers and essays in college, and a large number had written short opinion pieces. These students may have reported a high confidence level in their general writing ability simply by virtue of the fact that they had successfully completed these kinds of writing projects in their earlier academic careers.

At least half of these students reported that they had also performed “creative” writing or “journalistic” writing, and a similarly large number reported they had done “technical” writing. Assuming that evaluation of these kinds of writing is usually based on the quality of the writing itself, it seems reasonable that these students had likely received much feedback on their writing (probably positive feedback, since law students tend to have been

and Academic Success in Law School, 16 Evaluation & Res. in Educ. 95, 102 (2002)).
109. In her article on orienting first-year students to law school, Paula Lustbader devotes an entire section to student self-confidence. See Paula Lustbader, You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow, 47 Washburn L.J. 327, 361 (2008). Lustbader writes,

Confidence is a necessary component of being a successful lawyer and a successful person. . . . On the other hand, when students are overly confident, they may underestimate the degree of challenge and underprepare, which can result in failure. . . . Orientation programs should . . . help students gauge what they should be confident about, where they may be overconfident, and help them assume a more humble approach.
Id. at 361–362.
110. Supra fig. 9.
111. See supra fig. 11. All of the numbers drop off significantly for writing done either in graduate school or at work. As Figure 2, supra, showed, a high percentage of entering law students were twenty-three years old or younger. Making a broad assumption, it is likely that these students had not gone to graduate school or done significant professional work at all in their lives to date.
successful in their previous endeavors). Thus, it is not surprising that they were highly confident in their general writing ability.

As for the other half of the survey population, the data is less clear as to whether these students had ever been evaluated specifically on their writing ability and if so, how effective the evaluation had been. Specifically, on Survey 1, we asked students to list courses they had taken in which they were evaluated primarily on writing skills and ability rather than on their mastery of the subject matter. A large number of students reported taking such courses, but upon examination of the titles of these courses, it appeared to us that in at least some of them, the substance of the writing may have been the primary indicator of performance, rather than the writing itself. Here are some of the course titles that gave us pause:

- “History”
- “Topics on Adolescent Psychology”
- “Introduction to the Novel”
- “Civil Liberties”
- “The Life of the Mind”
- “Miscarriages of the Social Justice System”
- “History of Central America”
- “Stories of Communism”
- “Pride and Prejudice”

Moreover, of the courses listed in which we could assume that writing was central to the evaluation process, most were basic

112. The legal writing academy has long recognized that success in other kinds of writing will not automatically translate to success in legal writing. “The conventions of thought and expression in disciplines differ, enough so that what one learns in order to write in one discipline might have to be unlearned to write in another.” Mark Richardson, Writing Is Not Just a Basic Skill, 55 Chron. Higher Educ. A47 (Nov. 27, 2008).

113. “[S]ince law is above all an art of language, it is well for the student to have had a great deal of experience with writing and with close, intelligent criticism of this written work.” Cent. Mich. U., Pre-Law Discussion 4, http://www.chsbs.cmich.edu/Law_Center/ (accessed Feb. 4, 2010).


115. For obvious reasons, we were not able to verify the exact content of the listed courses; we based our assessment of the results only on the course titles given to us by the students. Moreover, even assuming the students’ writing skills were evaluated in courses such as these, we had no way to assess the thoroughness or consistency of the evaluation.
English courses such as freshman composition. The strategies students employed successfully in such courses, however, may be of only limited usefulness in early legal writing. When students begin their legal education, they are entering a new discourse community; writing successfully in the legal discourse community requires them to adjust the writing habits that may have led them to success in other discourse communities, such as journalism, engineering, business, even political science. One leading legal writing scholar and professor has compellingly expressed the difference: “[W]hile the unspoken goal of undergrad writing may have been to make simple things complex, the goal in most legal writing is to make complex things seem simple.”

As legal writing professor Mary Ray has observed, the overall difference in the goals of undergraduate writing and the goals of legal writing translates into some very specific differences in the writing that is expected. For example, Ray notes that in undergraduate writing, the reader prefers “sophisticated writing” (including a “wide vocabulary and more complex sentences”), while in legal writing, “the reader prefers clarity and readability” (precise words and shorter, simpler sentences). In undergraduate writing, “the document often has a page requirement,” while in legal writing, “[t]he document often has a page limit.” In undergraduate writing, “[t]he writer often chooses the organization and format of documents,” while in legal writing, “[t]he court or senior attorney has rules about the organization and format, which the writer must follow.” In undergraduate writing, “[t]he reader usually values originality,” while in legal writing, “[t]he reader values accuracy.” Thus, while many of the students we surveyed had commendable success in their undergraduate writing courses, and would likely be able to eventually reach a modicum of success in legal writing, they seemed overwhelmed and

116. A smaller number of students had taken technical writing courses of some kind, a very few had taken actual journalism classes, and an even smaller number indicated writing evaluation in courses such as “Introduction to Rhetoric.”
117. Anne M. Enquist, Talking to Students About the Differences between Undergraduate Writing and Legal Writing, 13 Persp. 104 (Winter 2005).
119. Id.
120. Id.
121. Id.
confused by the newness and unexpected difficulty of the legal writing milieu.\textsuperscript{122}

Perhaps most astonishing in light of the high confidence levels reported by the students is the fact that of the 265 students who responded, almost 50 percent (121 students) said they had never taken a single course in which they were evaluated primarily on their writing ability. The incongruity of this result startled us; it seemed unbelievable that so many of the same students who had never been told whether they could write well would express “extreme confidence” in their general writing ability.

In sum, the Survey 1 data revealed that (1) some of these beginning law students’ only significant writing to date had been in a traditional college setting (writing a theme for freshman composition or a term paper or other research assignment), where the skills that were valued may have been different than those that are valued in legal writing; (2) the writing evaluation some of these students received may have related not to their actual writing skills but to their mastery of content; and (3) some of these beginning law students had never taken any course that focused primarily on their writing skills. Nonetheless, the vast majority of the students we surveyed entered law school brimming with confidence in their general writing ability.

Not surprisingly then, Survey 1 revealed that for most of these students, their high confidence in their general writing ability was mirrored by their high confidence in their ability to learn legal writing. We asked students, “How confident are you about learning legal writing?”\textsuperscript{123} The responses to this question were skewed even more positively than the responses about confidence in general writing ability.\textsuperscript{124} Of the 261 students who responded, 183 of them (more than 70 percent) chose the top two response categories, reporting that they were “very confident” or “confident” in their ability to learn legal writing. An additional 55 students (21 percent) reported that they were “somewhat confident.” Only twelve students (4.6 percent) admitted they were “not at all” confident.\textsuperscript{125}

\footnotesize
\textsuperscript{122} See Oates & Enquist, supra n. 65, at 13 (noting as an example that while most English majors ultimately do “exceptionally well in their legal writing classes, . . . their success tends to happen more toward the end of the course rather than the beginning”).

\textsuperscript{123} See app. A, at question 10.

\textsuperscript{124} See supra fig. 10.

\textsuperscript{125} Of the 265 total students who completed Survey 1, 254 responded to the “general
However, perhaps even more so than with their confidence in their general writing ability, the data from the survey suggested that their confidence in their ability to learn legal writing was premature. One reason for this premature confidence was that most of the students we surveyed did not have a clear idea of what legal writing would entail. As discussed earlier, the students’ responses to the question about what legal writing entails were quite varied, and many were strikingly vague. It seemed to us that without a clear understanding of what legal writing is, these students had no real basis for feeling as confident as they did about their ability to learn it other than a lifetime of positive feedback within other discourse communities.

Another likely reason for some students’ premature confidence was that they had some writing experience that they believed could be classified as “legal writing.” The largest percentage of students who reported having done some prior legal writing—53 out of 103 (or 51 percent)—said they had written case briefs. However, even if these case briefs were similar in format to the early case briefs many law students write, it is unlikely that they contained the depth of legal analysis required in law school.

Another 20 students (about 19 percent) reported having written litigation or transactional documents. Only 20 students indicated that they had done any type of objective legal writing before law school, and only 23 indicated experience writing persuasive pieces such as trial briefs or motions. Thus, assuming the memos and briefs these students wrote were somewhat similar to those written by first-year law students, this still leaves only a small percentage of students who had any relevant legal writing experience before beginning law school. The majority of

writing confidence” question and 261 responded to the “legal writing confidence” question. Thus, there were a few students who did not complete these questions.

126. See supra sec. V(A) for a discussion of what beginning law students believed the study of legal writing would entail.

127. See supra fig. 12.

128. See Coughlin et al., supra n. 61, at 55 (describing in detail the many differences between expert and novice readers of judicial opinions).

129. See supra fig. 12. Thirty-one of the students who completed the survey listed a job title such as “paralegal,” “legal assistant,” or “law clerk” in their past employment history. These may have been the same students who reported having written litigation and transactional documents.

130. See id.
School X and Y students entering their first year of law school, however, had no legal writing experience that was likely to be very useful as they encountered their early first year legal writing assignments. Either way, with or without prior legal writing experience, the supreme confidence the students reported in their ability to learn legal writing was “setting them up for a fall,” as we learned in Survey 2.

On Survey 2, administered in mid-October, we asked, “Taking into account your law school experience so far, please indicate how confident you now are in your legal writing ability.”

As shown in Figure 21, the students’ responses confirmed that they had experienced the steep erosion in confidence that we had predicted would occur in the first eight weeks of legal writing. The graph of their confidence levels before law school was skewed dramatically to the positive side; eight weeks later, the graph looked closer to the traditional bell curve. Out of 124 students who answered this question, 77 of them (62 percent) were only “moderately” confident in their abilities at that moment, and 17 of them (14 percent) were “slightly” or “not at all” confident. This left only 30 students (24 percent) who still reported the highest confidence levels.

Perhaps even more than the visual depiction shown in the graphs, the students’ responses to the open-ended questions on Survey 2 bore out their plummeting confidence levels. Here are some of the statements we considered particularly revealing:

- “Law school has made me realize I’m horrible at writing like a lawyer.”
- “I feel like I don’t know anything anymore.”
- “I feel that I am not ready to write in legal terms and as a result am not equipped to be an adequate legal writer.”

131. See app. B, at question 1; supra fig. 21. On Survey 1, we asked how confident the students felt about their ability to learn legal writing. On Survey 2, we phrased the question slightly differently, asking them how confident they were at that moment in their legal writing ability. We sought to differentiate between the students’ prospective assessment of their legal writing readiness and their actual confidence level after eight weeks of exposure to what legal writing really entails. We also repeated the question about how confident they were that they could learn legal writing in the remaining months of instruction; those results changed only slightly between Survey 1 and Survey 2.

132. Compare fig. 10, with fig. 21.
“Prior to beginning this program I felt I was very strong as a writer.”
“T is no longer feel as confident about my abilities.”
“My apprehension about writing has been strengthened; my confidence has been shakened [sic].”

Moreover, while some drop in student confidence levels is probably inevitable simply because legal writing is difficult, the current generations of law students, “Generation X” and “Millenials,” may be particularly likely to overestimate their ability to succeed, making the inevitable drop in confidence even more impactful. As the scholarship in this area shows, these students have often been rewarded simply for showing up and making an effort. Law school forever alters that paradigm for educational success. As our study confirmed, the frustration, and sometimes even resentment, these students felt when their confidence in their ability to learn legal writing was challenged often stood as a detour, if not a roadblock, to progress in learning legal writing.

Significantly, at both School X and School Y, the erosion in the students’ confidence seemed to peak just at the midpoint of the first semester, when law school in general, and their legal writing assignments in particular, became more demanding.

133. See Lustbader, supra n. 109, at 361–362 (“Millennials’ . . . educational experiences focused on building self-esteem, and they grew up getting an award or trophy just for showing up at the soccer field.”).

134. “Predictably, the student who encounters demanding assignments and significant criticism for the first time in the law school classroom will react with confusion and hostility.” Joan Catherine Bohl, Generations X and Y in Law School: Practical Strategies for Teaching the MTV/Google Generation, 54 Loy. L. Rev. 775, 789 (2008).

135. At this point in their doctrinal classes, students may be experiencing heavier workloads as professors gradually cease to accommodate their status as novices. More subtly, but perhaps equally distressing to students, their doctrinal professors may be exposing them increasingly to “complex forms of working knowledge about particular ways to reason, understand the law, and appreciate lawyers’ roles, while at the same time confronting them with subtle forms of uncertainty embedded in each of these major facets of a lawyer's life.” Judith Wegner, Law Is Gray: Thinking Like a Lawyer in the Face of Uncertainty 25–26 (draft 2003) (quoted in Stuckey et al., supra n. 2, at 23) (unpublished manuscript on file with Roy Stuckey). As a corollary to this latter problem, proponents of the “Humanizing Legal Education” movement posit that the traditional law school curriculum teaches students that “tough minded analysis, hard facts, and cold logic are the tools of a good lawyer, and it has little room for emotion, imagination, and morality.” Id.; see also Lawrence S. Krieger, Human Nature As a New Guiding Philosophy for Legal Education and the Profession, 47 Washburn L.J. 247, 280 (2008) (noting that traditional classroom teacher-student interactions train students to believe that values and morals are unimportant in the law and that argumentation skills ought to be the highest aim). Thus, the
At School X, prior to Survey 2, students had written one short memo (called Memo 1) emphasizing the basic IRAC format for writing about case analysis and one closed-research objective memo (called Memo 2) requiring synthesis of two to three cases. Some students had conferences with their professors during the Memo 2 writing process; others did not. In mid-September, students had a week of legal research instruction. Then, in early October, just before we administered Survey 2, students received their first open-research memo assignment (called Memo 3). This assignment required them to identify the issue(s) for analysis, to research to find relevant authority, to analyze and synthesize cases, and to produce a seven- to ten-page objective memo. This assignment was due in early November. While almost all School X professors held individual conferences with their students during the Memo 3 writing process, these conferences generally occurred in mid- to late-October. Meanwhile, Memo 2 was not returned until mid-October, after students’ work on Memo 3 was well underway.

At School Y, the first-semester legal writing course included five small writing assignments that paved the way for a longer sixth assignment. This sixth assignment was a five-page closed research memo that counted for 50 percent of the students’ first-semester grade. At the time we administered Survey 2, School Y students had completed four of the five shorter assignments

heavier workload, the newness and ambiguity inherent in studying the law, and the emphasis on argumentation skills over values and morality may create “the perfect storm” when students reach the midpoint of the first semester.

136. Information about the first-semester program at School X was supplied by the Director of School X’s Legal Research and Writing Program, whom we do not name here in order to maintain the anonymity of School X.

137. Lack of feedback was a common frustration expressed by several Survey 2 participants. As one School X student put it, “It’s hard to write [Memo 3] effectively with no feedback whatsoever on [Memo 2]. We won’t get [Memo 2] back until we’ve already been writing [Memo 3] for 3 weeks.” In fact, partly in response to the data generated by Survey 2, School X decided to revise its fall schedule for the 2008–2009 year so that any given memo assignment was not distributed until the prior memo assignment had been graded and returned with professor feedback. According to School X’s Director of Legal Research and Writing, this change was received positively by the students, and the policy remains in effect.

138. Information about School Y’s first-year program, including a Fall 2007 syllabus, was supplied by the director of the Legal Research and Writing Program at School Y, whom we do not name here in order to maintain the anonymity of School Y.

139. Unlike School X students, who wrote an open-research memo in the fall semester, School Y students did not write an open-research memo until the spring semester.
and had been afforded the opportunity to rewrite the first three assignments. According to the syllabus, individual conferences did not take place until early November, well after students took Survey 2. In sum, when School Y students completed Survey 2, in early October, they were receiving new memo assignments at a rapid pace while continuing to revise prior memos, and they had not yet had the benefit of scheduled individual conferences with their professors. Given the demands that were being made of the students at both School X and School Y in the first eight weeks of the fall legal writing semester, and given the inherent difficulty of learning legal writing, we were not surprised by the level of frustration and discouragement that many students expressed in Survey 2, paralleling the steep decline in their confidence.

As we will explore later in Part VI, our study suggested to us that while legal writing professors may not be able to head off the crisis of confidence that seems to detour so many first-semester students, we can more actively help our students navigate through the detour. We do not think this will require major curricular changes in most legal writing programs. Rather, the changes we outline later in this Article center around promoting students’ early recognition of the coming roadblocks and seizing opportunities to help them understand that the roadblocks themselves can be invaluable parts of their journey to legal writing competence.

D. Many of These Beginning Law Students Became Disillusioned When They Realized That They Could Not Rely on Their Prior Strengths as Writers to Guarantee Immediate Success in Legal Writing.

In addition to the disappointment that stemmed from many of the surveyed students’ overconfidence in their ability to learn legal writing, the responses to Survey 1 and Survey 2 demonstrated that many students incorrectly assessed their strengths and weaknesses as writers when viewed through the lens of what good legal writers must be able to do. The survey responses from the students before they began law school\textsuperscript{140} demonstrated three misconceptions about their strengths and weaknesses as writers: (1) some students did not have the general writing strengths they

\textsuperscript{140} See supra figs. 13, 14.
believed they had; (2) the qualities many students reported as writing strengths may actually be weaknesses in legal writing; and (3) the qualities many students reported as writing weaknesses are often strengths in legal writing.

The most often reported strengths included (1) organization; (2) conciseness; (3) clarity; (4) grammar and punctuation; and (5) analysis. A sampling of the students’ responses shows just how firmly they believed these were their strengths:

- “I have a strong ability to convey thesis or argument of the paper.”
- “There is a good flow to my writing and organized thoughts.”
- “I have a solid ability to put thoughts clearly in writing . . . and am a good editor.”
- “My writing is simple and easy to read and understand.”
- “My writing is well organized and is easily followed by a reader.”
- “My greatest strength is in structuring papers for clarity.”

However, legal writing professionals would likely be quick to agree that it is in these very areas—analysis, organization, clarity, and conciseness—that most beginning legal writers struggle. In fact, legal writing professors typically must start from scratch when teaching these skills, and most legal writing textbooks devote entire units to teaching students how to perform legal analysis and how to write about it in an organized, clear, concise way.

141. Grammar was also among the top choices, and again some of the responses belied the students’ claimed proficiency in this skill. We tend to view grammar as an ancillary skill, and in fact, some legal writing professors do not view the teaching of grammar as a primary responsibility. The trend appears to be toward addressing deficiencies in grammar skills outside of the legal writing classroom, often through the use of writing centers, writing tutors, and other remedial writing programs. According to the 2008 survey of the Association of Legal Writing Directors (ALWD), of the 181 programs represented in the survey, 10 employed a full-time writing specialist, and 33 employed a part-time writing specialist. ALWD & Leg. Writing Inst., 2008 Survey Results 16 (2008) (available at http://www.lwionline.org/uploads/FileUpload/2008SurveyResults(REVISED).pdf) [hereinafter 2008 Survey Results].

142. This point is evident from the very titles of many of the preeminent legal writing textbooks. See e.g. Charles R. Calleros, Legal Method and Writing (5th ed., Aspen Publishers 2006); Veda R. Charrow et al., Clear and Effective Legal Writing (4th ed., Aspen
In terms of general writing skills, the students’ responses themselves demonstrate that in some cases, the students were not as skilled as they thought they were when it came to clarity, conciseness, and organization. For example:

- “My main strengths are my ability to get my point across in a way in which its [sic] easy to understand and comprehend.”
- “I have an ability to explain complex subjects concisely and in such a manner that non-technical people may understand them. I have the ability to formulate and express arguments such that they are clear and may be used for further actions.”
- “I believe my writing strengths to be how I lay out my main points in paragraph form and in great detail elaborate on how those prove my thesis. Additionally, I have been told by many professors/teachers that I assume a distinct voice and tone while writing that appears to be very authoritative in nature.”
- “Proofreading, ability to form complete thoughts and ideas, ability to express thoughts and ideas, ability to use appropriate grammar, ability to write to the audience, ability to form and back up a thesis, ability to provide a clear and concise analysis.”
- “Simple and easy to understand, but feel confident that people who read my writing can understand what I am trying to say.”
- “I believe I have the ability to stick to the topic at hand without over elaborating and getting off subject.”

These students strongly believed they had the ability to write in an organized, clear, concise fashion, even though some of their own descriptions were not models of organization, clarity, or conciseness.143

143. We acknowledge that these responses were likely written quickly and were likely
Further, the survey results showed that what many students considered to be their strengths may actually be weaknesses in the legal writing context. For example, more than 70 responses to the “strengths” question (about 30 percent) mentioned the writers’ “creativity”; their unique style; and their superior vocabulary. Here are some actual responses that highlight this clash between the students’ initial assessment of their writing strengths and the requirements of good legal writing:

- “Elaboration and organization.”
- “My writing tends to be elevated.”
- “A vivid imagination to create new ideas.”
- “As a writer, I communicate clearly, but compellingly. I enjoy varied syntax and compelling imagery.”
- “I have a descriptively large vocabulary.”
- “Large vocabulary; comfort with highly varied syntax.”
- “Creativity, uniqueness, my ‘voice.’”
- “I have a unique style of pairing words and sentences. I often manage to put an interesting spin on a dull topic by using analogies and visualizations.”
- “[I have] the ability to be verbose when necessary.”

However, again, most legal writing professors agree that unique style, creativity, a powerhouse vocabulary, and the ability to be “verbose,” as students understood these qualities, are not fundamental to good legal writing and may actually be detrimental. A disconnect seemed likely to occur when the students were told not to do the very things they thought they did well. Thus, based on Survey 1, we theorized (and Survey 2 confirmed) that a great deal of frustration would occur in the first few weeks of legal writing when these students realized that their prior...
strengths as writers did not necessarily translate to the legal writing arena.

Conversely, Survey 1 revealed that many of the surveyed students, who had not yet tried legal writing, identified as their writing weaknesses qualities that may often actually be strengths in legal writing. At least three of the top eight categories of the students’ perceived weaknesses—style, creativity, and vocabulary—are usually not problematic to the legal writer (at least, not to the beginning legal writer). The following responses are illustrative of those perceived “weaknesses” that, in the early legal writing context, are likely to be strengths:

- “I have trouble filling the paper.”
- “I don’t have a big vocabulary.”
- “I am not a creative writer.”
- “I don’t like writing flowery BS and like to get right to the point.”
- “Any writing that requires a great deal of complex emotional content is difficult for me.”
- “Sometimes conform to ‘generic’ writing styles instead of making them my own.”
- “I have trouble writing creatively. I am very critical of my own work.”
- “I certainly have not found a voice like Nabokov’s or Woolf’s yet.”
- “The obsessive need to be truthful and accurate.”

In sum, the Survey 1 results confirmed that one of the reasons these early legal writing students struggled so much is that meeting the demands of good legal writing required them to completely reassess their strengths and weaknesses as writers. This difficult reassessment, in many cases, caused students to feel rebuffed and perhaps even resentful.

Moreover, as the results of Survey 2 showed, while some students recognized this reassessment as a necessary part of the

146. See supra fig. 14.
147. See Enquist & Oates, supra n. 66, at 13 (“Early in the course, English majors may resist what they consider the formulaic and restrictive nature of legal writing. They complain that it ‘stifles their creativity,’ and they are frustrated because they cannot show off their vocabularies and sophisticated writing style.”).
learning process, others found it painful. On Survey 2, we asked students whether their experiences in law school in the first eight weeks had altered their view of their strengths and weaknesses as writers. Half of the students who took Survey 2 (52 out of 104, or 50 percent) said that their view of their strengths as writers had changed, and a similar number (56 out of 105 students, or 53 percent) said that their view of their weaknesses as writers had changed.

With regard to writing strengths, below are some Survey 2 responses that capture the themes of the students’ changed perceptions after eight weeks of law school:

- “Yes. I was a good writer outside of legal writing, but that skill did not translate exactly into legal writing. I learned that I have a lot of work to do to learn legal writing.”
- “My strengths weren’t as important as I had believed.”
- “It has emphasized my problems and made me realize that my strengths turn into weaknesses when attempting to write in law school.”
- “Yes, LRW challenged me to write more clearly and precisely.”
- “Honed existing skills and helped cut down on verbiage.”
- “I do not feel as though I am as strong a writer as I thought.”
- “I do not know that areas which I would have said were my strengths have been utilized so far.”
- “Yes, thus far I feel that writing for law is much different than any writing I have had to do before, it’s a whole different style.”

With regard to writing weaknesses, the students’ changed perceptions were even more striking. The students as a whole seemed to have a realistic grasp of how much they needed to improve, as shown by the following responses:

148. Here are three examples: “I do not doubt my strengths as a writer, but legal writing is unique and therefore presents new challenges.” “The difficulty with legal writing is more an issue of understanding what a legal writer is expected to do rather than an issue of writing ability.” “Experiences so far have confirmed for me that I can logically organize and succinctly state my ideas. They have also shown that there is still plenty of room for improvement, perhaps more than I had hoped.”
149. See app. B, at questions 2, 3.
• “I’ve found that my greatest weakness is complex sentence structures, which I never thought would be a problem.”
• “[My understanding of my strengths and weaknesses] has switched. Repetition now is good, and my writing style is bad.”
• “I know now that I must be more concise.”
• “I have realized how crucial it is to write with precision.”
• “I need to learn to be more concise. I used to think that more words were better.”
• “I felt like a weakness of mine was lack of creativity. However, the first LRW is more structured than I would have thought. So, my weaknesses haven’t been a hurdle.”

Tracking the responses of individual students who participated in both Survey 1 and Survey 2 more concretely highlights the very different reactions students had to the inevitable realization that their strengths and weaknesses did not wholly translate to their new life as legal writers.\textsuperscript{150} Student A, for example, had a fairly positive reaction to this realization; Students B and C, on the other hand, showed considerable frustration.

Student A in August, assessing his or her strengths:

“Strong ability to convey thesis or argument of paper. Good flow to paper. Organized thoughts before writing paper.”

Student A in October, reassessing his or her strengths:

“It’s a totally different style of writing. All of my papers before were about content, but with a lot of style. It’s been a big adjustment focusing on content and less on style. I think I’m becoming a better writer.”

Student B in August, assessing his or her strengths:

“I think I have a good sense of structure and flow of organization to my writing. I know how to use transitions and

\textsuperscript{150} As noted previously, each student was assigned a unique identifier that enabled our survey consultant to track individual responses while preserving the anonymity of the students. \textit{See supra} n. 16.
make a clear argument. In college, I learned how to write better analytically instead of descriptively.”

Student B in October, reassessing his or her strengths:

“I feel like I don’t know anything anymore.”

Student C in August, assessing his or her weaknesses:

“I have to get myself to start writing.”

Student C in October, reassessing his or her weaknesses:

“Yes! I can’t write simple!”

One student who had previously expressed a high comfort level with literary writing simply said, “I have many more weaknesses than I thought.”

Another question on Survey 2 was designed to crystallize the students’ reactions to their early legal writing experiences as they related to their views of their writing abilities. We asked, “What has been the most difficult aspect of learning legal writing so far?”

Student feedback mirrored much of the data from the strengths and weaknesses responses. One student wrote that it was difficult to “adjust from English paper style to the concise, direct format of legal writing.” Others emphasized that legal writing was a completely new style of writing and that writing in simple language had been very difficult. Several wrote about the difficulty of switching from prose style to logical writing, while still others said that being concise while achieving clarity was most difficult. While legal writing professionals have talked about these difficulties of adjustment for years, seeing these students’ direct feedback made it clear to us that the profession has it right: legal writing is different and more difficult than many students expect, and success in legal writing requires a thorough reassessment of, and often a significant adjustment to,
the writing techniques that have worked for the students in the past.

VI. RECOMMENDATIONS

As we have come to better understand why the process of learning legal writing is so difficult for so many students, we have begun to identify simple strategies—some “interventions”—that legal writing professors could implement to address each of the four expected roadblocks we have identified. Most of these strategies, which we believe will help students take charge of their own progress in both the study of law generally and the study of legal writing specifically, will likely have the greatest impact if practiced in the early weeks of legal writing instruction. Moreover, the strategies do not require major curricular changes; rather, they are centered on recasting the roles of student and professor.

A. Recasting the Context of the Legal Writing Class

As we explored in Part V(A) above, the first roadblock we identified to students’ adjustment to legal writing was their lack of context in which to place the key skills we were teaching them. This lack of context went beyond the legal writing classroom and, for many, encompassed their overall study of law. Thus, there is a very early need to address students’ ideas of what the study of law is and how legal writing fits into it. Central to this objective is recasting the roles of the legal writing professor and student.

Fundamentally, with regard to the study of law, students need to be told from the outset that the law is not a concrete, finite set of rules that can be mastered in a semester, or even in three years of law school. Unlike their previous academic pursuits, which they were able to master in one or two semesters, the law is ever-elusive and ever-moving, and they will never fully

154. From this point forward, we boldly generalize in the hope that the School X and Y students we surveyed were representative enough of early legal writers in general to apply what we learned from their experiences beyond those schools.

155. The concept of students and legal writing professors reexamining their roles was explored as early as 1994 by Professors J. Christopher Rideout and Jill J. Ramsfield in their foundational 1994 article entitled, Legal Writing: A Revised View, supra n. 153, at 63–65 (students), 66–68 (professors).
Thus, we need to recast their ultimate objective: they should not be seeking to master the law; they should be seeking to achieve competence in finding, understanding, and using the law. If successfully conveyed, this new understanding could, in our opinion, be very “freeing” to beginning law students as they worry less about extrinsic indicators of achievement and focus instead on the intrinsic satisfaction that comes from being fully engaged in the high calling of the law, to which law school is the “crucial portal.”

B. Recasting the Role of the Legal Writing Professor

Turning to the legal writing classroom in particular, we can provide context most concretely by immediately—even on day one—recasting the role of the legal writing professor. First, we can recast our role by explaining gently and patiently, but repeatedly, that unlike their undergraduate professors (for example, their Russian literature professor or their accounting professor), legal writing professors are not the typical “subject matter experts.” While their Russian literature professor likely knew virtually everything there was to know about that subject, legal writing professors do not claim to be sources of “perfect” knowledge about the field. We do claim to know what the typical legal professional is looking for in the written communication we teach.

Next, beginning legal writers need to understand that their audience is not their legal writing professor; rather, their audience is the practitioner who will ultimately use their writing to make important decisions. Put another way, the legal writing professor is simply a stand-in for the legal reader. Thus, unlike in their previous academic pursuits, successful legal writers will not succeed by simply “figuring out what the professor wants and doing it”; they must understand that there is a definite set of needs

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156. Few law professors would claim that they are “masters” of the law; rather, most would claim only that they have a high degree of familiarity with some particular area of the law, how that area is developing, and how lawyers use it. See e.g. Phillip C. Kissam, Thinking (by Writing) about Legal Writing, 40 Vand. L. Rev. 135, 145 (1987) (noting that many law students share a general belief which may be problematic, namely, that “any lawyer (or any incipient lawyer) who is any good will be able to provide right answers to legal problems with relative quickness, with great precision, and (most importantly) without making mistakes” (emphasis in original)).

157. Sullivan et al., supra n. 5, at 1.
and expectations that legal professionals share, and that we, their legal writing professors, are simply teaching them what those needs and expectations are and how to meet them.

To help students see the role of the legal writing professor in this new way, one simple strategy could be to regularly invite practitioners (judges, practicing attorneys, and even law clerks) into our classrooms. These “real-life” legal readers could reinforce that what we are teaching is what lawyers need and expect to see in the documents they read and is not merely idiosyncratic to us. We could thus illustrate in a concrete way that we, the legal writing professors, are not really the ones whom the students should seek to please. If done successfully, this recasting of the role of the professor could relieve some of the students’ anxiety; unlike before, they will not need to “learn the teacher” to succeed.

Another strategy that legal writing professors could use to recast their role is employing reader-based language when giving both oral and written feedback. This idea certainly is not original to us; legal writing professionals have long been advocating the benefits of this reader-centric feedback.158 We recognize that this strategy requires considerable discipline and consistency and is admittedly challenging when there is a big stack of papers on the desk. However, if we are truly committed to recasting the role of the legal writing professor, there should be no substitute for providing feedback that reinforces the concept of the ordinary legal reader as the consumer of the legal writing product. In sum, we think that recasting the role of the legal writing professor is

158. See e.g. Kirsten K. Davis, Building Credibility in the Margins: An Ethos-Based Perspective for Commenting on Student Papers, 12 Leg. Writing 73, 92 (2006) (explaining that when commenting on student papers, “[a] legal writing professor can cultivate [a student’s] rhetorical persona by focusing not on her role as a legal writing professor but on ‘playing’ the roles of various readers and evaluators with whom students will interact in their legal careers and adopting these personas” (citing Linda L. Berger, A Reflective Rhetorical Model: The Legal Writing Teacher as Reader & Writer, 6 Leg. Writing 57, 80 (2002))); Jane Kent Gionfriddo, The “Reasonable Zone of Right Answers”: Analytical Feedback on Student Writing, 40 Gonz. L. Rev. 427, 439–440 (2005) (“In addition to providing comments as educators, legal writing teachers should provide comments from the points of views of lawyers and judges—readers who lack the same familiarity with the analysis as the author.”); Patricia Grande Montana, Better Revision: Encouraging Student Writers to See through the Eyes of the Reader, 14 Leg. Writing 291, 310 (2008) (stating that legal writing professors can help students “transform their Writer-Based prose into Reader-Based prose as they revise” by “simulating the legal reader’s response and framing the questions and comments accordingly.”).
the *sine qua non* of a smoother, less traumatic adjustment for beginning legal writing students.

C. Recasting the Role of the Student

The rest of our recommendations focus on helping students recast their role—helping them recognize that they are novices in the discourse community of legal writing but that they can advance their own status by redirecting their prior skills and experiences and by preparing ahead for the detours they will encounter as they move from novice to advanced beginner.

1. Moving Students from an “Outside-in” to an “Inside-out” Approach to Legal Thinking and Writing

As explained in Section V(B) above, many beginning law students have become habituated to certain ways of thinking and writing about the subject matter in a particular area of study. Their chief goal has often been to demonstrate their mastery of the subject matter in whatever format their professor preferred (and sometimes to provide their own opinions and criticisms of the subject as well). Thus, we need to purposefully provide new law students with a different way of approaching the task of legal writing, which cannot be effectively accomplished using their previous writing habits (the gist-and-list strategy or the TIA strategy, for example).159

One simple way to explain to students that they are transitioning into a different kind of learning is to more thoroughly explain what the legal writing class actually involves. It does not just involve researching and writing.160 Legal research itself is a complex task that may require reading, evaluating, and filtering large amounts of material just to enable the student to identify

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159. See *supra* nn. 87, 89, and accompanying text.
160. One possible reason that students may be surprised by the scope of their legal writing courses is that the names of the courses sometimes fail to convey the breadth of the skills the students will be expected to learn. For example, at School X, through the 2009–2010 academic year, the first-semester legal writing course was called “Legal Research and Writing I.” Names like this unwittingly reinforce the “knowledge-telling” writing strategy that may have worked in previous settings but is inadequate for legal writing: “I will find the information you are seeking and then report it to you in summary form.” See *supra* n. 91 and accompanying text. The faculty at School X recently voted to change the course name to “Legal Analysis, Writing & Research” beginning with the 2010–2011 academic year.
the issues to analyze. Then, reading, reasoning, understanding, analyzing, and even rereading must occur between the research process and the writing process. Moreover, the writing process itself should typically encompass outlining, multiple efforts at drafting, revising, editing, formatting, and proofreading. Students must be taught that the “outside-in” approach to thinking and writing is simply not adequate to encompass the many complex tasks of the legal writer. In other words, the subject matter mastery and reporting of it that served them well in undergraduate courses will not do so in law school, because there are no formulas, no shortcuts, and no templates for the hard work of the legal writer, who must perform for himself the entire process from the “inside-out.”

Second, we can adapt our early teaching strategies to more effectively address our students’ deficiency in, and resistance to, careful analytical thinking (or, as we have been calling it, “inside-out” thinking). We cannot simply assume that our students will follow us when we instruct them that legal analysis consists of identifying the governing rule and applying it to a set of facts; in fact, it would probably be impossible to give our students too much practice in the deep thinking required for good legal analysis. And while it is a given that legal analysis and legal writing are recursive, we should nevertheless consider whether we are spending enough time on the fundamentals of performing legal analysis before we ask our students to write about legal analysis for the first time.

Another key intervention that would advance this realization could be to empower students to become more conscious metacog-

161. At School X, and many other law schools, library professors teach the research portion of the course. When this is the case, writing professors should be intentional about involving them in any efforts to improve students’ early experiences in legal writing.

162. One recent legal writing text devotes the majority of a chapter to explaining the difference between rule-based reasoning and analogical reasoning. See Coughlin et al., supra n. 61, at 131–149. The authors of that text rightly proceed from the assumption that today’s law students may never have learned about these analytical methods. See also Ruth Ann McKinney, Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert 33–45 (Carolina Academic Press 2005) (describing the various types of reasoning that novice legal readers will encounter).

163. See e.g. Dernbach et al., supra n. 71, at 168 (“Legal writing is too complex to be approached in a linear fashion and requires instead a recursive approach.”); Rodriguez, supra n. 108, at 213 (recognizing that the transition from the linear writing process to the recursive writing process is a source of anxiety and insecurity in novice legal writers).
Because law students have been successful students in other areas, we can assume that they are likely already metacognitive learners. They just may not know that the application of these techniques in a conscious way would be of enormous help to their law school success.

There is a wealth of scholarship on the benefits of metacognition for law students. For our purposes, this fascinating scholarship can be summarized as follows: the student himself must be empowered to take charge of his own learning. In the legal writing classroom, empowering our students to “own” their own learning could be achieved by the use of specific techniques to help students be aware of (1) what “old” writing habits they are bringing into the legal writing classroom; (2) which of those habits may be helpful to their legal writing process and which may not be; and (3) how well they are doing at integrating the new skills we are teaching them into their legal writing process. At the core level, we need to equip them to separate the writing process from the writing product and to accurately assess the effectiveness of the writing process they are using. We need to help our students “learn to invoke conscious choice and evaluate awareness on complex problems . . . instead of simply relying on well-established automated writing plans.”

Our study responses therefore directly support the need to apply the metacognitive model in the legal writing classroom.

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164. Metacognition can be loosely defined as “thinking about thinking.” See e.g. Robin A. Boyle, Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student, 81 U. Det. Mercy L. Rev. 1, 7–9, 14 (2003) (reviewing a number of scholars’ definitions of metacognition and citing Peter Dewitz as the author of the “thinking about thinking” definition) (citations omitted). As one legal scholar has succinctly advised, “Faculty need to explicitly teach students thinking strategies and make the students conscious of their cognitive processes.” Venter, supra n. 56, at 625.

165. See Rideout & Ramsfield, supra n. 155, at 64 (“[S]tudents . . . cannot afford to remain passive spectators in the legal writing classroom.” Through their active participation in the “dialogue of the classroom” they will be “constructing themselves, rhetorically, as lawyer-writers . . .”).

2. **Leading Students to a More Realistic Expectation about Their Success in Early Legal Writing**

As demonstrated in Section V(C) above, many students we surveyed—even those with much earlier and unrelated writing experience and those with limited or no legal writing experience—came into their legal writing classes expecting that they would be extremely successful early on. It follows that legal writing professors should be more deliberate about helping our students manage their expectations to avoid the frustration and resentment that often stem from the false belief that they will easily and quickly master legal writing.

Specifically, we can begin by telling our students in no uncertain terms that, as with mastery of the law itself, mastery of legal writing is not something they can or should aspire to. While most legal writing students might agree that they are novices at the beginning of the legal writing course, they may not realize that all of their hard work over the course of the year might at best result in achieving “advanced beginner” status. Our Teaching Assistants can provide valuable reinforcement in this regard. Most Teaching Assistants are successful students in spite of having experienced very similar crises of confidence in their early legal writing instruction. Still, even having overcome this crisis, our Teaching Assistants should be seen as only advanced beginners and not legal writing experts. It would perhaps be encouraging to the first-year students to use some examples of their Teaching Assistants’ “less than stellar” early work to illustrate that even for them, competence in legal writing did not come quickly or easily.

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167. *See supra* fig. 10.

168. *See supra* fig. 21.

169. Ruth Ann McKinney, *Depression & Anxiety in Law Students: Are We Part of the Problem and Can We be Part of the Solution?* 8 Leg. Writing 229, 249 (2002) (*"[W]e should take every opportunity to help students learn that others have succeeded before them. The more our students learn about the successes of other students, the more they will believe that they, too, will be successful. The more they believe that they will be successful, the more successful they will, in fact, be."*).

170. *Id.* Many legal writing professors themselves would probably admit to having taken the same detour in early legal writing. Indeed, both of the authors freely share with their new first-year students that the lowest grades we ever received in our entire academic careers were on the first papers we wrote in our first-year legal writing classes!
Our survey responses themselves provide a vehicle for graphically illustrating to our students the “real-time” reactions of past students who plowed this road before them. In PowerPoint® or a comparable format, and timed to be read in class at the moments the professor knows the students are likely experiencing a crisis in confidence, the words of our survey participants could be used to validate the current students’ own feelings and worries about whether they can conquer the new task of legal writing.\textsuperscript{171} Our survey participants, after stumbling badly in early legal writing classes, expressed fears\textsuperscript{172} that likely mirror the feelings of many of our current students at similar times. Their responses could provide solace as current students recognize that others before them also needed to adjust their goals and expectations early in legal writing; perhaps they could avoid the drastic plummet in confidence that their predecessors reported and that so many of them might otherwise encounter.

3. \textit{Leading Students toward Seeing That “the Reverse Side Also Has a Reverse Side”\textsuperscript{173}: A More Realistic and Healthier Self-assessment of How Their Prior Strengths and Weaknesses as Writers Will Impact Their Legal Writing}

Finally, we can alert students from the beginning that when it comes to legal writing, they are not reliable judges of their own strengths and weaknesses. As we discussed in Part V(D) above, many of the students we surveyed listed such qualities as creativity, a large vocabulary, and “flowery” writing as writing strengths. On the other side, many students listed “weaknesses” such as lack of creativity, limited vocabulary, and lack of “style.” Our challenge is to empower students much earlier to view their assessment of their strengths and weaknesses through the lens of

\textsuperscript{171} One noted legal writing professor, Professor of Law Louis J. Sirico, Jr. of Villanova Law School, tells his first-year students very early on, “You’re probably thinking right now that you have fooled everyone into believing that you are smarter than you really are. And guess what? Every other person sitting in this room is feeling the exact same way.” Sirico reports that simply giving voice to this feeling has been a very powerful consolation to many struggling students over the years. Conversation with Prof. Louis J. Sirico, Jr., Villanova L. Sch. (Portland, Ore. July 25, 2009).

\textsuperscript{172} \textit{See supra} sec. V(C) (providing students’ specific prose comments about their confidence levels).

the professional legal writer and to “let go” of the aspects of their prior writing that might hinder their progress as legal writers. For example, a student who has stated that her greatest writing strength is creativity is likely to be understandably frustrated when she is repeatedly instructed to “stick to the IRAC format” or to “repeat the court’s own words instead of substituting your own colorful synonyms.” At this moment of frustration, the student can respond in two different ways: she can continue to be frustrated because what she feels she does best is not valued in legal writing and can eventually disengage from the learning process; or she can recast her understanding of the role of creativity within legal writing to a more appropriate one and can remain committed to the learning process.

Our job as legal writing professors is to help students recognize these moments of frustration as opportunities for real growth as legal writers. For example, instead of seeing IRAC as a rigid formula that stifles her creativity, the student described above could be helped to recast her view of IRAC so that she comes to see it as a helpful tool that “frees” her from the need to come up with a separate organizational framework for each assignment. Put even more simply, legal writing professors have a golden opportunity in the first few weeks of first-year classes to help students see that when their initial assessments of their strengths and weaknesses are challenged, the better response is not to shut down (resent, resist, or give up), but to open up (accept, absorb, and give in).

VII. CONCLUSION

In sum, the words of beginning legal writing students themselves, which we have shared in this Article, make it clear that many encounter common frustrations in legal writing, especially in the early going. Simply by being more proactive in alerting our

174. See e.g. Rideout & Ramsfield, supra n. 153, at 59–60 (noting that “the seeming loss of the ability to ‘be original’ is something every law student encounters. . . . [Law students are frustrated by what they see as the lack of ‘creativity’ in legal writing and analysis.”).
175. See Rodriguez, supra n. 108, at 214 (‘Students who develop the most expertise when writing in a new genre . . . ‘initially accept their status as novices’ . . . “students who cling to their former writing strategies and ‘who resent the uncertainty and humility of being a novice have a more difficult time adjusting to the demands of [a new type of] writing.’ Becoming a novice legal writer involves being open to instruction and feedback, and being willing to experiment and make mistakes.” (Citations omitted)).
students to these “frustration zones,” we can improve the quality of their transition into the legal writing realm. We believe that with this kind of gentle help, most students will choose to face their frustrations head-on—that is, to take charge of their own learning in these moments and to view the detours and roadblocks as opportunities to enhance their early growth as legal writers.
APPENDIX A

SURVEY 1

August 2007

1. Which kinds of writing have you done?

<table>
<thead>
<tr>
<th>Kind of Writing</th>
<th>In College</th>
<th>In Graduate School</th>
<th>At Work</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Research paper (term paper, thesis, dissertation, etc.)</td>
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<td>Short opinion pieces</td>
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<td>Creative writing (poetry, short stories, etc.)</td>
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<td>Journalistic writing (news articles, feature stories, etc.)</td>
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<td>Technical writing</td>
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<td>Essay</td>
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<td>Legal writing</td>
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<td>Other (please describe below)</td>
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</table>

2. If you checked “legal writing” above, describe the kind of legal writing you have done, e.g., trial briefs, trial memoranda, case briefs, etc.

3. Please list below any courses you have taken in which you were evaluated primarily on your writing skills and ability rather than on the content of the writing. If you have not taken any such course, please write “none.”

176. © 2007, Miriam E. Felsenburg, Laura P. Graham, and Ananda Mitra.
4. Taking into account the writing that you have done prior to entering law school, please indicate how confident you are in your writing ability.

___ Extremely
___ Very
___ Moderately
___ Slightly
___ Not at all

5. Describe your strengths as a writer.

6. Describe your weaknesses as a writer, if any.

7. On writing projects, how often do you do the following?

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<th>Activity</th>
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<th>Usually</th>
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<td>Asking someone else to read your work</td>
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<td>Revising rough draft(s)</td>
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8. Describe what you think the study of law involves.

9. Describe what you think the study of legal writing involves.

10. Select the response below that best indicates how confident you are about learning legal writing.

___ Very confident
___ Confident
___ Somewhat confident
___ Not at all confident
___ Do not know

11. Based on what you know today, how important do you think the following are in good legal writing?

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<td>Use of legal terminology</td>
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<td>Other (please list in area below)</td>
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</table>

12. Indicate your undergraduate major(s).
13. Indicate any graduate study you have done, including the field(s) of study and degree(s) earned.

14. What law-related courses have you taken?

15. If you have taken any course(s) in which you were required to read judicial opinions, please list the title(s) of the course(s) below.

16. List the job title(s) and describe any job(s) you have held since graduating from college.
17. How old are you?

___ 20 or under
___ 21–23
___ 24–26
___ 27–29
___ 30–34
___ 35–39
___ 40 or over

18. What was your undergraduate grade point average (on a 4.0 scale)?

___ 4.0 or above
___ 3.70–3.99
___ 3.40–3.69
___ 3.10–3.39
___ 2.80–3.09
___ 2.50–2.79
___ 2.10–2.49
___ 2.09 or below

19. What was your LSAT score?

___ 170 or above
___ 165–169
___ 160–164
___ 155–159
___ 150–154
___ 145–149
___ 140–144
___ 139 or below
1. Taking into account your law school experience so far, please indicate how confident you now are in your legal writing ability.

___ Extremely
___ Very
___ Moderately
___ Slightly
___ Not at all

2. Have your experiences in law school thus far altered your view of your strengths as a writer? If so, please describe below.

3. Have your experiences in law school thus far altered your view of your weaknesses as a writer? If so, please describe below.

4. On legal writing assignments you have worked on so far in law school, how often did you do the following?

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<thead>
<tr>
<th></th>
<th>Always</th>
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<th>Sometimes</th>
<th>Rarely</th>
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© 2007, Miriam E. Felsenburg, Laura P. Graham, and Ananda Mitra.
5. Based on your experiences in law school, have you changed your opinion as to what the study of law involves? If so, please describe below.

6. Based on your experiences in law school, have you changed your opinion as to what the study of legal writing involves? If so, please describe below.

7. Based on the feedback you received on early legal writing assignments, how do you think you are performing in legal writing?

___ Near the top of the class
___ Above average
___ Average
___ Below average
___ Near the bottom of the class

8. Select the response below that best indicates how confident you now are about learning legal writing.

___ Very confident
___ Confident
___ Somewhat confident
___ Not at all confident
___ Do not know
9. Based on your legal writing instruction so far, how important do you think the following are in good legal writing?

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<thead>
<tr>
<th></th>
<th>Extremely</th>
<th>Very</th>
<th>Moderately</th>
<th>Slightly</th>
<th>Not At All</th>
<th>Not Sure</th>
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</table>
10. How often has your legal writing professor used the following teaching methods?

<table>
<thead>
<tr>
<th>Method</th>
<th>Frequently</th>
<th>Sometimes</th>
<th>Rarely</th>
<th>Not At All</th>
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<tbody>
<tr>
<td>Readings from textbook</td>
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<tr>
<td>Additional readings</td>
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<tr>
<td>Lecture</td>
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<tr>
<td>In-class writing</td>
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<td>Group writing</td>
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<tr>
<td>Reading other students’ work</td>
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<tr>
<td>Studying examples of legal writing</td>
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<tr>
<td>Using IRAC or a similar method of legal writing</td>
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<td>Rewriting assignments</td>
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<tr>
<td>Live feedback from professor</td>
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<td>Conference with professor</td>
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<td>Written feedback from professor</td>
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<td>Other (please describe below)</td>
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</table>
11. Of the teaching methods used by your legal writing professor, please rate the following according to their effectiveness.

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<tr>
<th>Method</th>
<th>Extremely</th>
<th>Very</th>
<th>Moderately</th>
<th>Slightly</th>
<th>Not at all</th>
<th>Not applicable</th>
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<tr>
<td>Readings from textbook</td>
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</table>
12. What other instructional methods do you think your legal writing professor should use to enhance your early legal writing instruction?

13. How important to your learning have your Teaching Assistants and/or Writing Fellows been?

___ Extremely
___ Very
___ Moderately
___ Somewhat
___ Not at all
___ Not applicable

14. Describe what you think the ordinary legal reader is looking for in legal writing.

15. What have you enjoyed most about legal writing?

16. What has been the most difficult aspect of learning legal writing so far?

17. Looking at all the work you have to do in law school, what percentage of your time do you spend on legal writing class assignments and learning?

___ 91–100
___ 81–90
___ 71–80
___ 61–70
___ 51–60
___ 41–50
___ 31–40
___ 21–30
___ 11–20
___ 1–10
18. How helpful has legal writing been to your learning in other law school classes?

___ Extremely
___ Very
___ Moderately
___ Somewhat
___ Not at all
___ Not sure

19. Please describe why you chose the response you chose to number 18 above.

20. What advice have your 2L and 3L colleagues given you about legal writing?

21. If you have received any grades from legal writing assignments, please indicate your grade range.

___ Near the top of the class
___ Above average
___ Average
___ Below average
___ Near the bottom of the class
___ Not applicable
CREATING ASSESSMENT PLANS FOR INTRODUCTORY LEGAL RESEARCH AND WRITING COURSES

Victoria L. VanZandt

I. INTRODUCTION

“A goal without a plan is just a wish.”
Antoine de Saint-Exupéry

Published in 2007, both the Carnegie Foundation for the Advancement of Teaching’s Educating Lawyers (Carnegie Report) and Roy Stuckey’s Best Practices for Legal Education (Best Practices) are comprehensive analyses of legal education in the United States, which recommend reform to the current state of legal education. Both advocate integrating the teaching of knowledge, skills, and values: the three “apprenticeships.” However, the
mere integration of the teaching of the three apprenticeships is not the ultimate goal; it is the learning of these three apprenticeships that is at the core of the recommendations. Stated differently, merely creating graduates that are trained in the three apprenticeships is not sufficient; the training must produce a level of competence in the three apprenticeships. This is where assessment comes in; both the Carnegie Report and Best Practices advocate for the use of assessment planning in legal education. Assessment of student learning can and does demonstrate whether there is an integration of the three apprenticeships, and such assessment can assist in determining the level of competency obtained in the three apprenticeships.

Assessment is currently being incorporated into legal education through accreditation. Some law schools are already engaged in assessment planning because of accreditation requirements of their affiliated undergraduate institutions. Moving forward, all


Although recent scholarship states that the overall curriculum should integrate the three apprenticeships, the same is not necessarily required of individualized courses within the curriculum. An LRW course provides an example of a course in which it is possible to integrate all three apprenticeships.

4. “Competence is context dependent in that it is a statement of relationship between an ability (in the person), a task (in the world), and the legal framework and specific contexts in which those tasks occur. Competence is developmental, and it is difficult to determine which aspects of competence should be acquired at which stage of professional education or how best to measure it.” Stuckey et al., _supra_ n. 2, at 60.

5. See _e.g._ Sullivan et al., _supra_ n. 1, at 162–184; see _e.g._ Stuckey et al., _supra_ n. 2, at 235–273. Gregory Munro finds that there are “strong underpinnings for a program of assessment in American law schools” in the MacCrate Report. Gregory S. Munro, *Outcomes Assessment for Law Schools* 28 (Inst. L. Sch. Teaching 2000). Published in 2000, Munro predicted that “[a]lthough the MacCrate Report may languish like some other recommendations, many schools probably will adopt at least some of its recommendations as part of an effort to define their goals and missions.” _Id._ at 29. As shown, the years subsequent to his prediction have shown that the MacCrate Report’s recommendations did not languish but exploded with even more emphasis placed on assessment and outcome measures in the last five years.

6. Undergraduate institutions have been requiring assessments for their programs of instruction for over twenty-five years. Munro, _supra_ n. 5, at 3. Regional higher-education accrediting organizations are “holding accredited schools accountable for demonstrating educational effectiveness at all levels.” ABA Sec. Leg. Educ. & Admis. to B., *Report of the*
law schools will likely be required to engage in the assessment process as the American Bar Association (ABA) is currently in the process of addressing the use of assessment in law schools in its accreditation standards.\(^7\) In July 2008, the ABA’s Special Committee on Output Measures issued a report recommending that “the Section of Legal Education and Admissions to the Bar re-examine the current ABA Accreditation Standards and reframe them, as needed, to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”\(^8\)

In spring 2009, the Standards Review Committee issued its “Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education.”\(^9\) One of the principles of accreditation review articulated by the Committee was “[a]ssessment of program quality and student learning.”\(^10\) Specifically, the Committee stated that “[a]ccreditation review in law, like other disciplines, must move law schools toward articulation

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\(^7\) See e.g. July 2010 Proposed ABA Standards, supra n. 3.

\(^8\) Outcome Measures Report, supra n. 6, at 54. The shift was premised upon “the latest and best thinking of U.S. legal educators (as reflected in the Carnegie Foundation and ‘Best Practices’ reports) and legal educators in other countries. . . . and practices of accreditors in other fields.” Id. Additionally, the shift was also seen as consistent with the current Preamble to the ABA Standards and Rules of Procedure for Approval of Law Schools. Id.; see ABA Sec. Leg. Educ. & Admis. to B., Standards and Rules of Procedure for Approval of Law School, at preamble (2009–2010) [hereinafter 2009–2010 ABA Standards] (available at http://www.abanet.org/legaled/standards/2009-2010%20Standards WebContent/Preamble.pdf). Notably, the Preamble outlines the three apprenticeships of knowledge, skills, and values espoused in the Carnegie Report and Best Practices. Id.

In the Outcome Measures Report, the Committee noted that some Standards are related to outcomes but are not “framed in terms of the outcomes that a law school should seek to produce or mechanisms for assessing those outcomes” and could be revised. Outcome Measures Report, supra n. 6, at 17, 57–58 (referencing Standard 202 (“Self Study”); Standard 203 (“Strategic Planning and Assessment”); Standard 302 (“Curriculum”); Standard 303 (“Academic Standards and Achievements”)).

\(^9\) Donald J. Polden, Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education, Syllabus (newsltr. of ABA Sec. Leg. Educ. & Admis. to B.) 1 (Spring 2009). In the summer of 2008, the Council of the Section of Legal Education and Admissions to the Bar requested that the Standards Review Committee engage in a comprehensive review of the Standards for Approval of Law Schools. Id.

\(^10\) Id. at 13.
and assessment of student learning goals and achievement levels.”

The Student Learning Outcomes Subcommittee of the ABA’s Section of Legal Education and Admission to the Bar’s Standards Review Committee created a draft of revised Standards, which incorporates an outcomes approach and assessment planning. The proposed Standards under Chapter 3, relating to the Program of Legal Education, address assessment planning directly. Although no formal changes have been made in the ABA accreditation process, by 2011, there is a strong likelihood that some form of assessment planning will be placed in the ABA Standards for accreditation of law schools.

Whatever requirements the ABA ultimately adopts, law schools and faculty members should not engage in assessment for accreditation sake. The most successful assessment programs are a result of institutional commitment apart from the accredita-

11. Id.
12. July 2010 Proposed ABA Standards, supra n. 3. Specifically, Proposed ABA Standards 304 and 305 address assessment planning and state,

Standard 304. ASSESSMENT OF STUDENT LEARNING

A law school shall apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students.

Standard 305. INSTITUTIONAL EFFECTIVENESS

In measuring its institutional effectiveness pursuant to Standards 202 and the rigor of its education program pursuant to Standard 301, the dean and faculty of a law school shall:

(a) gather a variety of types of qualitative and/or quantitative evidence, as appropriate, to measure the degree to which its students, by the time of graduation, have attained competency in its learning outcomes;

(b) periodically review whether its learning outcomes, curriculum and delivery, assessment methods and the degree of student attainment of competency in the learning outcomes are sufficient to ensure that its students are prepared to participate effectively, ethically, and responsibly as entry level practitioners in the legal profession; and

(c) use the results of the review in subsection (b) to improve its curriculum and its delivery with the goal that all students attain competency in the learning outcomes.

Id. at 3–4.

13. See Mary J. Allen, Assessing Academic Programs in Higher Education 20 (Anker Publ. Co. 2004) (arguing that undertaking assessment merely to satisfy accrediting bodies fails to achieve its purpose); see also Munro, supra n. 5, at 80 (arguing that "measures imposed for purposes of accountability are superficial").
tion process. Assessment provides certain intrinsic benefits, including accountability to the law school’s constituencies, including its students and the legal community in which it operates,\textsuperscript{14} improved student learning,\textsuperscript{15} coherence of the curriculum,\textsuperscript{16} and the foundation for curricular reform.\textsuperscript{17}

Likewise, the benefits for Legal Research and Writing (LRW) faculty are the same. Their skill and knowledge of assessment techniques are vast and can be helpful to their institutions as they embark on institutional assessment planning. In addition, assessment planning on the course level will assist LRW faculty in using the data collected from the assessment activities that they already incorporate into their courses to improve student learning.

This Article addresses the recommendation for the development of plans for assessing student learning outcomes and specifically focuses on introductory LRW courses.\textsuperscript{18} Although LRW faculty are well-versed in the use of multiple assessments in their courses, this Article provides instruction on the broader use of integrating their assessment activities into formalized assessment planning. For the purposes of this Article, introductory LRW courses are defined in relation to the ABA’s current requirement that a law school curriculum provide “writing in a legal context, including at least one rigorous writing experience in the first year”\textsuperscript{19} and incorporate the characteristics of the majority of first-year LRW courses. These characteristics include: a two-semester course, averaging 2.36 credit hours in the first semester and 2.21 hours in the second semester and integrating research instruction.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{14} Munro, supra n. 5, at 19, 61; see infra nn. 57–58 and accompanying text (further identifying the law school’s constituencies).
\item \textsuperscript{15} Munro, supra n. 5, at 18.
\item \textsuperscript{16} See id. at 96–98.
\item \textsuperscript{17} See id. at 4–5, 101. Assessment can demonstrate that new courses should be added or others retooled to reinforce the learning of knowledge, skills, or values. Likewise, by engaging in assessment, faculty may find that there is a need to refine and retool their own courses to meet the current demands of practice, as expressed in the outcomes.
\item \textsuperscript{18} Specifically this Article addresses assessment of student learning as opposed to institutional or programmatic assessment. For the distinction between the two types see infra nn. 33–38 and accompanying text.
\item \textsuperscript{19} 2009–2010 ABA Standards, supra n. 8, at Standard 302(a)(3).
\item \textsuperscript{20} ALWD & Leg. Writing Inst., 2008 Survey Results, at i–ii (2008) [hereinafter 2008 Survey Results] (available at http://www.alwd.org/surveys/survey_results/2008_Survey_Results.pdf); see also Commun. Skills Comm., Sec. Leg. Educ. & Admis. to B.,
This Article will discuss the basic parameters of creating assessments plans for introductory LRW courses. First, the Article will address assessment generally, synthesizing the literature on assessment. Second, the Article will provide instruction and examples of assessment planning in the LRW context. The Article concludes that the use of assessment plans in introductory LRW courses will continue to improve the teaching and learning of legal research and writing in the first year curriculum.

II. ASSESSMENT

Most law school faculty are relatively new to the field of assessment; therefore, an overview of the process and terminology is instructive. Notably, there is no “standardized assessment Sourcebook on Legal Writing Programs 79 (Eric B. Easton ed., 2d ed., ABA 2006) [hereinafter Sourcebook]. Self-described, the Sourcebook is a compilation of “the parameters and common features that define successful programs teaching [LRW] skills in law school” and defines “the outside limits of successful pedagogies and accompanying administrative structures, and describes some established programs within those limits.” Id. at 1 (citing the Preamble to the first edition of the Sourcebook on Legal Writing Programs). As noted by the Sourcebook, “[t]he goals of a school’s first-year legal writing course can be affected by the number of credits allocated to the course, the staffing of the program, upper-level writing electives, and other program-related factors . . . Other influences may include the history, culture and mission of the law school.” Id. at 6 n. 9.

21. See infra nn. 29–205 and accompanying text.
22. See infra nn. 26–202 and accompanying text.
23. See infra nn. 203–205 and accompanying text.
24. See infra pt. IV. Both the Best Practices and Carnegie Report agree that legal research and writing courses provide concrete examples of the future of legal education by focusing on practical skills instruction, among other things. See Stuckey et al., supra n. 2, at 96; Sullivan et al., supra n. 1, at 104.
25. Although American law schools are new to assessment, other American professional schools have been engaged in assessment for several decades. See e.g. Outcomes Measures Report, supra n. 6, at 20–46 (outlining the accreditation standards in other fields of professional education, which incorporate assessment of outcomes); Sullivan et al, supra n. 1, at 175 (discussing medical schools’ assessment procedures); see also Stuckey et al., supra n. 2, at 48–49 (discussing accreditation standards of the Accreditation Council of Graduate Medical Education). Additionally, some international law schools are assessing outcomes. See Stuckey et al., supra n. 2, at 45–47; Outcomes Measures Report, supra n. 6, at 11–13.

As American legal education moves into the assessment realm, there is a call for discussion and scholarship on the issue. See e.g. Sullivan et al, supra n. 2, at 184. To date, there is little scholarship on assessment planning in American legal education. Munro’s book, published in 2000, is one of the few books on the topic (if not the only one to date). See Munro, supra n. 5, at 45 n. 113 (reviewing legal scholarship in this area). On September 11–13, 2009, the first conference on assessment in American legal education, Legal Education at the Crossroad v. 3.0: A Conference on Assessment, was held at the University of Denver Sturm College of Law.
vocabulary," and anyone new to the area might be put off by the conflicting terminology. This Article will attempt to obviate the confusion surrounding the process. First, this Article will provide an explanation of basic assessment terminology and an overview of the assessment process. Second, this Article will outline the basic steps in assessment planning. Once a foundation in assessment is established, one can move to the actual creation of an assessment plan for his or her introductory LRW course.

A. Assessment Generally

Assessment in higher education has established itself over the last twenty years, starting at the undergraduate level. Simply defined, assessment is “a set of practices by which an educational institution adopts a mission, identifies desired student and institutional goals and objectives ('outcomes'), and measures its effectiveness in attaining these outcomes.” Assessment is often described as a circular process, represented as:

1. setting goals or asking questions about student learning and development;
2. gathering evidence that will show whether these goals are being met;
3. interpreting the evidence to see what can be discovered about students' strengths and weaknesses; and then

26. Allen, supra n. 13, at 6. Throughout the Article, when possible, conflicting terminology is provided and defined in the footnotes. This Article adopts a uniform set of defined terms to avoid confusion. A uniform set of defined terms or a shared vocabulary should be the first step in creating an assessment plan at a particular institution. Therefore, assessment of a program and assessment of student learning on an institutional, program, or course level will have a shared vocabulary. Such a shared vocabulary will assist in alignment of outcomes across the curriculum and provide for a cohesive assessment process within an institution.

27. See infra sec. II(A).

28. See infra sec. II(B).


30. Munro, supra n. 5, at 11; see id. at 9-12 (discussing the evolution of the term “assessment” and its various definitions); see also Allen, supra n. 13, at 2 (stating that assessment “involves the use of empirical data on student learning to refine programs and improve student learning”).
(4) actually using those discoveries to change the learning environment so that student performance will be improved.\textsuperscript{31}

There are two types of assessment: institutional or programmatic assessment and assessment of student learning.\textsuperscript{32} First, institutional or programmatic assessment looks at what an institution offers as a whole without solely focusing on student learning outcomes. Although it can focus on improving student learning, it can also include outcomes, which state what the institution can provide to its constituencies and which are not directly tied to student learning.\textsuperscript{33} For example, an institutional outcome might be that the law school is seen as a leader in Catholic and Marianist social thought in the community. To assess this outcome, the law school would look at, among other things, the scholarship of the faculty, the courses taught, and the seminars or symposia held.

The second type of assessment, and the focus of this Article, is assessment of student learning. Assessment of student learning refers to a process of evaluating students’ attainment of defined learning outcomes.\textsuperscript{34} For example, a law school might as-

\textsuperscript{31} Wright, supra n. 29, at 1–2 (emphasis in original). This final step is referred to as “closing the loop.” See also Allen, supra n. 13, at 10. Allen does not use the image of a circle but includes similar steps:
1. Develop learning objectives.
2. Check for alignment between the curriculum and the objectives.
3. Develop an assessment plan.
4. Collect assessment data.
5. Use results to improve the program.
6. Routinely examine the assessment process and correct, as needed.

\textit{Id.}

\textsuperscript{32} Munro, supra n. 5, at 12.


Learning outcomes are defined as “what students are able to demonstrate in terms of knowledge, skills, and values upon completion of a course, a span of several courses, or a program.” \textit{Id.} at 2. Program outcomes are defined as “what you want a program to do or accomplish rather than what you want students to know, do or value. Program outcomes can be as simple as a completion of a task or activity.” \textit{Id.} at 8. Such outcomes “usually have quantitative targets.” \textit{Id.} Developing program outcomes is similar to learning outcomes; however, it is the program that is the actor, not the student. \textit{Id.} Munro defines institutional (program) outcomes as “those goals and objectives which a school has set for itself in serving the people it has chosen to serve.” Munro, supra n. 5, at 18.

\textsuperscript{34} Munro defines assessment of student learning or “student assessment-as-learning” as a “process, integral to learning, that involves observation and judgment of each student’s performance on the basis of explicit criteria, with resulting feedback to the stu-
sess whether its graduates can formulate a comprehensive and effective research plan.

A complete assessment program should include both institutional or programmatic assessment and assessment of student learning.\(^{35}\) However, “[t]he best assessment of the program is student performance, so assessment of student learning will also provide feedback to the faculty and achievement of program outcomes.”\(^{36}\)

With either type of assessment, institutional or student learning, both must be performed on various levels within a law school.\(^{37}\) For example, both types of assessment must occur on the institutional, programmatic, and individual course level. With assessment of student learning, desired learning outcomes must be identified not only for the institution as a whole but for individual programs and courses.\(^{38}\) The focus of this Article is solely on the assessment of student learning on a course level, specifically assessment of student learning in introductory LRW courses.

In addition to distinguishing between the various types of assessment, one should also distinguish between assessment of student learning and testing for the purposes of assigning a final grade. Assessment differs from grading because although “[g]rades do indicate something about student learning” they do not indicate what learning outcomes are being obtained and which need more focus.\(^{39}\) Grades merely demonstrate a “summative” process, culminating in a transcript.\(^{40}\) Assessment is more a

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35. Munro, supra n. 5, at 12.
36. Id. at 99.
37. See Stuckey et al., supra n. 2, at 55.
38. All of these learning outcomes should be aligned to provide for a coherent curriculum. For a full discussion of alignment, see infra nn. 92–94 and accompanying text.
40. Id. at 12.
formative process, providing feedback to students as a means of enhancing the learning process.\textsuperscript{41} Another difference between assessment and grading is that “emphasis on measurement precision becomes less important in assessment because individual students are not identified . . . [and because] [a]ssessment studies are used to inform conclusions about student mastery of learning objectives.”\textsuperscript{42} Finally, grades alone are typically ineffective as a method of assessment because even in the absence of a formal curve, student performance tends to be measured or normed against the performance of other students rather than an objective standard.

B. Assessment Planning

With the future of legal education incorporating assessment of student learning, an explanation of the development of assessment plans is required. The first step in the assessment of student learning is to create learning outcomes and performance criteria, which clarify the learning outcomes.\textsuperscript{43} Second, strategies of instruction must be considered.\textsuperscript{44} Third, evidence must be gathered to assess whether the learning outcomes are being met.\textsuperscript{45} Fourth, the data collected from the assessment process must be analyzed and used to “close the loop” of assessment.\textsuperscript{46} Understanding these basic steps and their components is integral to creating any assessment plan.

1. Defining and Creating Learning Outcomes

The first step in creating a plan to assess student learning is often the most difficult and time consuming. It requires reflection on what does the model law school graduate know? What can the

\textsuperscript{41} Id. Assessment tools or measures can be formative or summative. “Formative assessment provides feedback to improve what is being assessed, and summative assessment provides an evaluate summary.” Id. at 9. For a full discussion of the distinction, see infra nn. 104-106 and accompanying text.

\textsuperscript{42} Allen, supra n. 13, at 12. Allen also states that subjective judgments often play a larger role in assessment than in typical grading. Id.

\textsuperscript{43} See infra sec. II(B)(1); see also Munro, supra n. 5, at 86 (stating that the first step is creating the “mission statement of the law school”). For the purposes of this Article, it is assumed that the law school already has a stated mission. Therefore, the mission statement is taken into consideration in creating the learning outcomes.

\textsuperscript{44} See infra sec. II(B)(2).

\textsuperscript{45} See infra sec. II(B)(3).

\textsuperscript{46} See infra sec. II(B)(4).
model law school graduate do? And what does the model law school graduate value? Answering these questions is a difficult task but not an insurmountable one. Although time consuming, it is a step that cannot be overlooked. Even after the learning outcomes are created, assessment is a circular process, such that learning outcomes can be refined, changed, or supplemented based upon future insight and data.

The terms “outcomes,” “goals,” and “objectives” are often used interchangeably in assessment literature and planning documents. However, for the purposes of this Article, learning outcomes will be used exclusively to represent this concept. Learning outcomes are defined as “the abilities, knowledge base, skills, perspective, and personal attributes which the school desires the students to exhibit on graduation.” Typically, learning outcomes are described as having three components: knowledge, skills, and values, correlating to the three apprenticeships of integrated instruction. As previously stated, learning outcomes are created on three levels: the institutional level, the program level, and the course level, being more detailed at each level.

Ideally, LRW faculty would be operating in an environment in which the law school has clearly defined its learning outcomes. If the institutional learning outcomes have already been created, then the task of creating learning outcomes on the course-level

47. See Allen, supra n. 13, at 27.
48. See supra nn. 32–38 and accompanying text, explaining the difference between institutional or program outcomes and student learning outcomes. Because this Article specifically addresses the assessment of student learning, it will not discuss the creation of program outcomes.
49. Munro, supra n. 5, at 17.
50. Stuckey et al., supra n. 2, at 43; Allen, supra n. 13, at 28. A law school “articulates its educational goals in terms of desired outcomes, that is, what the school’s students should know, understand, and be able to do, and the attributes they should have when they graduate.” Stuckey et al., supra n. 2, at 42.
51. In creating learning outcomes on the course level, A formidable obstacle every teacher faces is how to analyze the content of a course, predetermine the outcomes desired, and communicate the necessary performance expectations to the learners in a detailed, congruous syllabus that logically connects goals to the measures for grades. That is, the objectives follow from the goals, the requirements are demonstrations of performance of those objectives, and the evaluation methods reflect attainment of the objectives to measurable criteria. This is rarely simple—at times teachers need their own cooperative learning groups in order to solve the myriad of problems in coordinating course goals, uncovering the traditional discontinuities between goals and grading, and clarifying assessment.

Id. at 55 (quoting Tom Drummond, A Brief Summary of Best Practices in Teaching 6, http://webshares.northseattle.edu/ceceprogram/bestprac.htm (compiled 1994 and 2000)).
may be simplified. In identifying course-level outcomes, LRW faculty can and should be guided by the unique vision and mission of their institution and should tie their course-level learning outcomes to an institutional learning outcome. One can simply refer back to the institutional learning outcomes and tailor them to the specific course and add any specific learning outcomes that the faculty member believes can reasonably be accomplished in his course.

This task may be more difficult depending on the level of specificity in the institutional assessment plan. For example, if the institutional plan has detailed learning outcomes, it may be difficult to “choose” which of those learning outcomes are addressed in the introductory LRW course. Also, the language of the institutional learning outcomes may not be easily manipulated and may therefore provide incomprehensible learning outcomes once it has been “tailored” to fit the introductory LRW course.

For now, few LRW faculty have the luxury of this type of guidance from institutional learning outcomes. Most law schools have yet to fully develop a formal assessment plan with all of its attendant detail. However, this does not mean that LRW faculty cannot begin to develop course- and program-level learning outcomes and formal assessment plans now.

Assuming that the law school has not identified its institutional learning outcomes, there are nine guiding principles from assessment scholarship that can assist LRW faculty in developing the learning outcomes on the course level:

1. Outcomes should be created through a collaboration of the faculty, the bench, bar, and other constituencies (like student associations).

2. Outcomes should be consistent with and serve the school’s mission.

3. Outcomes should be adopted only after consensus is received following dialogue and deliberation, the goal being one of acceptance and permanence.

52. See e.g. id. (recommending the development of course-level student learning outcomes).
4. Outcomes should be measurable, meaning “a general judgment of whether students know, think, and can do most of what we intend for them.”

5. Outcomes should be stated explicitly, simply, in Plain English, and without educational or legal jargon.

6. There is no correct number of outcomes.

7. Demands of outcomes should be reasonable in light of the abilities of students and faculty. 53

8. Outcomes should be widely distributed. 54

9. Outcomes should be aligned with the curriculum. 55

Outcomes should be created through collaboration: Collaboration is used here in the broadest sense, meaning discussion, dialogue, and consultation with various individuals, institutions, and materials to aid in the creation of learning outcomes. The query is simple: “what [do] new lawyers need to know, understand, and be able to do when they begin practice”? 56 In creating the outcomes, there are several sources that should be consulted to answer these questions, and faculty creating outcomes need to “identify the legitimate groups or constituencies that have an interest in educational outcomes and begin positive steps of accounting to them.” 57 Such groups include accrediting bodies like the ABA and the Association of American Law Schools (AALS), state governments, potential, current, and former students, the bench, the bar, and actual and potential employers of graduates. 58

First, collaboration with the bench and bar could “invigorate the faculty members, educate the bench and bar, and forge a bond between the law school and the profession.” 59 The query should

53. Munro, supra n. 5, at 94–95; see also Stuckey et al., supra n. 2, at 49–50. Both Best Practices and Munro list the first seven as principles but mention eight and nine in other parts of their texts.
54. For a discussion on the distribution of the outcomes, see e.g., Munro, supra n. 5, at 144; Stuckey et al., supra n. 2, at 130.
55. For a discussion on alignment, see e.g., Munro, supra n. 5, at 96–99; Stuckey et al., supra n. 2, at 93–96.
56. Stuckey et al., supra n. 2, at 59.
57. Munro, supra n. 5, at 62.
58. See id.
59. Id. at 63.
be what legal research and writing skills are needed of a graduate to ensure that the introductory LRW course meets the current demands of practice. Although an introductory LRW course will not produce students with the skill level expected of graduates, this information is important when defining the terminal skills required of a graduate and to provide information about what skills must be introduced in the introductory LRW course. Such collaboration with the bench and bar can be done through the use of surveys. At the University of Dayton School of Law, Professors Susan Wawrose, Sheila Miller, and I formed the University of Dayton Bench and Bar Outreach Project, the purpose of which was to survey recent graduates and the bench and the bar to learn what legal research and writing skills a new attorney should possess. Initially, the data was sought to inform our curriculum as LRW professors; however, we found that such surveys could also serve to identify and to define the learning outcomes for our introductory LRW courses.60

Second, one can look to students to assist in creating learning outcomes. *Best Practices* recommends that students be involved in a “collaborative course design” with the professor.61 However, this collaboration may be somewhat difficult because students rarely know, prior to starting a course, what they will need to learn in that course or the best outcomes to be achieved. Their outcomes may not be pragmatic in terms of the professor’s desired outcomes, credit hours, and course description. That is not to say that there cannot and should not be input from former students and others, but merely that current students of the course may have difficulty in creating the outcomes before the course commences. However, their input can be valuable once the course has commenced and the outcomes are defined. In a typical two-semester introductory LRW course, after the first semester students can be surveyed to determine what skills they believe need

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60. The initial survey to recent graduates was circulated in January 2010. Information on the Bench and Bar Outreach Project and its results to date are on file with the Author.

61. Stuckey et al., *supra* n. 2, at 121. Professor Vernellia Randall, at the University of Dayton School of Law (UDSL), has her students state their desired learning outcomes at the outset of the course. To aid in the creation of the learning outcomes, the students are given guidance, through assigned readings and a list of Professor Randall’s teaching outcomes. At the end of the course, students are required to reflect upon the learning outcomes that they identified at the beginning of the course and their attainment of the same. Information relating to this project is on file with Professor Vernellia Randall.
more emphasis in the second semester. Such information can also be helpful for creating learning outcomes for future semesters. Also, current students can be surveyed as to what they need to know to engage in their summer legal employment, internship, or externship.\footnote{62}

Third, a faculty member should collaborate with her own institution when creating learning outcomes. Using a “top-down approach,” the faculty member can consult institutional documents that describe the introductory LRW course: catalogs, registration materials, mission statements, and brochures.\footnote{63} Additionally, a “bottom-up approach” will assist in creating learning outcomes by consulting sources such as the introductory LRW course’s instructional materials, like syllabi, course descriptions, assignments, tests, and texts.\footnote{64}

Fourth, when creating learning outcomes, there is no need to recreate the wheel. Even if learning outcomes on an institutional level have not been developed, there are many examples of statements of the knowledge, skills, and values that a law school graduate should possess. At the broadest level, proposed ABA Standard 302 states learning outcomes that a law school should have.\footnote{65}

\footnote{62. In the mid 1990s, Professor Rebecca Cochran at UDSL began a project called “Student Consultants.” As part of the project, she and Professor Maria Crist, also from UDSL, collected information from current students who were engaged in summer employment about their research and writing assignments. In 2006, I continued the project with a group of twenty students. The results of the various Student Consultants projects at UDSL are on file with the Author.}

\footnote{63. Allen, supra n. 13, at 32.}

\footnote{64. Id. at 33.}

\footnote{65. Proposed ABA Standard 302 states, (b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:}

(1) knowledge and understanding of substantive law and procedure;

(2) competency in the following skills:

   (i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;

   (ii) the ability to recognize and resolve ethical and other professional dilemmas; and

   (iii) a depth and breadth of other professional skills for effective, responsible and ethical participation in the legal profession.

(3) knowledge and understanding of the following values:

   (i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
Other broad statements of skills can be found in assessment and legal education literature. For example, *Best Practices* includes various statements of desired outcomes, most of which include references to knowledge, problem solving, writing, analysis, research, oral communication, and professionalism.66

Often such broad lists of skills are “terminal” lists that a graduate should possess. An introductory LRW course cannot include instruction in all of those skills. However, it is important to recognize the terminal or end goal when creating the learning outcomes for an introductory course, with the knowledge that such skills should be reinforced in later courses.

(ii) the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and

(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.

(4) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school’s mission and goals.

*July 2010 Proposed ABA Standards, supra* n. 3, at 1–2.

66. See generally Stuckey et al., *supra* n. 2, at 50–55 (providing examples of learning outcomes from various sources). The professional skills that *Best Practices* recommends are as follows:

- the application of techniques to communicate effectively with clients, colleagues, and members of other professions;
- the ability to recognize clients’ financial, commercial, and personal constraints and priorities;
- the ability to advocate a case on behalf of others, and to participate in trials to the extent allowed upon admission to practice;
- effective use of current technologies and strategies to store, retrieve, and analyze information and to undertake factual and legal research;
- an appreciation of the commercial environment of legal practice, including the market for legal services;
- the ability to recognize and resolve ethical dilemmas;
- effective skills for client relationship management and knowledge of how to act if a client is dissatisfied with the advice or service provided;
- employment of risk management skills;
- the capacity to recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge, and skill, and to develop strategies that will enhance professional performance;
- the ability to manage personal workload and to manage efficiently, effectively, and concurrently a number of client matters; and
- the ability to work effectively as a member of a team.

Moving from the broad to the more narrow, the ABA *Sourcebook on Legal Writing Programs* provides an excellent detailed and comprehensive list of the outcomes for legal writing programs and specifically includes the following list of outcomes for an introductory LRW course:

- understand the legal system of the United States
- analyze facts, issues and legal authorities
- conduct legal research efficiently in print and electronic sources
- communicate effectively in writing and orally
- recognize and address professional responsibility issues
- appreciate the varying roles of the lawyer, from analyst to advocate
- apply their knowledge and skills to solve legal problems.

Addressing writing instruction specifically, the *Sourcebook* identifies four goals that a student should learn: audience, purpose, process, and levels of learning and skills needed to produce documents. Addressing research instruction, the *Sourcebook* finds that LRW faculty in introductory LRW courses should teach the basics of print and electronic sources and techniques, but also instruct in

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67. *Sourcebook, supra* n. 20, at 6. The *Sourcebook* also recognizes that LRW courses should “introduce students to the basic norms of the legal profession [including] . . . how law offices and court systems function and how lawyers behave within the legal system . . . [as well as] understand their ethical obligations to clients, to courts, and to the profession; . . . [and] the importance of civility and professionalism.” *Id.* at 35. The *Sourcebook* identifies several aspects of professionalism that are relevant to LRW courses such as “legal ethics, professional norms and expectations, and policies related to plagiarism and collaborative work.” *Id.* The *Sourcebook* also adds to that list skills in time management and efficiency as well as self-reliance and the ability to educate oneself. *Id.* at 35, 43.

68. *Id.* at 18–19.

69. The *Sourcebook* recommends that research instruction in the first year should introduce students to, and help them distinguish, federal and state sources, official and unofficial sources, annotated and unannotated sources, primary and secondary sources, mandatory and persuasive sources. Students may be exposed to such primary sources as case reporters, constitutions, statutes and codes, rules of procedure and evidence, and administrative
The importance of research in analyzing a legal problem and communicating that analysis in written form;

appreciating the role of intuition and imagination throughout the research process;

planning a research strategy at the outset and being flexible enough to revise it as necessary during the research process; and

determining when research has been exhaustive, given the time and monetary limitations of law practice.\(^{70}\)

With regard to oral advocacy skills, the Sourcebook provides that an LRW course’s outcomes can be “to introduce oral advocacy techniques, to improve legal analysis, and to increase students’ self-confidence in their ability to think and speak on their feet.”\(^{71}\) The Sourcebook also identifies other skills taught in some LRW courses, including interviewing, counseling, negotiation, and ADR, noting that some schools require a basic competency in such skills, while other schools incorporate these other skills, not for the students to obtain a basic competency, but merely “to help create a realistic law practice context.”\(^{72}\)

regulations; such secondary sources as legal encyclopedias, treatises and hornbooks, America Law Reports and other annotations, Restatements, and legal periodicals, including law reviews, legal newspapers, and bar journals; and such finding tools as digests and citators.

\(^{70}\) Id. at 27.

\(^{71}\) Id. at 26.

\(^{72}\) Sourcebook, supra n. 20, at 33–34. The Sourcebook outlines several considerations for those programs incorporating such skills, including time constraints and difficulty in assignment creation. Id. at 34. The Sourcebook also notes that incorporating such skills can provide certain advantages such as
With this comprehensive statement of learning outcomes for LRW courses from the Sourcebook, an LRW faculty member can easily create learning outcomes for her introductory LRW course. It merely takes organizing these statements into numbered learning outcomes and following the other principles provided below.

Outcomes should be consistent with and serve the school’s mission: Mission is defined as “a holistic vision of the values and philosophy of the department.” Learning outcomes, whether on an institutional, program, or course level, do not exist in a vacuum and are not a product of the whims of individual faculty members. The LRW learning outcomes must reflect and be responsive to the law school’s stated mission. Again, most law schools have a defined mission statement. Therefore, an easy step in the creation of learning outcomes for an introductory LRW course is reference to and incorporation of the basic tenets of the law school’s mission.

Outcomes should be adopted after consensus: Just as the law school’s mission should be referenced when creating the learning outcomes, likewise, the law school’s faculty as a whole should be consulted when creating learning outcomes, and consensus should be received. First, consensus among LRW faculty provides for consistency in the LRW curriculum at each institution. Such consensus can be essential if LRW faculty switch students from one semester to the next. In this situation, consensus on the learning outcomes will provide for a smooth transition from one semester to the next and ensure that a proper foundation is achieved in the first semester. Second, consensus among the whole law school

[Students learn skills better in context than in isolation. In addition, teaching skills in combination can have a synergistic effect. A student who interviews a client, uses the facts learned in that interview to make research decisions, and then uses that research to draft an objective office memorandum has learned more than just three discrete skills. That student has learned about the interrelationships among the skills and how those skills are used in practice. Id. at 34–35. An additional benefit is that “[c]aring about a client—even a mock client—often engages students more than relying on a written set of facts. Students see how their ‘people skills’ can be an asset in the practice of law.” Id. at 35.]

Allen, supra n. 13, at 28–29; see Munro, supra n. 5, at 86–89 (providing in-depth treatment on the development of the school’s mission). In assessment literature, the term “goal” is often used interchangeably with the term “mission.” However, the term “goal” used in this Article represents the goal of integrated instruction, whereas mission is tied to the unique vision and purpose of a particular institution.

74. This statement argues against an ad hoc adoption of such outcomes, which can be inconsistent with a school’s mission and lack credibility and acceptance. See Stuckey et al., supra n. 2, at 49.
faculty can provide understanding and appreciation for what is taught in LRW courses. Such consensus allows for the courses to be aligned across the curriculum. Notably, consensus on learning outcomes does not impinge on a faculty member’s academic freedom because “[a]greeing on course learning objectives does not standardize courses.”

**Outcomes should be measurable:** To provide detail to the learning outcomes and make them measurable, it is advisable, although not necessary, to create “performance criteria.” Performance criteria are created by tying the course learning outcomes to a specific act of performance and a competency level. The expected performance should be specified by name, using an observable action verb, which defines the level of learning expected. Levels of professional development, such as the stages of novice, advanced beginner, competent, proficient, and expert can be used for the competency levels. Because this Article addresses introductory LRW courses, the highest level “expert” should not be expected for any outcome. For example, the Sourcebook identifies the writing skills in which students should obtain a “basic proficiency” following a two- or three-semester LRW course: organization, format, writing style, and citation form.

The use of performance criteria will inform other faculty of what skills have been introduced and what level of competency is to be obtained in those skills in an introductory LRW course. Assessment planning does not require such specificity, and meaningful assessment can occur without it. However, after the ini-

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76. Osters & Tiu, supra n. 33, at 10 (asking the question, “Are your outcomes measuring something useful and meaningful? Will relevant parties find the information generated credible and applicable to decisions that need to be made?”).
77. The distinction is made between learning outcomes on the institutional or program level and learning outcomes on the course level. Institutional or program learning outcomes are often more general, whereas course learning outcomes can be more specific.
78. See generally Allen, supra n. 13, at 37 (noting that some experts suggest using more detailed learning objectives).
79. “Performance criteria express in specific and measurable/observable terms that are acceptable to a specific course or program.” Osters & Tiu, supra n. 33, at 5.
80. Stuckey et al., supra n. 2, at 245; see infra n. 202 (providing the definitions of the various levels).
81. Sourcebook, supra n. 20, at 24–25. The Sourcebook does not define the term “basic proficiency.”
82. Allen, supra n. 13, at 38.
tial planning stage, performance criteria can be identified and inserted into the assessment plan. These same levels of competency are used later in the assessment tools and in analyzing the data. Using the same terminology for the competency levels is important to add consistency and coherence to an assessment plan. If one chooses to include performance criteria, the other eight basic tenets for creating learning outcomes apply equally to the creation of performance criteria.

Outcomes should be in Plain English: After the faculty member has identified the learning outcomes that she wishes for her course, the next step involves actually putting the outcomes into “outcome language.” When writing learning outcomes, one must focus on student behavior, as opposed to what the program, course, or teacher will deliver; learning outcomes are student focused, not instruction focused. Additionally, when developing learning outcomes, one must use simple, specific, action verbs, which delineate behavior. For example, a learning outcome addressing legal research should not state: “an LRW graduate will learn how to research, using the fundamental print and electronic sources.” This learning outcome focuses on what is being taught, not what is being learned. A properly framed learning outcome would state that “an LRW graduate will perform research, using fundamental print and electronic sources.” Here, the learning outcome focuses on the graduate’s action.

There is no correct number of outcomes: On the course level, the number of learning outcomes depends on what an LRW faculty member realistically believes can be accomplished in his course. At a minimum, these outcomes will include some of the institutional learning outcomes and many of the LRW program learning outcomes. At a maximum, the outcomes will include other outcomes that that particular faculty member believes can be accomplished in his particular course. For example, not all introductory LRW courses address legal correspondence. To the

83. Id.
84. See infra nn. 195–198 (providing the use of competency levels in the analysis of the data).
85. Osters & Tiu, supra n. 33, at 2; Allen, supra n. 13, at 28 (stating that objectives are “behavioral”).
86. Allen, supra n. 13, at 28 (“They describe the student behaviors that demonstrate their learning.”). An illustrative list of action verbs to be used in creating learning outcomes and performance criteria can be found in the Appendix to this Article.
extent that a faculty member believes that there is adequate instruction, student practice, and assessment on correspondence, he may include a learning outcome for legal correspondence. However, the number of outcomes should remain reasonable and manageable; including too many outcomes makes an assessment plan cumbersome and difficult to manipulate.

Demands of outcomes should be reasonable: As a natural complement to a reasonable number of outcomes, a faculty member should test the outcomes themselves for reasonableness. This test can be based on results from prior years as to what can realistically be accomplished within the credit hours allotted for a course. Failure to test the learning outcomes for reasonableness can diminish other faculty and students’ confidence in the faculty member’s ability to gauge the realities of the course and its limitations and student ability. Continuing with the former example, if the LRW faculty member includes a learning outcome for legal correspondence, yet he never has the students write a letter and never provides feedback if the letters are written, it is questionable as to whether that faculty member could claim that his students obtain a minimum level of competency in that skill. If legal correspondence is included in his assessment plan, which is ultimately distributed to his students and the rest of the faculty, there will be an expectation that there is a level of competency obtained by his students in that skill. To obviate any confusion, it is advisable to write the learning outcomes based upon past experiences in the course and only to promise what is known to be delivered even if one touches on other subject matter or other skills throughout the semester.

Outcomes should be widely distributed: After the learning outcomes are created, they should be made public.87 The learning outcomes should be “widely distributed—in the catalog, on the web, in department newsletters, and on syllabi. All major stakeholders, including regular and adjunct faculty, fieldwork supervisors, student support personnel, and students, should be aware of them and should use them to guide course and curriculum planning and learning.”88 The goal is to create intentional learners

87. Allen, supra n. 13, at 28.
88. Id.; see also Munro, supra n. 5, at 144 (stating that the learning outcomes should be distributed to the students in the syllabi).
and intentional teachers.\textsuperscript{89} Once distributed, the learning outcomes should be discussed with the students to ensure that prior to the commencement of the course, students are aware of what they will be learning, how they will be learning, why they will be learning it, and to what extent they will be learning it, by referencing the competency level in the performance criteria. The faculty member should explain her goal to the students and the methods used to achieve that goal and transmit that “development of professional expertise is the ultimate objective and it will take time and hard work to achieve it.”\textsuperscript{90} Furthermore, at the end of the course,

it is important to review with the students the mission, goals, objectives, and outcomes and to show them how the pieces of instruction and their performances have contributed to meeting those purposes. Remind the students of the potential uses of the knowledge and abilities gained for school, law practice, and life. This provides students a sense of understanding, achievement, completion, and reward.\textsuperscript{91}

\textbf{Outcomes should be aligned with the curriculum}: After the learning outcomes are created, they must be aligned with all courses in the law school’s curriculum via the institutional assessment plan, which allows for teaching to occur in a progressive manner.\textsuperscript{92} Such alignment allows for a “cohesive curriculum.”\textsuperscript{93} Alignment is particularly important to skills education. Faculty should consider where learning outcomes are introduced, practiced, and ultimately achieved.\textsuperscript{94}

\textsuperscript{89} Allen, supra n. 13, at 28. Educators must also explain their teaching objectives to their students, by incorporating “transparent teaching objectives and helping students understand what [they] are trying to accomplish.” Stuckey et al., supra n. 2, at 41.

\textsuperscript{90} Id. at 130.

\textsuperscript{91} Munro, supra n. 5, at 151.

\textsuperscript{92} See id. at 54 (stating that “the learning experience should be structured so that knowledge, skills, and concepts build upon one another in an orderly progression of increasing difficulty and complexity”) (internal citations omitted).

\textsuperscript{93} Allen, supra n. 13, at 44.

\textsuperscript{94} “Important learning objectives should be introduced early, and they should be reinforced and further developed throughout the curriculum.” Id. at 40. Allen uses a curriculum alignment matrix to demonstrate where a certain objective is “introduced” “practiced” or “demonstrated” throughout the curriculum. Id. at 43. Additionally, she uses a course alignment matrix demonstrating where there is a “basic” “intermediate” or “advanced expectation of an objective.” Id. at 46. This latter course alignment matrix “maps details of each course’s relationship to program objectives, allowing all program faculty to be aware of what individual courses contribute and providing information for discussion
Students are introduced to legal research and writing skills in the introductory LRW course. Then, these skills are to be reinforced in the “upper-level writing requirement,” which could include, at a minimum, a capstone experience. LRW faculty should work to clarify the alignment so that unreasonable expectations are not placed upon the introductory LRW course to be responsible for all of the legal research and writing skills that a student must acquire before graduating from law school. A clearer understanding and consensus can only strengthen the bond between the law school faculty as a whole and the LRW faculty and help all work toward an integrated curriculum.

Additionally, faculty members should create outcomes, or more specifically, performance criteria, to be achieved in each class meeting and align those “class outcomes” with the course outcomes. These “class outcomes” should be articulated to the students through the use of the syllabus and orally announced at the beginning of each class, demonstrating how this particular class aligns with the overall outcomes of the course. It may help to review what students have done in the previous classes, what they will accomplish in this class, and what will be happening in up-coming classes. Such alignment in the course will aid students in understanding the learning process. Also, the faculty member should ask herself what is to be accomplished in each class and whether the subject matter fits into the overall outcomes of the course. Such alignment and reflection is paramount to “intentional teaching.”

2. Strategies of Instruction

Once learning outcomes have been created, the next issue is how to best achieve those outcomes through instruction. An integral part of intentional instruction is considering what learning devices to use to best achieve the learning outcomes. Through the Legal Writing Institute (LWI) and individual research, many LRW faculty already use different teaching methodologies and continually revise and reinvent their courses to best deliver their material. Because assessment is a circular process, the purpose concerning where learning should occur.” Id. at 47; see also Stuckey et al., supra n. 2, at 93 (discussing the use of curricular maps for alignment).

95. For a detailed discussion on strategies of instruction, see e.g., Munro, supra n. 5, at 139–151; Sourcebook, supra n. 20, at 49–73; Stuckey et al., supra n. 2, at 105–234.
of which is to provide evidence of student learning, changes to one’s class structure or teaching techniques may occur after evidence of assessment of student learning is gathered. For example, if an LRW faculty member learns from the assessment process that her students are not obtaining her desired level of competency in citation, she could include additional exercises, quizzes, tests, or other assessment tools within her course to reinforce the skills to ensure that the aspired to competency level is reached. At a minimum, it is essential for faculty to question their teaching assumptions and ensure that their teaching methods align with their learning outcomes, which reflect current practice.

3. Assessment Measures or Tools

After creating the learning outcomes, aligning those outcomes to the curriculum, and designing the optimum strategy of instruction, the next step involves the gathering of evidence using assessment measures or tools. First, a definition of the relevant terminology is provided with illustrative examples for introductory LRW courses. Second, specific assessment tools are introduced. Third, a review of considerations and problems associated with assessment tools follows. Aside from the creation of the learning outcomes, this step in the assessment process is the most time consuming and requires one literally to assess what he claims to achieve.

a. Terminology for Assessment Measures or Tools

In broad terms, “[a]ssessment methods are tools and techniques used to determine the extent to which the stated learning outcomes are achieved.” Assessment can use either direct or indirect measures of student learning. “Direct measures require students to demonstrate their achievement.” In introductory LRW courses, a direct measure would be the writing of a

96. See infra sec. II(B)(3)(a).
97. See infra sec. II(B)(3)(b).
98. See infra sec. II(B)(3)(c).
99. Osters & Tiu, supra n. 33, at 5.
100. Allen, supra n. 13, at 6.
101. Id. at 6. Allen uses the example of juggling; a direct measure would be the students’ ability to juggle three balls in a certain arc for a certain amount of time. Id. at 7.
memorandum. Direct assessment measures can also include actual samples of student work and performance in the form of traditional tests, quizzes, exams, and exercises. Indirect measures are based upon opinion, either the student’s opinion or the opinion of another observer. In an introductory LRW course, an indirect measure would be a survey of the students asking whether they feel that their writing improved over the course of the semester.

Direct assessment measures can be summative or formative. “Formative assessment provides feedback to improve what is being assessed, and summative assessment provides an evaluative summary.” A summative assessment would be a grade on a multiple-choice citation quiz whereas a formative assessment would be the use of comments on a draft of a memorandum. Introductory LRW courses already provide a lot of formative review, although typically not for purposes of a formalized assessment plan. However, summative review can also be appropriate. For example, one could use summative review of direct assessments, (quizzes, tests, or exercises) for objective skills, such as citation, hierarchy of legal authority, grammar, and research sources or skills. These direct assessments could also be formatively reviewed.

Assessment can use traditional and performance measurement. Traditional measurements consist of garden variety testing, using multiple-choice or essay exams; “[p]erformance measurements . . . require students to directly demonstrate their learning.” An example relevant to introductory LRW courses would be using a multiple-choice exam to test hierarchy of authority, a traditional measurement, versus using a written memorandum assignment to measure a student’s knowledge of hierarchy of au-

102. Wright, supra n. 29, at 4.
103. Allen, supra n. 13, at 7. An indirect measure would be either the student’s opinion as to whether his or her juggling improved or a professional juggler’s opinion of the student’s juggling. Id.
104. Id. at 9; see also Munro, supra n. 5, at 35 (finding that summative assessment is like traditional law school exams, where measurement of student learning is done “after the fact”).
105. Munro, supra n. 5, at 36.
106. Best Practices notes that virtually no written tests are given in experiential courses to gauge students’ knowledge of the subject matter. Stuckey et al., supra n. 2, at 239.
108. Id. An example of a performance measurement would be a piano recital or the juggling example used by Allen. Id.
authority in practice in a written memorandum, a performance measurement. Using one type of measurement may not provide accurate results; therefore, it is important to use multiple measures. The triangulation of several different measures validates one’s conclusions as to whether learning outcomes are being obtained.

“Authentic assessment involves real-world activities that professionals in the discipline encounter.” Introductory LRW courses use a variety of authentic assessments. For example, using a hypothetical case as the basis of a memorandum assignment is “authentic assessment.”

Assessment can provide quantitative or qualitative data. “Quantitative data involve numerical scores that indicate how much students have learned.” Such scores are usually “summarized using descriptive statistics, such as the mean, standard deviation, and range.” Qualitative data differs in that it does not use numerical scores and is often an opinion or description of what was learned. Often such results are reported verbally and “may be based on interviews, focus groups, or responses to open-ended survey questions.” Grades on a citation quiz would be considered quantitative, whereas comments and review following an oral argument would be considered a qualitative analysis.

“Assessments can involve value-added or absolute judgments.” The difference between the two is “whether the assessment is of change or of absolute performance.” For example, in an introductory LRW course, a professor may claim that students will show improvement in their communication skills (a value-added judgment) or that students will be able to draft a clear, concise, and effective client letter (an absolute judgment). “Value-added assessment generally involves comparing two

109. Id. at 8.
110. Id.
111. Id.
112. Id.
113. Id.; see also Munro, supra n. 5, at 115 (citations omitted) (defining quantitative as “that form of evaluation characterized by its identification of individual components and provision of a quantitative score”).
114. Allen, supra n. 13, at 8.
115. Id.; see Munro, supra n. 5, at 111 (citations omitted) (defining qualitative as “evaluations in which a holistic judgment concerning a subject is made”).
117. Id. (emphasis omitted).
118. Id.
measurements that establish baseline and final performance,”

such as pre-tests and post-tests. If baseline data is not available, then assessment can be performed by comparing groups,

such as comparing 1Ls to 3Ls. Value-added assessment for LRW skills could be a curricular or program-wide assessment, such as testing citation skills in an introductory LRW course and then again in a final upper-level writing requirement course.

“Developmental assessment” refers to the tracking of an individual student’s development. The data gathered from developmental assessment can be summarized for all students in a course to assess that course. Developmental assessment can use “a series of check-points or hurdles (progression exams),” which students must pass before they can continue. If students do not pass the progression exams, they can be given “prescriptions” for additional work to improve and hone their performance. Developmental assessment in introductory LRW courses can take place with the teaching of proper grammar and citation. For example, with citation, students can be required to complete a series of Interactive Citation Workstation (ICW) exercises before being allowed to take a summative exam at the end of the introductory LRW course. Failure to complete all of the ICW exercises successfully requires students to take other “prescriptions” until a satisfactory level is reached. The students’ use of proper citation is also formatively assessed throughout the course in the larger writing assignments, which include inter-office memoranda, research reports, and trial briefs.

Assessment can be criterion-referenced or norm-referenced. Criterion-referenced assessment or evaluation is when “the student’s performance is compared with criteria adopted by the faculty.” These criteria should state the desired level of performance. Norm-referenced assessment is “comparing the stu-

119. Id. at 9.
120. Id.
121. Id. (emphasis omitted).
122. Id.
123. Id.
124. Id. at 10.
125. Munro, supra n. 5, at 119.
126. Id.
127. These levels of performance should be the same as the competency levels included in the performance criteria, thereby providing consistency. Id. at 75 (arguing that “[p]erformance assessment— with explicit criteria, feedback and self-assessment—is an
dent’s performance with that of other students taking the test.”

The final grades in most law school courses, including introductory LRW courses in which grades are assigned, are norm-referenced. However, norm-referenced assessment is “inconsistent with sound assessment principles. In education that is student-centered and ability-based, criterion-referenced testing is more appropriate because students are evaluated on the degree to which they meet criteria that the teacher clearly identified and explicitly stated to the students.”

Embedded assessment refers to assessment measures embedded into a course or other testing procedure within a course. “[T]he best assessment is done in the same context and arena in which the teaching was done. Hence, assessment should be primarily class-embedded; that is, it should be an integral and formative part of the students’ learning in the classroom.”

Embedded assessment has many advantages and allows faculty to get “double duty” out of one assignment:

Faculty examine learning where it occurs, students are motivated to demonstrate their learning, and assessment planning contributes to an aligned curriculum.

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What differentiates embedded assessments from other class activities is that they are designed to collect information on specific program learning objectives. In addition, results are pooled across courses and instructors to indicate program

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effective strategy for ability-based, student-centered education”). Munro states that “[a]fter law teachers have analyzed what they want students to be able to do (outcomes), then they must identify the criteria for a competent performance.” Id. Munro stresses the importance of explicit criteria arguing that without them, assessment can be arbitrary and subjective. Id.

129. Id. at 119–120. However, moving in this direction would be a fundamental change in law school culture, which has always been norm-referenced.

130. Allen, supra n. 13, at 168 (defining embedded assessment as “[a]ssessment activities occurring in courses. Students generally are graded on this work, and some or all of it also is used to assess program learning objectives”).

131. Munro, supra n. 5, at 171. This statement demonstrates and reaffirms the premise that the bar examination constitutes a poor assessment tool because it is given outside the classroom and out of context.

accomplishments, not just the learning of students in specific course sections.\textsuperscript{133}

The work is still graded by the professor, but a sample is collected for assessment purposes.\textsuperscript{134} Ideally, the students’ identifying information is removed for purposes of assessment, and reviewers (those reviewing the samples for assessment purposes) use a rubric or some type of specific scoring tool to assess the learning outcome specifically.\textsuperscript{135}

There are many examples of embedded assessment tools in introductory LRW courses. One example would be the trial brief. One can use the trial brief as a portion of the overall grade in the course and as a direct assessment method, assessing various different learning outcomes, such as citation, hierarchy of authority, written communication, or other more discrete skills. In addition to the larger memoranda or brief assignments, many assessment measures are already embedded in introductory LRW courses, which demonstrates that assessment does not require much additional work on the part of LRW faculty who already incorporate multiple and varied assessment activities in their courses. Faculty members need only recognize that these embedded measures can serve the dual purpose of grading and assessment and learn how to use them for the second purpose of assessment. By merely modifying some of the activities and their results for assessment purposes, LRW faculty can gather assessment data throughout a semester with minimal extra work.

b. Specific Assessment Tools for Introductory LRW Courses

The types of assessment tools are as varied as the learning outcomes they measure. Any tool that provides evidence of student learning can be seen as an assessment tool. For example, traditional measures such as tests, quizzes, or exams can be used to assess a variety of learning outcomes for introductory LRW courses. Likewise, various performance methods, such as exercises, inter-office memoranda, and trial briefs can be used.\textsuperscript{136} In ad-

\textsuperscript{133} Id. at 87.
\textsuperscript{134} Id. at 88.
\textsuperscript{135} Id.
\textsuperscript{136} See e.g. Osters & Tiu, supra n. 33, at 5. For examples of the use of such tools in an assessment plan, see infra section III(B).
tion to these widely used measures in introductory LRW courses, there are additional direct and indirect measures that can be used. This Article highlights some of these measures, which may not be commonly used in introductory LRW courses presently.

First, small-scale, direct, embedded assessment tools\textsuperscript{137} can be used, such as “one-sentence summaries”\textsuperscript{138} and “empty outlines.”\textsuperscript{139} These tools could be useful in assessing the students’ ability to read, understand, and synthesize the substantive law used in memorandum or trial brief assignments. Likewise, small-scale assessment tools such as “background knowledge probe” and “misperception/preconception check” could be used with clickers to assess students’ grasp of the substantive law for such assignments.\textsuperscript{140} Class participation or even the Socratic method can also assess a learning outcome on knowledge, specifically for legal principles involved in a simulation.\textsuperscript{141}

Second, interviews are another direct assessment tool that can be used in introductory LRW courses. Such interviews can be done with groups of students or with an individual student.\textsuperscript{142} “[I]nterviews allow faculty to ask follow-up questions to clarify the breadth and extent of students’ understanding.”\textsuperscript{143} Such interviews can assess several learning outcomes: knowledge, syn-

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\begin{enumerate}
\item[Munro, supra n. 5, at 134 (describing these tools as “classroom assessment”). Munro also describes other tools such as the “Muddiest Point Paper,” which requires student to set forth the point that was the least clear; the “Paper or Project Prospectus,” which requires “student[s] to draft a plan or outline for a paper or project,” and the “Word Journal,” which requires “student[s] to characterize the text or idea in a single word and then explain why [they] chose that word.” Id. at 134–135 (internal citation omitted). Also, for an analytical and critical thinking learning outcome, Munro proposes other tools, such as the “Categorizing Grid,” the “Pro and Con Grid,” and the “Analytic Memo”—“all of which require students to analyze or sort thoughts and arguments.” Id. at 134 (citations omitted).
\item[Allen, supra n. 13, at 87 (requiring students to summarize an important concept in one sentence); see also Munro, supra n. 5, at 135 n. 323.
\item[Allen, supra n. 13, at 87 (requiring students to complete a blank or partially filled in outline).
\item[Id.; see Munro, supra n. 5, at 134 n. 314. Munro defines the “background knowledge probe” as “a questionnaire requiring short answers or multiple-choice selection to collect information on the students’ level of preparation.” Munro, supra n. 5, at 134 n. 314.
\item[See e.g. Stuckey et al., supra n. 2, at 132–141 (arguing that the Socratic method should be used sparingly because of its inability to assess the learning of all students and because of its focus on merely assessing the knowledge of a few students who are called upon directly).
\item[Allen, supra n. 13, at 88.
\item[Id. at 88–89.]
\end{enumerate}
thesis, communication, and interpersonal skills. Such interviews can be structured so that the same questions are asked of every student or the questions are un-structured. The interviews should use open-ended questions. In an introductory LRW course, a faculty member could use such interviews for research conferences in a memorandum or brief assignment. Such an interview would be an authentic assessment, where the student is acting as a junior associate and is making an oral report to his partner who is played by the faculty member.

Third, portfolios are another type of direct assessment measure that can be used by LRW faculty. There are two basic types of portfolios: showcase portfolios and developmental portfolios. A showcase portfolio demonstrates the extent of a student’s mastery of learning outcomes by “showcasing” his best work product. A developmental portfolio demonstrates the extent of a student’s mastery of learning outcomes by showing the student’s progress, including samples of the student’s early work product and later work product throughout the student’s academic career. This type of portfolio provides a value-added judgment as well as an absolute judgment by reviewing the final paper. In addition to the writing samples, the portfolios could include “reflective essays” or reviews, which are indirect assessment tools, in which a student is asked to review all of the documents in the portfolio and reflect on his development of the learning outcomes. In addition to being an assessment tool, portfolios have the added benefit of providing the student with a sample of his work product for prospective employers; typically, a showcase portfolio would be best for this purpose. Students are likely to be

144. Id. at 89.
145. Id.
146. Id. Allen offers additional considerations when using competence interviews. Id. at 88–90.
147. The Sourcebook also states that a faculty member can evaluate research skills “by self-reporting, by commercial or teacher-created research exercises, by inferences drawn from written work based on their research, by oral or written examination, or by any combination of these methods.” Sourcebook, supra n. 20, at 69.
148. Allen, supra n. 13, at 90.
149. Id. at 92.
150. Id. at 92–93.
151. Id. at 93.
152. Id. at 90.
engaged in this process because it serves two purposes for them: grading and material for interviews. Both types of portfolios can be used in LRW courses. LRW faculty can use the portfolios to assess the introductory LRW course by comparing student progress from year to year. In order to make this assessment valid, LRW faculty should look at past assignments on the same topic. Therefore, they would be comparing comparable student work product. If comparing student work product on different topics, the data may not be reliable as one subject area may have been more difficult or the facts may have been less developed.

In addition to the lesser-utilized direct assessment measures, there are also different indirect assessment measures that can be used in the introductory LRW course. As previously noted, indirect assessment measures “involve a report about learning rather than a direct demonstration of learning.” Unlike direct assessment measures, indirect measures are typically not embedded in a course and do not serve the dual purpose of grading and assessment. However, LRW faculty can use indirect measures to assess multiple learning outcomes. Examples of indirect assessment methods include: reflection papers, surveys, interviews, and focus groups.

First, reflective essays are a viable indirect assessment tool in introductory LRW courses and can be embedded in open-ended survey questions, course journals, homework assignments, and as part of a developmental portfolio. Reflective essays can assess a variety of learning outcomes. For example, they can be used to assess students’ ability to recognize moral and ethical dimensions to problems, assess research planning and implementation skills, and assess communication skills. Reflective essays can be used as a direct assessment measure and an indirect measure at the same time, including directly assessing writing skills, as well as indirectly assessing selected issues, such as a student’s reflection on
his learning. Such essays “provide students opportunities to make qualitative statements about their learning and to share ideas for program improvement. Because the assignments are open-ended, this technique allows faculty to discover new ideas that might otherwise have been overlooked.”

Second, surveys are valid assessment tools for introductory LRW courses. Surveys can seek information on very discrete topics or can seek more wide ranging data. Surveys can also be periodically repeated to track the impact of course changes from assessment. When using surveys, like when using any indirect assessment tool, the participants’ perceptions, “regardless of their accuracy,” are important. Surveys can be sent to various stakeholders to gather important data. Surveys sent to alumni, the bench, and the bar can be used at the outset of the assessment process when defining learning outcomes, by asking the question, “What legal research and writing skills do graduates or new attorneys need to possess?” Exit surveys to LRW students allow faculty to gather information on students’ perceptions of their attainment of the LRW learning outcomes. Surveys can also elicit information from alumni and employers as to the attainment of the LRW learning outcomes. Additionally, surveys can be used within an institution, to other faculty members and other departments, like an externship program, to assess the attainment of learning outcomes by introductory LRW students.

Third, in addition to their use as a direct assessment tool, interviews are also an indirect assessment tool that can be used in introductory LRW courses. Like surveys, as an indirect tool, they can serve numerous purposes and seek a variety of data from the same stakeholders. However, “they provide a sense of immediacy and personal attention that often is lacking with sur-

158. Id.
159. Id. at 112.
160. Id. at 104.
161. The surveys of the University of Dayton Bench Bar Outreach Project are being used for this purpose. For a full discussion of this project, see supra n. 59 and accompanying text.
162. For a full discussion on survey design and use, see Allen, supra n. 13, at 104–112.
163. Munro, supra n. 5, at 123–124.
164. Allen, supra n. 13, at 113.
165. Id.
veys.” The major drawback to the use of interviews in an introductory LRW course is their time-consuming nature.

Fourth, focus groups can be used as an indirect measurement tool. To be done well, focus groups require a lot of preparation and typically use a neutral facilitator. Their practicality for introductory LRW courses is somewhat limited. However, a viable use would be in assessing the LRW program at a law school, as opposed to an individual course.

c. Appropriateness of Assessment Measures or Tools

Prior to using an assessment tool, one must test it for effectiveness. The three necessary components of effective assessment are reliability, validity, and fairness. Simply stated, “[r]eliability means the test or measuring procedure yields the same results on repeated trials.” Reliability depends on representative content sampling and scoring consistency.

Validity is more in-depth. At its core, it means the assessment must accomplish the purpose for which it was intended. Specifically, validity is “how well a procedure assesses what it is supposed to be assessing,” testing whether the assessment measure provides useful information. “In law school courses, validity means the test or other assessment of student performance...” 

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166. Id. Allen includes a full discussion on the proper use of interviews. Id. at 113–118.
167. See id. at 118–124 (discussing the proper use of focus groups); see also Munro, supra n. 5, at 136 (discussing the use of Small-Group Instructional Diagnosis (SGID) as an indirect tool to improve teaching).
168. The University of Dayton Bench and Bar Outreach Project is planning on using focus groups to inform the survey results of the bench, the bar, and alumni. See supra n. 60 and accompanying text.
169. Stuckey et al., supra n. 2, at 239.
170. Id. Reliable is defined as consistent results or “measurement precision and stability.” Id. at 63 (outlining the major types of reliability).
171. Munro, supra n. 5, at 107–108.
172. Validity is determined by “whether the assessment ‘effectively measure[s] student competence with respect to the various instructional objectives of the law teacher.'” Id. at 74 (citation omitted). There are several types of validity: formative validity, construct validity, criterion-related validity, face validity, and sampling validity. Allen, supra n. 13, at 63 (including a full definition of these terms). Allen argues that the most important for assessment purposes is “formative validity,” which is “how well an assessment procedure provides information that is useful for improving what is being assessed.” Id.
173. Id. at 62.
measures whether the course goals and objectives have been met.”

Validity avoids bias and unreliability. Fairness contemplates assessment being “equitable in both process and results.” If an assessment tool is not valid or reliable, then it is “inherently unfair.”

Fairness is also imparted through the use of assessment criteria and rubrics. Once an assessment method is chosen, it is incumbent upon the assessor to share the scoring or evaluative method with the students prior to the assessment. Therefore, the students will understand upon which standards they will be assessed. Just as it is important in grading to provide the standards upon which students will be graded prior to their performance, the same holds true in assessment.

In addition to being reliable, valid, and fair, assessment must also be ethical. When collecting information from human subjects, ethical responsibility comes into play and can involve institutional review boards (IRBs). Typically, assessment methods are exempt from IRB review because IRBs provide an exemption for research that has the “sole purpose of improving educational institutions.”

Regardless of whether an assessment procedure has to go through the IRB process, there are other ethical responsibilities when gathering data from human subjects. First, participants’ autonomy should be respected by giving participants enough information about the project to make an informed decision about their participation. Such “informed consent” can be obtained by the faculty member by simply telling the students that a particular assignment will be used for both grading and assessment purposes and asking for the students’ permission. Second, faculty should respect anonymity, confidentiality, and privacy. As previously stated, a simple safeguard is the redaction of identifying information on the students’ work product that is used for assessment.

174. Munro, supra n. 5, at 106 (noting that this is content validity).
175. Allen, supra n. 13, at 63.
176. Munro, supra n. 5, at 109; see id. (indicating primary areas of unfairness).
177. Id. at 110.
178. Allen, supra n. 13, at 64.
179. Id. at 65.
180. Id. at 66.
181. Id. at 66–68 (summarizing ethical principles for collection and use of human subject data).
4. Analysis of the Assessment Data

As part of the assessment cycle, the LRW faculty member should choose at the outset of the year a learning outcome that he wishes to assess. It is not necessary or even expected that each learning outcome will be assessed every year. That would be an unrealistic expectation. The faculty member should choose a learning outcome that he feels needs more emphasis. This choice could and should be based on the faculty member’s past teaching experiences. If he feels that after two semesters he is often dissatisfied by his students’ knowledge and use of proper citation, he may chose to focus on that learning outcome. Then, he will decide what assessment tools should be used to assess that skill throughout the year, remembering that the use of multiple methods will provide more reliable results.

For example, if the faculty member chooses to assess citation that year, he could use a pre-test at the beginning of the first semester. Then, he could have the students perform ICWs to reinforce the skill. He could have a summative test on citation in the first semester. On the memo or brief assignments, he could provide formative comments on citation. He could also include a second quiz or test in the second semester or a “post-test” on citation. All of these assignments or methods are embedded in the course, and the scores on the assignments would be used for grading purposes.

He would also put aside a set number of student samples of the above assignments to use for assessment. There is no proper number of student samples that must be used to inform one’s assessment data. Obviously, the larger the pool analyzed, the more reliable the results. However, it is not necessary or even advisable to use all student results to attain reliable assessment data.

182. Depending on the level of detail that the faculty member chooses to place in his plan, he could “map” the various learning outcomes to demonstrate which learning outcome would be assessed in what year. As previously stated, assessment is a cycle. For example, in year one, the faculty member may assess one skill, like citation. In year two, he would analyze the data on citation and start a new assessment project on written communication. In year three, he would incorporate new teaching methods or assignments to reinforce his data on citation, analyze the data on communication, and possibly start a new assessment on another learning outcome. The simplest way to map the assessment cycle is to include other columns in the plan with proposed dates for the collection of assessment data, the analysis of the data, and the use of the results of the assessment project.
The analysis of the assessment data can be done by the faculty member or by outside assessors, also called evaluators. Of- ten, the use of an outside assessor is preferable because there will not be the bias involved with the faculty member and because it helps separate assessment from grading. Outside assessors need not be “professional assessors.” It is advisable to use such outside assessors for institutional learning outcomes. However, the assessment of student learning outcomes on the course level can easily be accomplished by the individual faculty member whose course it is and who can use the data for the dual purpose of grading and to improve student learning in his or her course.

Regardless of who analyzes the data, the approach should be considered and pilot-tested to ensure that the data is worth analyzing. Two common approaches to reviewing assessment data are content analysis and the use of rubrics. Content analysis allows an assessor “to summarize common themes and the extent of consensus concerning those themes,” by using a written coding scheme. An example would be the analysis of open-ended questions in a survey instrument.

As is well known by LRW faculty, rubrics “make the impossible manageable.” Most LRW faculty use rubrics for grading; however, they can serve a dual purpose by also being used for assessment purposes. There are two common types of rubrics: holistic rubrics, those that “describe how one global, holistic judgment is made” and analytic rubrics, which “involve making a series of judgments, each assessing a characteristic of the product.

\[183. \text{Munro, supra n. 5, at 161–162 (discussing the use and cost of outside assessors).}\]
\[184. \text{Munro notes the concern where the assessor is also the teacher, sounding fears of lack of objectivity. Id. at 113. However, he states that such concerns can be overcome by the use of outside assessors. Id. at 113–114.}\]
\[185. \text{Id. at 161 (listing those who can serve as assessors).}\]
\[186. \text{Allen, supra n. 13, at 132.}\]
\[187. \text{Id. With either type of approach, inter-rater reliability, defined as scoring consistency among assessors, is required for accurate assessment data. Id. at 145. Assessors using rubrics must be “calibrated” or “normed” so that the results are more reliable. Id. at 142. For example, if assessors are accustomed to grading on a curve, their use of rubrics may be more biased. Id. at 142–143.}\]
\[188. \text{Id. at 133. Allen includes a complete discussion of the use of content analysis. Id. at 132–137.}\]
\[189. \text{Id. at 138.}\]
\[190. \text{When rubrics are used in conjunction with grading, there is better feedback on student learning, by identifying strengths and weaknesses. Osters & Tiu, supra n. 33, at 5.}\]
being evaluated.”191 For purposes of assessment, LRW faculty can share their grading rubric with an outsider assessor, who is assessing a learning outcome. Even if the faculty member shares a rubric, the faculty member may include course-specific items for her use in grading.192 In addition to sharing rubrics with assessors, rubrics can also be shared with students for evaluating their own work product or for peer review.193

As previously stated, an assessment plan can use explicit competency levels in the performance criteria; these same levels of competency should also be used in the rubrics.194 An important task for the assessor, whether the LRW faculty member or an outside assessor, is defining what that level of competency means.195 Merely using the terms in the performance criteria is insufficient. The assessor needs to include specific descriptions of the various levels of performance to demonstrate what is needed to achieve the desired competency level.196 Additionally, such criteria should be shared with the students because “[t]hey need to know what comprises mastery of a lawyer’s task, and they need to establish a pattern of thinking about the criteria for competent performance.”197 Rubrics using various competency levels are compiled by the Legal Writing Institute for various documents, including appellate briefs, client letters, memos, and trial briefs.198

5. **Closing the Loop of Assessment**

Once the learning outcomes are created, they are aligned with the curriculum, valid and reliable assessment tools are chosen, and the assessment data is analyzed, the last step becomes using that data to close the loop of assessment. **Best Practices** argues that the “main purpose of assessments in educational in-

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192. Id. at 140.
193. Id. at 144.
194. See infra n. 202 for a discussion of various competency levels.
195. Stuckey et al., supra n. 2, at 245.
196. See id. (providing examples of criteria with specific definitions); see also Munro, supra n. 5, at 114, app. D (providing various descriptors for levels of performance).
197. Munro, supra n. 5, at 113.
stitutions is to discover if students have achieved the learning outcomes of the course studied” and that “the outcomes of assessment should be to foster learning, inspire confidence in the learner, enhance the learner’s ability to self-monitor, and drive institutional self-assessment and curricular change.”

There are a variety of uses of assessment data. The data from an introductory LRW course can be used to assess the LRW program or as part of institutional assessment. Assessment data can also be used to revise LRW syllabi and course descriptions, to alter emphasis placed on certain skills, to modify teaching strategies, and to retool assignments, among other things. At its base, the data should be used to improve student learning, because if the data is not used, then the whole assessment plan has failed its purpose. However, the assessment process does not end there; assessment is a circular, organic process that is only successful if revisited and revised based upon the data available at the time.

III. AN ASSESSMENT PLAN FOR INTRODUCTORY LRW COURSES

Below is a sample assessment plan (the Plan) for an introductory LRW course, consisting of two semesters with three credits each, incorporating research instruction. The Plan includes four learning outcomes with eleven specific performance criteria. The Plan also includes examples of assessment methods in the third column, which are defined and explained in further detail in Section III(B).

<table>
<thead>
<tr>
<th>Learning Outcome</th>
<th>Performance Criteria</th>
<th>Assessment Tools (Examples)</th>
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<tbody>
<tr>
<td>Graduates will</td>
<td>Criterion 1: With compe-</td>
<td>• Research Plan</td>
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199. Stuckey et al., supra n. 2, at 235 (citations omitted).
200. See e.g. Munro, supra n. 5, at 78 (“Academic planning under the principles of assessment is never finished. The process evolves and continues as a faculty evaluates and changes teaching methods, courses, materials, and the curriculum.”).
201. The learning outcomes and performance criteria in the Plan are borrowed in large part from a 2009 draft of institutional learning outcomes and performance criteria created by the Assessment Committee at UDSL. The Author gives credit to the invaluable collaborative work in creating the draft to the Committee, including Assistant Dean for Student Affairs Lori Shaw (Chair), Professor Harry Gerla, Professor Jeffrey Morris, and Professor Vernellia Randall, and the rest of the faculty for their input and insight.
202. The Author has not commenced a formal assessment project under the Plan. Therefore, there is no data to analyze or to present as of the Article’s publication date.
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<th>Learning Outcome</th>
<th>Performance Criteria</th>
<th>Assessment Tools (Examples)</th>
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| perform effective and efficient legal and non-legal research. | tency, students will devise and implement a coherent and effective research plan, exhibiting an understanding of the limitations created by time and financial constraints. | • Interview  
• Reflective essay/journal |
| Graduates will demonstrate analytical and problem-solving skills. | Criterion 1: With competency, students will critically read and analyze the pertinent law and facts. | • One-sentence summary  
• Empty outline  
• Background knowledge probe  
• Perception/misperception check  
• Memo or Trial Brief |
| | Criterion 2: With competency, students will analyze the facts or circumstances in the problem to cases or principles and apply precedent in solving the legal problem. | • Memo or Trial Brief |
| | Criterion 3: With competency, students will evaluate and synthesize factual and legal arguments and predict a reasonable conclusion, which solves the problem. | • Client letter  
• Memo or Trial Brief |
<p>| | Graduates will | • Portfolio |</p>
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<th>Learning Outcome</th>
<th>Performance Criteria</th>
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| communicate effectively and efficiently to individuals and groups. | tency, students will write briefs, memos, correspondence, and other legal documents that are clear, concise, well-organized, professional in tone, appropriate to the audience, and if appropriate, contain proper citation to authority. | - Memo, Trial Brief, or client letter  
- Pre- and post-test on grammar  
- Summative citation quiz  
- ICWs |
| Graduates will demonstrate attributes of professional responsibility. | Criterion 1: With competency, students will articulate pertinent practical implications, tactical considerations, ethical issues, human-relation issues, and other non-legal factors (such as diversity issues and group status) bearing on the problem. | - Reflective essay/journal |
| | Criterion 2: With competency, students will demonstrate self-reliance and self-learning skills, which allow them to take on a new area of the law and understand that area. | - Memo or Trial Brief  
- Reflective essay/journal |
| | Criterion 3: With competency, students will operate under professional norms and recognize their professional responsibilities, including time management skills, decorum to the court, and interpersonal skills with clients, | - Client letter  
- Demand letter  
- Reflective essay/journal  
- Memo or Trial Brief |
A. Outcomes and Performance Criteria in the Plan

Suggesting one set of learning outcomes for introductory LRW courses nationwide is a difficult task due in large part to the varying types of courses at each institution and the varying amounts of credits awarded. However, the outcomes listed in the Sourcebook provide an excellent place to start. This Plan incorporates the basic tenets from the Sourcebook. It includes four main outcomes: research, analysis/problem solving, communication, and professional responsibility attributes. These outcomes align with the institutional learning outcomes of my school, University of Dayton School of Law, and address two of the three apprenticeships: skills and values. Although students learn a substantive area of the law in the memorandum and brief assignments, I do not include a specific learning outcome for substantive knowledge. I believe that a student’s understanding and knowledge of the substantive area is assessed through the learning outcome addressing analytical and problem-solving skills.

The outcomes addressing research and communication include qualifiers: “effective and efficient,” whereas the other two outcomes do not include qualifiers. I chose to include qualifiers because the goal is not for students to be able to research and communicate; I want my students to be able to research and communicate “effectively and efficiently.” However, there still exists varying levels of effective and efficient research and communication, and this is demonstrated by the use of competency levels in the performance criteria listed under these outcomes. Conversely, there are not qualifiers under the other two learning outcomes. This omission is intentional, and the competency level is provided in the performance criteria.

The learning outcomes address “graduates.” As used in the Plan, the term represents “graduates” of the introductory LRW course. Both the learning outcomes and the performance criteria are written in broad terms. It is preferable to use broad language

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<th>Assessment Tools (Examples)</th>
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<td>courts, and colleagues.</td>
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203. Sourcebook, supra n. 20.
so that a faculty member can determine how to best achieve that outcome and performance criteria. For example, the research performance criterion does not specify what the specific “print and electronic” tools are. This omission is intentional, allowing me to choose what sources should be included. For example, in the past, my students were required to learn how to update sources using Shepard’s in book form. However, due to the efficacy and reliability of on-line citators, my students no longer use books to update their sources. The learning outcome and performance criterion, as written, provide me that flexibility. Additionally, all the learning outcomes and performance criteria are written in language that is student performance focused, not on what I provide.

All of the performance criteria use the same level: competency.\textsuperscript{204} I chose this level because it reflects what I believe a gradu-

\begin{itemize}
  \item Novice - Rigid adherence to taught rules or plans
  \item - Little situational perception
  \item - No discretionary judgment

  \item Advanced Beginner - Guidelines for action based on attributes or aspects (aspects are global characteristics of situations recognizable only after some prior experience)
  \item - Situational perception still limited
  \item - All attributes and aspects are treated separately and given equal importance

  \item Competent - Coping with “crowdedness”
  \item - Now sees actions at least partially in terms of longer-term goals
  \item - Conscious deliberate planning
  \item - Standardized and routinized procedures

  \item Proficient - Sees situations holistically rather than in terms of aspects
  \item - Sees what is most important in a situation
  \item - Perceives deviations from the normal pattern
  \item - Decision-making less laboured
  \item - Uses maxims for guidance, whose meaning varies according to situation

  \item Expert - No longer relies on rules, guidelines, or maxims
  \item - Intuitive grasp of situations based on deep tacit understanding
  \item - Analytic approaches used only in novel situations or when problems occur
  \item - Vision of what is possible
\end{itemize}

\textit{Id.} A future project will be using this model and adapting it to the skills required of attorneys, as has been done with other disciplines, including nursing. See “Staged” Models of Skills Acquisition, http://www.umdnj.edu/idsweb/ids5340/models_skills_acquisition.htm (Apr. 26, 2009) (adapting the model to clinical nursing). Notably, the January 2010 Draft of the Proposed ABA Standards and interpretations used the term “proficiency.” See e.g. ABA Sec. Leg. Educ. & Admis. to B., Stands. Rev. Comm., Student Learning Outcomes
ate of an introductory LRW course can accomplish. Obviously, some of these graduates may achieve a higher competency level due in part to their previous experiences, education, or aptitude. Likewise, some graduates may not achieve the level at all. However, this standard demonstrates what I believe the typical graduate will achieve, acknowledging that this is an introductory course and all of the performance criteria should be reinforced in upper-level courses, including the upper-level writing requirement.

The number of learning outcomes and performance criteria are relatively small: merely four learning outcomes and eleven performance criteria. Again, this is intentional. If the Plan includes too many learning outcomes and performance criteria, it may become unmanageable and cumbersome.

B. Assessment Tools in the Plan

The assessment tools in the Plan are merely examples of measures that can be used to determine whether the learning outcomes and performance criteria are achieved. To ensure valid, reliable, and fair assessment, I include multiple assessment measures: direct and indirect, formative and summative. A faculty member should be creative in her use of assessment tools, using past, tried and true tools and being open to new assessment tools, such as those that come across the LWI listserve on a regular basis. There is a font of useful knowledge among LWI members and LRW faculty nationwide.

The Plan includes various direct assessment measures. Throughout the Plan, the memo or trial brief is used. The memo or trial brief assignments are excellent direct, embedded assessment tools that can be used for the dual purpose of grading and
assessment. They are used in the Plan to assess all of the learning outcomes and a majority of the performance criteria, including hierarchy and weight of authority, research skills, analytical and problem-solving skills, and communication skills. Another type of performance measure would be drafting smaller documents, like letters or motions, which could be used to assess the same skills as the larger memo or trial brief assignments.

Another sub-set of direct assessment measures includes tests, quizzes, or exams. In the Plan, these measures are used to assess discrete skills such as the hierarchy and weight of authority, research, and citation. Additionally, the Plan includes a comprehensive exam at the end of the semester. This exam could assess a discrete skill such as research or could be more encompassing, like the Multistate Performance Test, assessing a variety of skills, such as critical reading, organization, analysis, synthesis, and communication.

Another example is the use of pre- and post-tests, which are direct assessment tools that are simple to administer and provide valid and reliable data for assessment. Again, pre- and post-tests are appropriate for assessing discrete skills such as citation, but also for more encompassing communication skills, such as assessing proper grammar and writing style. In the Plan, pre- and post-tests are used to assess the performance criterion addressing written communication skills, specifically grammar. My students take a pre-test in the form of a grammar diagnostic at the beginning of the course. If a student does not receive a passing grade on the pre-test, she is given a “prescription” activity, such as a CALI lesson on grammar. All students will receive formative assessments on their written work throughout the semester, with specific comments relating to grammar. Subsequently, all students will be assessed using a post-test at the end of the semester. These types of tests will serve as a value-added and absolute attainment component of student achievement with regard to the learning outcome addressing communication.

The Plan incorporates other types of small-scale embedded direct assessment tools such as, “one-sentence summaries” and “empty outlines.” These tools are used to assess the learning outcome addressing analytical and problem-solving skills and can be embedded in the course by assessing the students’ ability to read, understand, and synthesize the substantive law used in memo and brief assignments. Likewise, small-scale assessment tools
such as “background knowledge probe” and “misperception/preconception check” are also included to assess analytical and problem-solving skills.

The oral competence interview is another type of embedded direct assessment tool that is used in the Plan. The Plan uses interviews for research conferences in memo or brief assignments to assess research skills. Such an interview would be an authentic assessment. Likewise, class participation and/or the Socratic method are used to assess the learning outcome addressing communication.

The Plan also uses portfolios. First, a showcase portfolio can be used to demonstrate the highest form of a student’s legal research and writing skills and communication skills from the course. Second, the developmental portfolio can be used to include all of the student’s writing in the introductory LRW course to demonstrate his improvement over the course of two semesters.

These direct assessment measures, which are embedded in the course, can provide both summative and formative review. Formative review is more time intensive for the LRW faculty member, requiring feedback to the students. However, summative review of direct assessment measures is also appropriate. Specifically, one example is the use of ICWs to assess citation skills. This would allow an LRW faculty member to identify deficiencies demonstrated by the majority of students early on and address them with the whole class. Likewise, the faculty member can also use the exercises to pin-point problems demonstrated by individual students and address those problems individually with each student instead of spending class time on particular deficiencies. This type of review may be qualified as “summative”; however, it does provide some feedback to the students. This type of review, which is not labor intensive on the part of the LRW faculty member, still provides for learning experiences or opportunities, which are truly student focused as opposed to teacher focused.

In addition to the direct assessment measures in the Plan, there are also indirect assessment measures. As noted, the use of indirect assessment measures are not as useful in assessment planning on the course level; therefore, the Plan only includes reflective essays or journals.

Reflective essays or journals are used in the Plan to assess several learning outcomes. Addressing research skills, students
could reflect on the research process, on the steps they took, on their efficiency, on how they might alter their research plan in the future, or on which sources they found most effective. Also, reflective essays are used in the Plan to assess students' ability to recognize moral and ethical dimensions to problems. Learning outcomes regarding values may be difficult to assess in introductory LRW courses, as the core of the course is not focused on values, like in a Professional Responsibility course. Regardless, reflective essays can require students to reflect on issues including but not limited to their representation of the client in the simulation, the difficulties they encountered, and their feelings about being a zealous advocate. Reflective essays, regardless of the subject matter, can also be used as a direct measure to assess communication skills.

IV. CONCLUSION

The task of creating an assessment plan for an introductory LRW course is a large one but not insurmountable. It takes time and creativity. LRW faculty continue to demonstrate, through their scholarship and daily practices, their dedication to improving their students’ learning. Creating assessment plans is just putting their hard work and dedication into a formalized plan. Most LRW faculty already have learning outcomes, stated or unstated, for their courses. By merely articulating these learning outcomes and placing them into a formalized assessment plan, much of the heavy lifting is done. LRW faculty can and should continue to use multiple formative assessments in their courses. Now, instead of just using the results of those assessments for grading purposes, they can use the results to assess the achievement of their stated learning outcomes.

As shown, assessment planning and implementation will not create additional burdens on LRW faculty, and the benefits from such planning is plentiful. By being proactive in creating their assessment plans, LRW faculty will be placing themselves in a position of knowing the reasonable outcomes of their courses when their institution begins creating its plan. But, most importantly, there is the benefit of improved student learning, to which we all strive and hopefully can achieve through the use of assessment planning.
### APPENDIX

#### Action Verbs for Learning Outcomes

<table>
<thead>
<tr>
<th>Intellectual</th>
<th>Verbal</th>
<th>Skill</th>
<th>Attitude</th>
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<tbody>
<tr>
<td>Discrimination, Concrete and Defined Concepts, Rule and Higher-order rule,</td>
<td>Reciting from memory</td>
<td>Performance</td>
<td>Demonstration of a newly acquired value</td>
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<tr>
<td>Cognitive Strategies</td>
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<tr>
<td>• Discriminate</td>
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<td>• Analyze</td>
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<td>• Interpret</td>
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206 Action Verbs for Learning Outcomes, http://sunny.crk.umn.edu/course/itc/itc510/action_verbs_for_learning_outcomes2.htm (accessed Sept. 20, 2009). Osters and Tiu include a list of action verbs for various levels of cognitive, affective, and psychomotor learning. Osters & Tiu, supra n. 33, at 4. They state that Bloom’s taxonomy can be a useful resource for creating learning outcomes. Id.; see also Allen, supra n. 13, at 34 (using Bloom’s taxonomy to clarify the desired level of performance).
A PRELIMINARY EXPLORATION OF THE ELEMENTS OF EXPERT PERFORMANCE IN LEGAL WRITING

Erika Abner and Shelley Kierstead*

INTRODUCTION

This Article describes our exploratory and descriptive research into the elements of expert performance in legal writing. This research is intended to provide a framework for a more comprehensive research project designed to develop a description of increasingly sophisticated writing competencies that can be expected of lawyers as they progress through their careers. Before charting the process by which expert legal writing capacity is acquired, it seems necessary to develop some ideas about what expertise looks like, and how those who are considered experts characterize their journey to expertise. We also wanted to analyze the extent to which these findings are consistent with existing academic theories of expertise.

There is virtually no debate about the importance of proficient written communication within the practice of law. The venerable MacCrate Report lists oral and writing communication as fifth within the top ten fundamental skills,¹ while the more recent Carnegie Report notes the importance of teaching and learning legal writing in law school, asserting that legal writing holds the potential to bridge the three apprenticeships of head, heart, and hands.² In their seminal article chronicling the gaps between law firms and law schools, Professors Bryant Garth and Joanne Mar-

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tin note that partners within law firms expect young lawyers to enter firms with the ability to communicate effectively in both oral and written contexts, and with the ability to instill confidence in clients.\textsuperscript{3} For advocacy lawyers in Ontario, who form the majority of our research participants, the need for highly effective writing skills has arguably become a more pronounced practice component in light of increased judicial expectation that written materials will be filed prior to oral presentations in court.\textsuperscript{4}

Despite the recognition of the importance of legal writing, practitioners and judges continue to bewail the poor writing skills of new graduates and excoriate law schools for ineffective teaching.\textsuperscript{5} Oddly, these commentators do not consider the vast divide between learning in school and learning in practice, nor do they consider the time element in developing expertise.

We note at this point that we will pay scant attention to the extensive literature on legal reasoning, or teaching students to “think like a lawyer.” While valuable, our research focuses on legal writing as learning to solve “problems like a professional,” which is best captured in the following quotation:

\begin{quote}
Effective lawyers do not practice law. They solve problems, using law as one among many professional tools. “Thinking like a lawyer” is not the same thing as “solving problems like a professional.” “Thinking like a lawyer” is a label used by doctrinal teachers for a collection of textual interpretation skills and heightened forms of skepticism. Although these are certainly useful in professional life, they are only part of the mental processes needed to solve professional problems . . . . so much energy has been devoted to textual
\end{quote}


\textsuperscript{4} The judicial expectation is derived from procedural rules that either mandate or allow for the submission of written materials in advance of oral hearings. For example, see the Ontario Rules of Civil Procedure, Regulation 194, rules 20 (summary judgment); 21 (determination of issue before trial); 22 (special case); 37 (motions—general); 42 (discharge of certificate of pending litigation); 61 (appeals); 68 (judicial review); 77 (settlement conference); and 78 (pre-trial conference).

interpretation and skepticism that we actually know very little about how effective lawyers go about solving problems.\textsuperscript{6}

Part I summarizes the key expertise literature, including expertise in writing and the studies of novice-expert lawyers relied on for analytical purposes within this work. This Part also briefly reviews the research literature on the transition from school to work as new professionals learn to write in the workplace. Part II follows with a description of the recruitment and methodology used for the focus group research that forms the foundation for this Article. Part III discusses themes revealed through the focus groups, and Part IV discusses how the findings relate to expertise theory. In the course of this discussion, we also make suggestions and raise questions about teaching and learning legal writing that may assist those who are engaged in the facilitation of legal skills development for law students and early-years practitioners. If, indeed, the acquisition of writing expertise is a “process” that requires both exposure to various kinds of legal problem solving opportunities and ongoing writing practice and feedback, the landscape for training law students and young lawyers could change significantly. For example, within law schools, further emphasis on the development of teaching strategies that emphasize facts, the existence of multiple audiences, and the interrelatedness of legal and non-legal elements within a legal problem may foster eventual expert performance. Ensuring that students engage with increasingly complex writing problems throughout law school will require additional institutional commitment to ongoing writing throughout law school. More generally, both law schools and law firms may need to re-assess how realistic institutional performance expectations are at different stages of lawyers’ careers.

\textbf{I. EXPERTISE LITERATURE}

\textbf{A. Expertise—Overview}

Unlike expertise in the legal field, expert performance in many other disciplines has been studied quite extensively. We do

not aim to present an exhaustive account of this work, but rather to highlight a number of ways that research suggests expert performance tends to be illustrated. First, experts are more likely to generate best solutions to problems such as chess moves; experts created best designs in a design task. Further, experts detect features of problems that novices do not see, such as patterns in x-rays, and can perceive the “deep structure” of a problem or situation. These competencies are related to what has been termed the ability to “name and frame” messy, ill-defined problems by first identifying the issue and then situating the problem within a larger picture in order to address it properly.

When solving problems, experts have the ability to call on relevant domain knowledge and strategies with minimal cognitive effort, but they are also able to engage in more cognitively effortful processes when the automatic approach is insufficient. Experts are able to choose appropriate problem solving strategies, working forward from the given problem to the goal rather than working backwards. Related to this characteristic is experts’ ability to transition appropriately and effectively from heavy reliance on one set of resources to heavier reliance on another, and the ability to know when to “slow down” in order to transition from automatic resources into greater reliance on effortful processes.

16. Id. at S114.
In many domains, it will take approximately ten years of intensive practice to acquire expertise, which has been described as the “ten-year rule”:

Just how long it takes to reach the highest levels of expertise varies with individuals, with domain of expertise and with factors pertaining to deliberate and well-structured practice. Many researchers argue that it takes ten years of focused practice to attain sufficient cognitive expertise to be able to win at international tournaments in chess and other established domains of expertise. The “10-year-rule” represents a very rough estimate and most researchers regard it as a minimum, not an average.\(^\text{17}\)

Experience alone is not a guarantee of expertise.\(^\text{18}\) Routine work, although performed proficiently, may not lead to improvement.\(^\text{19}\) Ericsson has theorized that expertise results from deliberative practice, which requires concentrated and sustained effort at increasingly more complex tasks.\(^\text{20}\)

While generally speaking, positive attributes are associated with experts, studies have also suggested certain negative characteristics of expertise.\(^\text{21}\) Most notably, experts sometimes inaccurately predict expert performance, with there being a direct correlation between level of expertise and inaccuracy of expectation. For example, the greater the level of expertise, the less likely one is to accurately predict how long it will take novices to complete a task.\(^\text{22}\)

Professors Scardamalia and Bereiter differentiate experts from those they describe as “experienced non-experts”: “the expert addresses problems whereas the experienced non-expert carries out practiced routines.”\(^\text{23}\) Experts reinvest in learning, seek out


\(^\text{18}\) Moulton, *supra* n. 15, at S114.

\(^\text{19}\) *Id.*


\(^\text{23}\) Bereiter & Scardamalia, *supra* n. 13, at 11.
more complex problems, and “tackle more complex representations of recurrent problems.” 24 On this representation of expertise, not all senior lawyers could be considered experts; indeed, many senior lawyers may contribute to poor legal writing through continual inability to recognize complex rhetorical requirements.

B. Novice and Expert Lawyers

The limited research base into the differences between novice and expert lawyers focuses on reading cases 25 and initial client interviewing. 26 One study examined the differences between novices (law students) and experts (specialist practitioners) in problem solving, in this instance an initial evaluation of a Social Security Disability claim. 27 A review of the studies is contained in Appendix B of this Article.

The majority of the studies are exploratory and descriptive and compare the work of novices to more experienced lawyers or law professors or compare one group of students to another. 28 The rhetoric researchers tend to utilize more mixed method research designs. 29

The line of research on reading cases, although limited, is the best developed. These studies tend to focus on learning expert strategies in order to develop teaching methods to assist first-year law students in learning to read cases. 30 In contrast, the interviewing studies 31 and the problem-solving study 32 address the

24. Id. at 94.
29. See e.g. Deegan, supra n. 25; Lundeberg, supra n. 25; Stratman, supra n. 25.
30. Id.
32. Weinstein, supra n. 27.
value of different methods of legal education—traditional classroom, simulations, and clinical legal education—to experience.

All these studies used experience as a proxy for expertise, although in some studies the researcher examined the differences between experts within a specific field of law (e.g. immigration in Colon-Navarro\textsuperscript{33}) to law students. None of the studies identified and applied the “ten-year rule”; indeed, in some research practitioners with as few as three years of experience were deemed to be experts.\textsuperscript{34}

Despite the importance of oral and written communication in surveys and descriptions of lawyering competence\textsuperscript{35} researchers have not turned their attention to legal writing (as distinguished from legal reading) and the stages of growth and development from novice to expert legal writers.

C. Writing Theory

Over the past thirty-odd years, the focus in relation to the development of good writing has shifted from the external written product to the internal processes associated with writing.\textsuperscript{36} When characterized in this way, writing becomes a “thinking” problem rather than an “arrangement” problem.\textsuperscript{37} Proper understanding of the writing process has been increasingly tied to an assessment of cognitive resources and demands.\textsuperscript{38} While there is still scant empirical literature about professional writing,\textsuperscript{39} a number of commonalities appear to exist across writing fields. First, after assessing protocols of various expert writers, Flower and her colleagues concluded that there are three basic text production processes: planning (generating concepts and setting goals to be achieved within the text); translating ideas into text; and review-

\begin{footnotesize}
\begin{enumerate}
\item Colon-Navarro, supra n. 26.
\item See e.g. Lundeberg, supra n. 25.
\item Id.
\item Ronald J. Kellog, Professional Writing Expertise, in Handbook of Expertise and Expert Performance, supra n. 17, at 390.
\end{enumerate}
\end{footnotesize}
ing ideas and text (detecting faults at multiple levels).\textsuperscript{40} By no means, however, are these stages linear—rather, the processes occur and reoccur throughout the planning, drafting, and re-drafting stages.\textsuperscript{41} For example, revision, when practiced by expert writers within this context, is understood as a means to examine content, structure, and voice.\textsuperscript{42}

It appears that there are specific attributes that expert writers bring to the writing task. One is the ability to solve the ill-structured problems that often underlie the writing project.\textsuperscript{43} Another is the ability to avoid cognitive overload by relying on information that has been stored in long term memory to set goals.\textsuperscript{44} The more experienced the writer, the greater is his or her repertory of semi-automatic plans and goals.\textsuperscript{45} In turn, Stanovich and Cunningham’s research indicates that extensive reading is a strong indicator of the amount of knowledge stored in long-term memory.\textsuperscript{46} This is interesting in light of recent research suggesting that overall amounts of reading have decreased for the general population and for incoming law students.\textsuperscript{47}

Domain-specific knowledge is perhaps one of the key elements of the understanding of writing expertise.\textsuperscript{48} Expertise in one substantive area is not automatically transferable to another, and as such, an expert journalist will unlikely be able to generate an expert scientific report.\textsuperscript{49} Awareness of audience contributes to expert writing. Hyland documented the ways in which academic writers engaged their readership in 240 published articles.

\begin{thebibliography}{99}
\bibitem{42} Linda S. Flower et al., \textit{Detection, Diagnosis, and the Strategies of Revision}, 37 College Composition & Commun. 16, 17 (1986).
\bibitem{43} Carl Bereiter & Marlene Scardamalia, \textit{The Psychology of Written Composition} 389 (Lawrence Erlbaum Assocs. 1987).
\bibitem{44} Id.
\bibitem{45} Id.
\bibitem{46} Id.
\bibitem{41} Keith E. Stanovich & Anne E. Cunningham, \textit{Where Does Knowledge Come From? Specific Associations between Print Exposure and Information Acquisition}, 85 J. Educ. Psych. 211, 224 (June 1993).
\bibitem{47} Gallacher, \textit{supra} n. 5, at 171 n. 29.
\bibitem{48} Ericsson, \textit{supra} n. 20, at 10.
\end{thebibliography}
across ten disciplines. Finally, the general rule that it takes ten years of intensive practice to achieve excellence applies to writing. For example, Wishbow drew this conclusion after examining the work of sixty-six poets, while Gardner did so in relation to the works of T.S. Eliot.

D. Legal Writing and Analysis

As referred to above, a small number of researchers have conducted empirical examinations of the behavior of novice and expert lawyers in relation to reading, problem analysis, and client interviewing. These studies have not examined differences in legal writing processes between novices and experts.

Some legal academics have used research from other fields to hypothesize about its implication for legal writing. Professor Joseph Williams, for example, uses the domain specificity of expertise to explain, in part, the fact that law students tend to write poorly. With every transition, he posits, we become novices. Further, the cognitive load required to integrate the new substantive materials to which students are exposed leaves them with less cognitive energy to attend to basic skills such as grammar and sentence structure. Professor Linda Berger has described the connections between prior research and the evolution of the “new rhetoric” in legal writing, which sees “writing [as] a process for constructing thought, not just the ‘skin’ that covers thought.”

Professors Chris Rideout and Jill Ramsfield also discuss the move away from traditional “formalist” legal writing.

53. Colon-Navarro, supra n. 26; Deegan, supra n. 25; Lundeberg, supra n. 25; Sherr, supra n. 26; Weinstein, supra n. 27.
55. Id. at 1–2.
56. Id. at 15.
57. Berger, supra n. 36, at 155.
There is extensive literature that sets out various criteria for sound legal reasoning and legal writing, but it is most often not linked to empirical research. Some reference is made to Garth and Martin’s study of lawyers’ competencies.\textsuperscript{59} For example, Wellford noted the study’s conclusion that law firms are unsatisfied with sloppy editing, poor organization, significant grammatical and syntactical errors, poor logic, and faulty reasoning in writing samples provided by potential summer students.\textsuperscript{60} Neumann also refers to the Garth and Martin study.\textsuperscript{61} A small number report on research studies into judicial preferences.\textsuperscript{62} For example, Lewis surveyed advocacy preferences of eighty federal and state appellate judges.\textsuperscript{63} Overall, however, the following categories of writing (with selected examples) emerge: legal writing texts, generally prepared for first-year law students with a focus on developing methods for presenting legal analysis (for example, IRAC—Issue, Rule, Application, Conclusion), use of clear, concise language, recognition of audience, and differentiation between predictive and persuasive writing;\textsuperscript{64} general literature on writing in practice, emphasizing clarity and the avoidance of legalese;\textsuperscript{65} classical rhetoric in legal writing, focusing on audience, tone, and purpose;\textsuperscript{66} judges writing with advice to lawyers, suggesting adherence to document length restrictions, use of point-first writing,

\textsuperscript{59} Garth & Martin, supra n. 3.
\textsuperscript{60} Robin S. Wellford, Legal Reasoning, Writing and Persuasive Argument 5 (LexisNexis 2002).
\textsuperscript{63} Lewis, supra n. 62.
\textsuperscript{64} See e.g. Charles R. Calleros, Legal Method and Writing 8, 71–94, 240–279 (5th ed., Aspen Publishers 2000); Neumann, supra n. 61.
and avoidance of lengthy quotations;\textsuperscript{67} and practitioner-based experience and advice on writing.\textsuperscript{68}

E. School-Work Transition

A discussion of the process of developing expertise as a legal writer should include the rich literature that has emerged in the past ten years on the transition from learning and writing in school to learning and writing at work. Understanding the differences in learning to write within these two worlds may lead us to explore different questions about the nature of expertise in legal writing. First, learning to write as a practitioner may include different stages than those required of other experts. Second, we may reach different conclusions and provide different recommendations on teaching and learning in school and the workplace, than we might reach for other forms of expert performance.

Several researchers have addressed the profound differences between writing at work and writing in school, described generally as differences in complexity, multifunctionality and implications of power relations.\textsuperscript{69} These studies examined the transitions for engineers,\textsuperscript{70} social workers,\textsuperscript{71} architects,\textsuperscript{72} and government workers.\textsuperscript{73} These studies rely substantially on the work of Lave and Wenger on communities of practice and the nature of apprenticeship within those communities.\textsuperscript{74} A community of practice is a

\begin{itemize}
\item \textsuperscript{67} See generally John Laskin, Forget the Windup and Make the Pitch, Advoc. Soc'y J. (1999); Susan T. Mackenzie, A Mediator's Perspective on Effective Mediation Advocacy, 12 Pract. Litig. 17 (May 2001).
\item \textsuperscript{68} See generally Darby Dickerson, Motion Potion: Tips for Magical Memoranda, 16 Pract. Litig. 7 (Jan. 2005); David Lee, A Few Words on Choosing Words Well, 7 Pract. Litig. 71 (Jan. 1996); Joshua Stein, How Could Anyone Possibly Have Comments on My Masterpiece? 46 Pract. Law. 11 (June 2000); Wayne Schiess, How to Write for Trial Judges, 13 Pract. Litig. 41 (July 2002).
\item \textsuperscript{69} See generally Patrick Dias et al., Worlds Apart: Acting and Writing in Academic and Workplace Contexts (Lawrence Erlbaum Assocs. 1999).
\item \textsuperscript{71} See generally Catharine LeMaistre & Anthony Paré, Learning in Two Communities: The Challenge for Universities and Workplaces, 16 J. Workplace Learning 44 (2004), Anthony Paré & Catharine LeMaistre, Active Learning in the Workplace: Transforming Individuals and Institutions, 19 J. Educ. & Work 363 (2006); Winsor, supra n. 70.
\item \textsuperscript{72} Dias et al., supra n. 69, at 151–182.
\item \textsuperscript{73} See generally Aviva Freedman & Christine Adam, Learning to Write Professionally, 10 J. Bus. & Technical Commun. 395 (1996).
\item \textsuperscript{74} Jean Lave & Etienne Wenger, Situated Learning: Legitimate Peripheral Participation (Cambridge U. Press 1991).
\end{itemize}
“set of relations among persons, activity, and the world, over time and in relation with other tangential and overlapping communities of practice.”\textsuperscript{75} Members observe and participate; newcomers are gradually drawn over time into the community as they undertake authentic activities. Entry into the community of practice is also implicated in development of identity as a practitioner: “Movement toward full participation in practice involves not just a greater commitment of time, intensified effort, more and broader responsibilities within the community, and more difficult and risky tasks, but, more significantly, an increasing sense of identity as a master practitioner.”\textsuperscript{76}

These studies challenge the notion that teaching writing to law students can be an authentic activity so that students can “hit the ground running” as they enter practice.\textsuperscript{77} Instead, as is evident from the following table, the academy offers a simplified form of power relations [student-professor] and limited, if any, multi-functionality. As students enter the community of practice from their position of “legitimate peripheral participation,” they learn to write like lawyers through a complex process of observation, imitation, assistance, and mistakes.\textsuperscript{78} The following table provides an overview of the differences between writing in school and writing at work:\textsuperscript{79}

<table>
<thead>
<tr>
<th>School</th>
<th>Work</th>
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<tbody>
<tr>
<td>Social motives of writing. Learning disciplinary language as well as to sort and rank students.</td>
<td>Social motive of writing is instrumental; primary aim is to get it done.</td>
</tr>
<tr>
<td>Documents have spatial and temporal existence.</td>
<td>Documents have a continued physical existence as well as an ongoing role in institutional conversation and memory.</td>
</tr>
<tr>
<td>Texts have a discernible beginning and end.</td>
<td>Texts are one strand in an intricate network of events, intentions, other</td>
</tr>
</tbody>
</table>

\textsuperscript{75} Id. at 98.

\textsuperscript{76} Id. at 111.


\textsuperscript{79} Dias et al., supra n. 69.
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Professors do not need students’ written work.</td>
<td>Written work is essential to the enterprise.</td>
</tr>
<tr>
<td>Objective of writing is clearly and explicitly for learning.</td>
<td>Learning is a product of doing the work within the community of practice.</td>
</tr>
<tr>
<td>Curriculum is planned.</td>
<td>Tasks are improvisatory; curriculum cannot be designed and sequenced (or possibly in a limited way).</td>
</tr>
<tr>
<td>Writing tasks, even within a simulation, are generally simplified.</td>
<td>Writing tasks cannot be simplified.</td>
</tr>
<tr>
<td>Roles of teacher and learner are clearly defined.</td>
<td>Learners/novices must learn their multiple roles inside a network of complex relationships; they need to learn new ways of learning.</td>
</tr>
<tr>
<td>Writing is shaped before the first draft.</td>
<td>Completion of first draft is the start of a long process of iteration and shaping: “document cycling.”</td>
</tr>
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</table>

| There is individual ownership of the documents. | There are multiple owners of the documents, including the institution. |
| Socially shared knowledge—the teacher possesses knowledge, some of which she shares with students. | Distributed cognition—learners/novices are thinking in partnership with others, including culturally provided tools and implements. |

The following description captures the differences in an architectural practice:

Students get little experience of collaboratively writing long documents of great complexity (often through collaboration with other parties outside the office, such as consultants based in different firms around the city), of writing that impacts on a situation in multifunctional ways, saying different things to different readers, or of writing that is implicated in power relations, either as the vehicle of the exercise of power or as the hostage to fortune that draws financial and legal
retribution from others in power. Students do not give orders to others, go on record as making recommendations, sign certificates of payment for thousands of dollars, adjust their writing in the light of the known backgrounds and foibles of a whole case of important other players, put documents meticulously away for indefinite storage, or get out of trouble by retrieving 5-year-old documents from dusty files. They do not have to insert their writing into the middle of tangled intertextual webs and chains of speech, writing, and drawing, nor above all, do they see writing, fed into a situation, instigating massive financial flows and titanic physical operations with cranes, trucks, earthmovers, tons of materials and armies of differentiated workers.80

These considerations apply equally to the transitions that law students face as they move into practice (with the possible exception of the physical operations). In addition to the differences noted in the chart, writing in a law practice moves considerably faster than writing in school. A memo in law school may have a deadline of four to six weeks; the same memo in a law firm may be required within a day. Even experienced lawyers must sometimes act with unwelcome speed: “These days, responding to clients’ and to opposing counsel’s written communications is no longer a methodical and reflective process. Instead, it has become a series of quick reactions . . . .”81

II. METHODOLOGY

A. Recruitment and Process

This project used three focus groups of senior advocacy and research lawyers. Fifteen lawyers and one former Superior Court Justice participated in the focus groups. All participants had been in practice for at least ten years, and most had practiced over twenty years. Twelve participants were from large, multi-service law firms; four were from small firms. Eleven were advocacy lawyers; four were research lawyers; and one was a former judge. Our objective in selecting this sample was to recruit a group of individuals with a significant amount of experience in legal writing and analysis who would generate a variety of ideas

80. Id. at 181–182.
about the writing process. We also wished to obtain a sample size sufficient to unearth a sufficient number of themes within the focus group discussions to provide direction for future research initiatives.

Participants were recruited in three ways: (1) an invitation to all advocacy lawyers in three large, multi-service law firms, where the invitation was sent by the firms’ professional development director; (2) an invitation to the moot court “judges” for the first-year moots at a large law school; and (3) an invitation to the research lawyers at four large, multi-service law firms.

The focus group discussions were divided into two stages. In the first stage, participants were asked to reflect on the primary issues or problems they had noted in legal writing by students and new associates. Specifically, participants were asked to write down at least three problems or issues with new lawyers’ writing. Participants then reviewed their lists with the group, which provoked lively discussion.

In the second stage, participants were shown a letter prepared by a first-year associate and asked to comment on it. In particular, they were asked whether they thought the letter would instill confidence in a client. The letter was a standard reporting letter to a client following a pre-trial conference in a wrongful dismissal action.

Reporting letters are both retrospective and prospective; a letter may be linked back to the lawyer’s original opinion to the client on the merits and risks of the action as well as provide predictions about the future. These letters are vital links within an advocacy file, as they are a formal memorialization of a meeting or other event together with analysis and predictions of the future. These letters are shaped not only by the lawyer’s legal

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82. The letter was obtained by one of the participants who asked for sample letters from his associates. The letter was revised to remove all client identifiers. We obtained permission to use the letter within the focus groups but not explicit permission to publish its contents.

83. Reporting letters are prepared by lawyers at all levels of experience. Preparing reporting letters is a common activity for the advocacy lawyer; generally, they are written after every important stage in a litigation action to provide an updated opinion based on new information and evidence. The reporting letter should advise the client of what occurred at that stage, provide options for action together with a recommendation, and seek instructions for further action. The audience may be a single individual or, in the case of a corporation, the audience could include general counsel, another corporate officer or employee, or even the board of directors.
analysis, but also by their understanding of the predilections of particular judges, their own client, and possibly the opposing lawyer and client. As one writer notes, “[Every] written communication becomes a part of the litigation and should be crafted with care and with strategic considerations in mind.”84 For these reasons, and because “lawyers are letter factories,”85 it is appropriate to analyze letters as evidence of the types of ill-structured problems that require the writer to “[solve] problems like a professional.”86

B. Data Sources

The focus group sessions were transcribed, and the transcripts were divided and coded using the following inductively-derived themes: Product, Process, Speculation, Teaching and Learning, and Identity. The Product theme included all statements regarding the final written product. The Process theme included all statements regarding the process of creating the final product, including pre-writing such as outlining as well as revision. The Speculation theme included all statements theorizing about why students and young lawyers write poorly. The Teaching and Learning theme included statements about the participants’ own experiences as learners as well as their experiences teaching writing to students and new lawyers. Finally, the Identity theme included any statements by these very experienced practitioners about the connection between their professional identity and their written work.

Because the majority of the participants practiced in large, multi-service firms, we can assume that their students and new associates are drawn from a pool of strong students. Canadian law schools, although ranked, do not operate within the “tier” system into which American law schools fall. Arguably, a strong student from any school would likely be equivalent to a strong student from any other Canadian law school. In reviewing the comments on student writing, it is helpful to remember that the participants are discussing high-achieving students.

84. West, supra n. 81, at 22.
86. Neumann, supra n. 6, at 405.
In order to achieve credibility within this research, negative case analysis was undertaken. To establish dependability, from the outset of the work, all focus groups were audio recorded. Verbatim transcripts of the focus groups were created by a transcriptionist and reviewed/modified by the researchers. The principal investigators and the research assistant coded several parts of the transcripts separately and then met to discuss and agree on the complete coding framework. The final themes were derived from a coding process that started with a listing of the units of meaning derived by a line-by-line reading of the transcripts, then moved to an analysis of connections and differences within the units of meaning in order to articulate categories and subcategories, which in turn were combined into the themes articulated above.

For a complete listing of the units of meaning, categories and subcategories, and final themes, see Appendix A. Note that there is some overlap in themes—for example, organization was discussed in relation to both final written products and in relation to the overall process used to approach a legal writing task. Organization’s relationship to overall understanding was also a discussion topic that fell within the Speculation theme.

While we recognize that focus group research can result in incomplete data, by the end of the third focus group, saturation had been reached in relation to the topics we had addressed with participants. For the purposes of generating information with which to move forward with a more detailed research project, the focus groups provided an efficient, effective method. To illustrate the confirmability of results, when discussing data in Part III below, the authors will refer to quoted passages from the focus groups to illustrate how particular themes arise within the data.


89. Within the qualitative research process, saturation is said to be reached when further participants are merely repeating data already provided and are not adding to the development of codes, interpretation or theory. Martin N. Marshall, *Sampling for Qualitative Research*, 13 Fam. Prac. 522, 523 (1996).
III. EMERGENT THEMES

Each theme identified by the focus group participants contained numerous dimensions. Interestingly, while we expected a number of the topics discussed below to emerge, there were also unexpected, yet consistent comments. First, the notion of identity as linked to proficient writing emerged as relevant. Second, some of the speculative comments in relation to young lawyers’ writing were not ones that the authors had anticipated. Third, we did not anticipate the strong focus on the importance of revision to expert performance in legal writing.

A. Product: General Discussion

First, the practitioners were able to describe seven product issues, including: grammar, organization and sequencing, road-mapping, verbosity (both legalese and excessive detail), analysis (including use of authority, attention to facts, identification of counter-arguments, bold conclusions), attention to client problem, and rhetorical issues (audience, purpose, and tone).

Grammar issues were noted by several participants in each of the three focus groups; the issues are captured in the following quotes:

- “Appalling grammar.”
- “I don’t think they have a strong grasp of grammar, basic grammar.”
- “[T]he basics of writing, making sure you have a sentence and knowing how, the difference between a good sentence and a bad sentence.”

Organization was the second-most frequently noted issue; organization is closely tied to legal analysis and audience. Organization issues were

- “For me, the number one point was organization. They don’t think about the order of sequencing of, of the structure of the thoughts and how that one fits into the other.”
- “[I]t’s not sequential enough, one concept doesn’t flow to the next.”
• “And what I see, especially when reading factums (equivalent to United States court briefs), is that you’ll often get a series of issues more or less at random.”

New lawyers don’t grasp the importance of “point-first writing” and leading with the best argument:

• “And just getting your head around point-first writing is . . . they don’t come out of school understanding that, and that is huge.”

• “But you’ve got to go with the best that you’ve got because you may not get the judge past five pages . . . lead with your strongest point right away, especially if you’re responding.”

Legal analysis, despite three years of law school, still eludes some students and new lawyers.

The “case dump” without further analysis:

• “[S]o I’ll get a memo from a student and there’s pages and pages of using cases…you haven’t done the work. But you have to figure that out for me and present them to me.”

• “[T]hey just say well, here’s a case, here’s another one, here’s twenty cases.”

Another form of “case dump” could be described as the “literature dump”:

• “I want a research memo on [without prejudice settlement communications] . . . I’ll get back [noted Canadian text] whole chapter on without prejudice communications and if that’s what I wanted, I’ve got it on my shelf, I could have read it. So you wind up getting a fifteen- or twenty-page memo when all you really wanted was them to go out and research whatever they could find . . . really directed on that narrower point.”

In contrast to the mass of unanalyzed cases, another lawyer noted the problem of bold conclusions unsupported by the cases (also described as the “quantum leap”). These bold conclusions
may be contrasted with what some participants noted as the inability to grapple with uncertainty:

- “[I]f they are faced with an issue on which there is no clear solution, they can’t reason their way through it.”

**Understanding and use of authority**, including understanding of organization of primary and secondary authority (which they learn very early in law school and which presumably would have been reinforced regularly) and the more subtle understanding of norms of legal practice, was viewed as problematic:

- “[T]here’s no rational ordering principles. So maybe they, first they’ve got a, I’m not sure a Court of Appeals case from 1978 and they just have some Supreme Court of Canada case before or after, and then something from a master.”

- “When I ask them . . . so you’ve got this wonderful case that you think is on point. Who was the judge? And they say, oh, I didn’t think to look at that.”

**Insufficient attention to facts** was noted, both in terms of the importance of facts to the decision maker and how advocates can shape facts to their client’s advantage:

- “The characterization of facts is very frequently what’s going to convince or not convince.”

- “But they do forget, they think if they just lay the facts out that they don’t have to keep leaving them in, and that’s a real problem, you know, that they’ll say, here’s what happened, and then they’ll start talking about the law and they’ll forget that, you know, the facts have to be loaded throughout the entire piece.”

- “[I]t’s trying to tell a story to somebody, in a persuasive way, hopefully . . . you’ve got to persuade the judge you’re on the side of the angels . . . and even if you don’t think you’re necessarily on the side of the angels, you’re trying

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90. In Ontario, a “master” is a court officer who rules on procedural matters within civil litigation actions.
to pull out the elements as to why this is an important element for the judge to care, why should a judge care.”

Analysis is intimately connected to organization:

- “I’m referring to the intellectual organization of, of the sequencing of thoughts, how are you, how are you going to structure the questions you’re asked and the order in which you, you provide either the answers or the analysis. And I’m trying to; sometimes things are backwards, why did you talk about that first when you really need to talk about this first? And, and sometimes when you get them, you missed a step of the analysis by failing to consider what are all the things I have to talk about and what are the order I’m going to talk about them?”

**Wordiness and verbosity:** Participants noted two aspects of wordiness and verbosity: the first was the use of legalese and excessive language, while the second was the more subtle issue of excessive detail.

- “[T]he excessive use of legalese.”

- “[K]eeping a focus on what you’re trying to accomplish at the end of the day . . . too detailed or descriptive, you lose the point, you just get bogged down in verbiage . . . you’re trying to explain all of this stuff which can be irrelevant . . . what’s important, what’s not.”

- “It takes a long time to learn what you can leave out, what not to say, what’s unnecessary.”

**Attention to audience:** While attention to audience surfaced as an issue in writing for judges, it also was noted as an issue in crafting different types of documents for different readers, such as other lawyers or clients.

- “And they also have to think about who they’re really writing to. Because who are, the name at the top of the letter is not always who you’re really writing to. We, as lawyers for example, cannot communicate with the other side’s client. Many times we’d like to communicate with the other side’s client. We can’t. But we do know that the letters we write to the lawyer on the other side in many instances are sent over to the client. It’s a great
opportunity to talk to the other side’s client. And if I write the letter for another lawyer, the client won’t get it. So I have to write the letter in a way that if he sees it, not only will his lawyer understand what I’m saying, if I’m trying to persuade him on something, but it will be accessible to the client as well.”

B. Product: Letter Discussion

In contrast to the general discussion, the specific review of the letter focused on document rhetoric (audience and purpose) and the connection between organization and analysis. The participants were universally of the view that the letter did not serve the purpose of providing the client with clear options, including the pros and cons of each, together with a recommendation. As in the general discussion, analysis was tied to organization; the letter was “scattered and disjointed,” “talking about things at the end that should be at the beginning,” and “not orderly in the options.” One participant observed that “they’re giving you their process, not shaping their process that will suit you as the reader,” thus tying organization to audience needs.

The participants were of the view that the client would probably struggle to understand this letter. First, it was unclear whether the specific client was a lawyer or a human resources director, which might make a difference to their understanding of the law of wrongful dismissal. Second, the client was from Quebec, which might affect both their understanding of Ontario law and the procedure for this particular court. Finally, the objective of the letter was to obtain instructions on how to proceed with the matter, and this objective would not have been obvious to the client reader.

C. Process: General Discussion

The practitioners identified the critical importance of an effective writing process, in particular, revision. Even fairly simple documents require some revision. Newer lawyers did not appreciate the need for revision, nor did they factor in the necessary time (which one participant estimated at 25 percent of the writing time).

As a process issue, one participant identified the importance of thinking through the context:
• “One of the first questions I always ask myself is what is really going on? I mean . . . what does the bigger picture look like and how do each of these issues fit into the bigger picture?”

Participants identified different approaches to the writing task:

• “And when I do a memo, I still do an outline. I mean, it’s rough and it’s flexible and I may do all kinds of things with it, but I just don’t get on the computer and . . . dump my brain out because the editing of something like that is too much work.”

As opposed to

• “But I’ve never written anything that I didn’t just write it first, and then I imposed organization after . . . .”

One participant even identified a “physical” outline: for a complex document, he organized his sources into discrete bundles throughout his office and dictated the document as he moved from one bundle to the next.

D. Process: Letter Discussion

The participants engaged in a lively (and sometimes lengthy) discussion about the process of creating these types of letters, including the virtues of dictating the first draft of a document. The process of document creation is intimately connected to the business of the practice of law; the participants speculated that perhaps there was pressure to contain the costs of litigation, which led to a letter having been sent out in its first draft form.

Our speculation: Primarily through their general feedback, participants speculated about some of the reasons for weakness in young lawyers’ writing skills. These speculations provide valuable topics of inquiry for future research with lawyers who have varying amounts of practice experience.

**Understanding the Importance of Writing:** A number of participants were of the view that an understanding of writing’s importance is critical:
“To do good writing you have to think, you have to start with the assumption that it’s intensely important, what you’re doing.”

Yet there was a widespread sense that younger lawyers did not perceive writing as important:

“I get the sense that they [younger lawyers] just don’t think it’s important.”

Note, however, one lawyer’s speculation that many aspects of young lawyers’ communication difficulties may be driven by their fear of the new advocacy situations they face.

**Use of Technology:** Another area of speculation related to technology’s role in the development of strong legal writing. Some participants pointed to the “computer dump” that can occur with electronic source searching and the negative impact this dump can have on the sorting of relevant sources:

“It’s a function of getting, going from law school and getting free QL [QuickLaw] and dashing around and not, I don't know, maybe, I think they’re not as thoughtful, I think they’re more likely just to sit down and go bup, bup, bup, bup.”

“So, I would much rather have good, recent, high-level authority from the Supreme Court of Canada, the House of Lords, [or] a Court of Appeal that I know that our judges will respect, rather than just the piling on of endless lists of cases which are of dubious authority. And guess what, the computer's only making that worse.”

Further, the availability of electronic precedents within law firms gave rise to concern:

“And there is a huge tendency in complicated commercial documents, if you see something new from another transaction or another document, oh, I should add that to my . . . precedent. . . [A]nd we bloat and we bloat and we bloat, and we end up with a hundred and twenty page credit agreements that, when you actually get down to them, you have approximately six pages that actually do stuff, that define relationships or set out obligations.”
In summary, the concern seemed to be that the ready availability of numerous documents leads to less serious thinking about the appropriate use of these sources. Inappropriate source use, in turn, leads to poor content and thus, a poor written product.

**Reading:** A number of participants voiced opinions about the extent to which younger lawyers read:

- “[I]t seems to me there is a lack of people reading, you know, as there used to be in the past . . . . So as an example, I saw, I think it was a discussion about scientific testing, or about the validity of testing. And somebody was writing a comment about has this . . . been subject to peer review, and they spelled “peer” p-e-e-r and “review” r-e-v-e-u-e, which is somebody who’s heard about peer review but never read the term.”

These decreased reading levels were attributed to poor legal writing for lawyers in early years of practice.

**Good Writing and Experience:** Finally, there seemed to be widespread agreement that achieving expertise in legal writing requires time and experience:

- “I think it takes ten years, it’s almost magical. Seven years, ten years, but ten years, it’s sort of like the light goes [on], you don’t know a thing until ten years in terms of the practicalities and practising and working and the importance of all of these things.”

E. **Teaching and Learning**

The participants discussed both formal and informal learning in the workplace. Formal learning opportunities included workshops provided by the firm as well as those of outside continuing legal education providers, such as the one on judicial writing. Informal learning included use of precedents and feedback on writing as well as continuing relationships with mentors and supervisors. Participants described the importance of one-on-one learning experiences:

- “And, you know, my writing really improved when I got in with this Q.C.,\(^91\) guy, he said, you know, seven words in

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91. Queen’s Counsel—traditionally a Q.C. designation related to the title-holder's
a sentence, that’s it, punchy, one noun, one verb, one thought per sentence . . . .”

- “I was trained in the most inefficient, the most expensive, the most old-fashioned way that it possibly could be done, because I was taught one on one, in a tutorial, which I would have to read my essay aloud to two people, one of whom still remains the brightest lawyer I have ever met in my life anywhere. And to get instant feedback on what you had done was terrifying and deeply sobering. And reading it aloud revealed all the defects in the prose, the fact that you would have to do it week after week meant that you were completely naked and there was, your thought was being judged. And he’s still the brightest lawyer I have ever met. He’s now the clearest writer in the House of Lords and his judgments are an absolute joy, and I learned a lot.”

The two participants from very small firms agreed that, without mentors, they learned through their own mistakes.

The former judge described the importance of feedback from his colleagues at a judicial writing workshop, which he attended at the outset of his judicial career and again about five years into it. In contrast, a senior lawyer described how she found it considerably more difficult to persuade associates to attend a writing workshop than a workshop on some aspect of substantive law.

Across all three focus groups there was some discussion of how the one-on-one approach had changed since they began practice, with the result that new lawyers appeared to receive less individualized help.

F. Identity

The study group participants described a strong sense of connection between their writing and their professional identities:

- “You need to be the kind of person who cares that the letter is a mirror of who you are, it’s a reflection I guess, it is who you are.”

faithfulness to the Crown, but more recently, it reflects a recognition of contribution to the legal profession.
• “[T]hat is your image, and it’s the image you project either to the profession, the world, or whatever. And it’s either one of crispness or intellectual sloppiness.”

IV. DISCUSSION AND CONCLUSIONS

The themes outlined above allow us to formulate a much more informed set of inquiries for a comprehensive research project aimed at developing a description of increasingly sophisticated writing competencies that develop through the years of practice. Additionally, some of the themes seem to re-enforce aspects of expertise in other domains; it seems likely that while legal writing raises its own domain-specific aspects of expertise—particularly in light of the specific nature of legal analysis—it will also share certain facets of expertise as more generally understood.

Three caveats must be noted. First, this work was exploratory in nature, and while saturation was reached, the number of research participants was small. As such, conclusions require further validation through additional research. Second, because the survey subjects consisted of advocacy lawyers, a judge, and research lawyers who supported advocacy work, findings cannot be assumed to be transferable to non-advocacy areas of legal writing. Finally, as a result of the manner in which the researchers’ initial question was posed—“What is most problematic about novice lawyers’ work?”—our subsequent analysis of the data collected requires that we draw inferences about expert performance based on it being the opposite of the problems identified by the research participants.

The focus group results raise questions about the cognitive aspects of expertise in legal writing. For example, discussion of novice writers’ difficulty with integration of facts and law could tie in to Weinstein’s discussion of how some analysts’ work on legal problems occurs primarily in the fact space while others’ is focused in a law space. Key to Weinstein’s research is the fact that experts are able to integrate the two more effectively than novices. Further research should focus on the ability to illus-

92. Weinstein, supra n. 27, at 48.
93. Id.
trate this integration within a written product at various stages of practice.

In relation to Product issue themes identified above, the importance of organization, analysis, and rhetoric—specifically audience and purpose—was consistently raised by focus group participants in both the general feedback and the letter critique. These elements mirror emphasis within current legal writing texts: “Good organization is crucial in legal writing,”94 and “[E]ffective analysis depends on a willingness to peel away assumptions and appearances while opening up several different ways of looking at things.”95 They also seem to tie in to the experts’ ability to understand and respond to the “deep structures” of problems.96 The letter analysis, in particular, was suggestive of lawyers’ ability to “name and frame” the problem by placing it within a larger context for analysis.97 The expert lawyers’ ability to comment on the potential implications of this letter being sent to various individuals, and their reference to employment law principles to critique the letter, suggested a ready ability to call on relevant domain knowledge with minimal cognitive effort. Again, both within the general feedback and the letter analysis, participants commented extensively on the need to be able to reach a conclusion after having assessed the risks associated with various options. This ability seems to tie in to the general ability of experts to generate the best solutions to problems.

What we were not able to discern from the feedback in this research was the actual manner in which the experts themselves would go about solving a messy, ill-defined problem. Nor were we able to gauge how the process might differ among lawyers with different levels of experience. Future research using think-aloud protocols and document analysis from lawyers at various stages of their legal careers will augment our understanding of these elements.

Our analysis of the Process theme reveals apparent connections between our expert participants’ description of how they achieve good written products and the general literature that de-

94. Neumann, supra n. 6, at 62.
96. Chi et al., supra n. 10, at 134.
97. Schön, Educating the Reflective Practitioner, supra n. 11, at 4.
scribes writing as a continuous, recursive process of planning, writing, and revision. While participants differed to some degree on whether their “first draft” was achieved from a quite structured outline or from a more free-flowing articulation of initial analysis, there was uniform agreement about the necessity of using revision to clarify, revise, and generate legal arguments. Editing for basic adherence to grammatical norms was also noted to be a key aspect of the revision process. Participants’ frustration with novice lawyers’ inattention to these basic elements raises questions about the extent to which this problem relates to Williams’ theory about novice writing giving rise to cognitive overload and a corresponding (but temporary) regression in basic writing skills. This is particularly worthy of further analysis in light of the prominent roles that revision and attention to grammatical integrity play in current legal writing texts. Future research that analyzes the differences in a document dealing with the same legal problem, generated by lawyers with different levels of experience, may contribute to additional understanding of the impact of novice transition issues on basic writing abilities. This work will undoubtedly also tie in to the general writing on school-to-work transitions, which require former students to work more quickly, analyze more complex, multi-faceted problems, and manage the anxieties associated with the knowledge that the work being produced is not simply an academic endeavor but part of the ongoing life and progress of a file. In fact, many of the “product” and “process” difficulties described by the research participants are linked to the types of difficulties described in the general school to work transition literature. For example, the novice lawyer who authored the opinion letter that was reviewed by our research participants appeared unable to connect her writing to its social motive: providing the client with clear options and a recommendation. Her text as written did not function as a strand within the “intricate network;” it appeared to stand alone as a review of an isolated event.

98. Williams, supra n. 54, at 15.
100. Schultz & Sirico, supra n. 95, at ch. 8.
101. Dias et al., supra n. 69, at 226–230.
102. E.g. id. at 194–196.
103. Id. at 224–226.
Participant views about the link between good legal writing and professional identity also seem tied to the transition from school, where writing exists to meet academic requirements, to legal practice, where writing forms an integral part of the achievement of client goals and professional success. Future researchers could explore this phenomenon in the context of movement into a community of practice; as Lave and Wenger describe: “[L]earning and a sense of identity are inseparable: They are aspects of the same phenomenon.”\textsuperscript{104}

Speculation among participants about why novice legal writing differs from expert legal writing reveals tentative ties with the literature on overall expertise in writing, and illustrates clearly the need for individualized interviews with participants in future research studies. First, participant speculation relating to the amount of general reading done by younger lawyers, and its relationship to their ability to write well, seems to relate to general findings within the research on expert writing that writers who read more write better, and to research findings suggesting that overall amounts of reading have decreased among incoming law students.\textsuperscript{105} Within future research, interview questions aimed at assessing the amount of reading engaged in by lawyers at different practice stages should be related to assessments of written document quality.

Literature that discusses the time-line involved in achieving expertise (approximately ten years) seems to be reinforced by participant opinion.\textsuperscript{106} However, a more structured assessment of the quality of written documents at different practice stages will provide a more nuanced understanding of how the process of achieving expertise evolves over time.

One of the unexpected areas of speculation within the research that is worthy of further exploration stems from the opinion of a number of participants that young lawyers do not understand the importance of legal writing. If this assumption is true, questions are raised in relation to how to better instill the desired sense of importance in younger lawyers. If the assumption is not true, it may be very useful to determine where the “disconnect” lies between young lawyers’ attitudes and senior lawyers’ percep-

\textsuperscript{104} Lave & Wenger, supra n. 74, at 115.
\textsuperscript{105} Gallacher, supra n. 5, at 182–183.
\textsuperscript{106} Ericsson, supra n. 20, 10.
tions about those attitudes. Our participants’ speculations, and their general view of the writing of their new lawyers, illustrate the uphill struggles that new lawyers face in their transition to writing in practice.

Future research that draws on our conclusions should require an actual writing project and examine pre-writing, composing, and revising processes for lawyers at different stages of development—ideally, at two, seven, twelve and eighteen (or more) years of practice. Researchers should also investigate the learning process within law firms, that is, the extent of the influence of mentors, supervisors, friends, or others.

V. EDUCATIONAL IMPORTANCE

Our current research is important for both law school teaching and for the ongoing professional development of junior lawyers.

At both law school and early practice stages, our overall re-
view of expertise and school-to-work transition research suggests that it is worth paying attention to how realistic institutional performance expectations are at different stages, in light of writers’ exposure to and experience with various contexts within which messy, ill-defined legal problems arise. It is hoped that future research will produce information to assist in this assessment of performance expectations. Participants’ discussion of the importance of mentors to their development as writers lends credence to the proposition that mentoring and one-on-one feedback in law school and through the early years of practice is key to writing success.

Within the law school setting, a few initial observations are offered. First, in response to the literature on expertise that suggests cognitive overload can cause a regression in already-acquired skills, it would be useful to consider pre-screening incoming law students for core writing skills. Such an assessment would allow professors to better assess whether problems such as grammar, sentence structure, and organization stem mostly from

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108. Williams, supra n. 54.
the overload associated with learning substantive aspects of a new (legal) domain, and as such, are more likely to be temporary, or are present prior to the beginning of law school. The latter scenario would allow institutions to recommend remediation strategies to students prior to their commencement of law school.

Next, it seems likely that teaching strategies that emphasize facts, the existence of multiple audiences, and the inter-relatedness of legal and non-legal elements within a legal problem may assist students to develop processes that may foster eventual expert performance. Working through more complex legal writing problems will likely give rise to the need for more individualized feedback in order to foster students’ successful completion of assigned projects. This may require that professors issue fewer assignments with more required drafts in order to allow students to work through the intertwined processes of planning, translating thoughts to text, and reviewing. Tackling increasingly sophisticated writing problems probably also requires institutional commitment to ongoing writing instruction throughout law school.

The school-to-work literature suggests that as students near the end of their law school training, they should be made aware of strategies for learning in the professional work-place.\textsuperscript{109} For example, students should be made aware of the depth and breadth of the transition ahead, and efforts should be made to assist them to understand how to learn from others and how to be alert to the situational elements that will surround them within their new roles.\textsuperscript{110}

In light of the exploratory nature of this research project, the suggestions above are tentative—they call for further research in order to be confirmed or repudiated. Our hope is that this work will begin to mark a path that has the potential to motivate efforts to develop a realistic approach to law school/law practice education that will foster expertise in legal writing.

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\textsuperscript{109} LeMaistre & Paré, supra n. 71, at 378.

\textsuperscript{110} Id.
Appendix A
Coding Framework
(Note that repeat entries have been deleted)

<table>
<thead>
<tr>
<th>Units of Meaning</th>
<th>Categories/Sub-Categories</th>
<th>Themes</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 years—light goes off</td>
<td>Speculation</td>
<td>Speculation</td>
</tr>
<tr>
<td>5 to 6 years for comfort level</td>
<td>Speculation</td>
<td>Speculation</td>
</tr>
<tr>
<td>Ability to shift gears</td>
<td>Process required for good legal writing</td>
<td>Process</td>
</tr>
<tr>
<td>Ability to teach good writing</td>
<td>Speculation</td>
<td>Speculation</td>
</tr>
<tr>
<td>Assumption of importance</td>
<td>Speculation</td>
<td>Speculation</td>
</tr>
<tr>
<td>Assumption of Importance (lack in younger people)</td>
<td>Speculation</td>
<td>Speculation</td>
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<tr>
<td>Assumption of reader’s background knowledge</td>
<td>Assumed—final product—rhetoric</td>
<td>Product</td>
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<tr>
<td>Attention to facts</td>
<td>Assumed—final product</td>
<td>Product</td>
</tr>
<tr>
<td>Audience</td>
<td>Assumed—final product—rhetoric</td>
<td>Product</td>
</tr>
<tr>
<td>Avoiding procrastination</td>
<td>Process required for good legal writing</td>
<td>Process</td>
</tr>
<tr>
<td>Better readers are better writers</td>
<td>Speculation</td>
<td>Speculation</td>
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<tr>
<td>Bloat</td>
<td>Evidenced—final product</td>
<td>Product</td>
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<tr>
<td>Bold conclusions</td>
<td>Evidenced—final product</td>
<td>Product</td>
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<tr>
<td>Brain dump</td>
<td>Assumed—final product</td>
<td>Product</td>
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<tr>
<td>Business of lawyering practice</td>
<td>Practice realities</td>
<td>Practice</td>
</tr>
<tr>
<td>Clarity</td>
<td>Evidenced—final product</td>
<td>Process/Product</td>
</tr>
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<td>Communication</td>
<td>Process required for good legal writing</td>
<td>Process</td>
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<tr>
<td>Completeness</td>
<td>Evidenced—final product</td>
<td>Product</td>
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<tr>
<td>Constant trimming</td>
<td>Required process for</td>
<td>Process</td>
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<td>Units of Meaning</td>
<td>Categories/Sub-Categories</td>
<td>Themes</td>
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<td>good legal writing</td>
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<tr>
<td>Context</td>
<td>Process required for good writing</td>
<td>Process</td>
</tr>
<tr>
<td>Cut and paste</td>
<td>Assumed—final Product</td>
<td>Product</td>
</tr>
<tr>
<td>Decision making</td>
<td>Evidenced—final product</td>
<td>Product</td>
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<tr>
<td>Dictating</td>
<td>Process used to write</td>
<td>Process</td>
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<tr>
<td>Dictation—iterative process</td>
<td></td>
<td>Process</td>
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<tr>
<td>Different contexts of writing</td>
<td>Understanding of process required for good writing</td>
<td>Process</td>
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<tr>
<td>Different types of writing</td>
<td>Understanding of process required for good writing</td>
<td>Process</td>
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<td>Edit emails</td>
<td>Required process for good legal writing</td>
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<td>Editing—going through document again and again</td>
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<td>Effective use of tools</td>
<td>Process used to write</td>
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<td>Expert vs. experienced non-expert</td>
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<td>Failure to take writing seriously</td>
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<td>Faulty distinguishing</td>
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<td>Free access to QL—lack of thoughtfulness</td>
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<td>Good writing “looks easy”</td>
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<td>Good writing not function of years</td>
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<td>Importance of thinking</td>
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<td>Inattention to statutes</td>
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<td>Intellectual organization</td>
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<td>Intention</td>
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<td>Lack of situational knowledge</td>
<td>Process required for good writing</td>
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<td>Large scale organization</td>
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<td>Linda Flower—roles of writers</td>
<td>Process required for good legal writing</td>
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<td>Maturity to be torn apart by colleagues</td>
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<td>Not coming to a landing</td>
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<td>Rules of good writing cut across disciplines</td>
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<td>Stream of consciousness vs. outline</td>
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<td>deteriorating performance?</td>
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<td>Think through counterargument</td>
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<td>Process required for good legal writing</td>
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<td>Typing own material</td>
<td>Process used to write</td>
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<td>Understanding linked to clarity</td>
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<td>Understanding of problem</td>
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<td>Unsupported conclusions</td>
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<td>Use of technology</td>
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<td>Young lawyers do not have the experience</td>
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<td>Young lawyers too imitative</td>
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## Appendix B
Research Literature on Novice-Expert Lawyering

### Reading Cases

|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Question | Part 1: What knowledge and strategies do experts use to understand and analyze a legal case?  
Part II: How best to teach expert reading strategies to law students? |
| Method | Observed and interviewed participants as they think-aloud while reading two contracts cases. Participants were told to read to prepare to answer questions in class. |
| Participants | Eight law professors, two attorneys, and ten law students with at least a masters degree. |
| Findings | Experts used six general comprehension strategies: use of context, overview, rereading analytically, underlining, synthesis, and evaluation. Novices used five strategies not used by the experts: expressing confusion about legal terms, expressing confusion about English words with legal meanings, contextually defining words, adding incorrect information, and attempting to assign names to the plaintiff and defendant. |
| Conclusion/Discussion | Developed case analysis guidelines to help novices: putting case in context, providing an overview of the case, rereading the facts and important terms, and synthesizing the case elements. Conducted a further experiment to see which method of delivering case guidelines would be most effective.  
All law students benefitted from guidelines to varying degrees. Second- and third-year students not much helped; consider whether different guidelines for different levels of cognitive development might be more appropriate. |
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<tr>
<td><strong>Question</strong></td>
<td>Examines individual reader differences in a specific domain, and to determine if a relation exists among strategy use, reading outcomes, and domain performance as assessed by grades.</td>
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<tr>
<td><strong>Method</strong></td>
<td>Observed reading a law review article; practice with a short text on how to do a think-aloud. Reading task was to prepare for class; told to be ready to focus on what the text said, what it might mean, and anything else they deemed important. Then was a recitation section, where interviewer simulated a classroom situation. Final debriefing on personal perceptions about reading abilities.</td>
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<tr>
<td><strong>Participants</strong></td>
<td>Twenty students who had just completed first year. Ten highest ranked and ten lowest ranked for first-year grade point averages.</td>
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| **Findings** | Students primarily used three types of reading strategies: problematizing, rhetorical, and default.  
- Problematizing: Raising questions about the meaning and structure of the cases.  
- Rhetoric: evaluative.  
- Default: linear progression through the text.  
Because rhetorical used only about 8 percent, compared only problematizing and rhetorical. Found a difference in cognitive processing, where the use of the problematizing strategy appeared a better predictor of first-year performance than either LSATs or undergraduate GPA. |
| **Conclusion/Discussion** | Problematizing strategy helpful to these students in this reading situation.  
Law schools should look into reading practices of students to make the challenges of this novel discourse public. |
<table>
<thead>
<tr>
<th><strong>Article</strong></th>
<th>Laurel Currie Oates, <em>Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs</em>, 83 Iowa L. Rev. 139 (1997).</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Question</strong></td>
<td>How do students read cases to prepare for class?</td>
</tr>
<tr>
<td><strong>Method</strong></td>
<td>Think-aloud while reading cases; structured interview about how they prepared for class, whether their think-aloud was the same or different from how they usually read cases.</td>
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<tr>
<td><strong>Participants</strong></td>
<td>One law professor with three years of practice experience and three years teaching LRW, and four students admitted under special admissions.</td>
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<tr>
<td><strong>Findings</strong></td>
<td>Professor put case in historical and legal context, used analysis, synthesis, and evaluation. Needed to read for a specific purpose. Students appeared as four different types: expert reader, expert student, misguided student, and uncaring student.</td>
</tr>
<tr>
<td><strong>Conclusion/Discussion</strong></td>
<td>To improve odds for special admissions students: explain the differences between legal reading and other types of reading, model reading as an expert, and consider diagnostic tests that evaluate students’ ability to read cases.</td>
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<tr>
<td><strong>Question</strong></td>
<td>Compares reading strategies of experts compared to law students.</td>
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<tr>
<td><strong>Method</strong></td>
<td>Participants read a case using think-aloud method; purpose of reading was to prepare for a meeting with a client who had a similar case; short interview after the reading. Coded for three themes: problematizing reading strategies, default reading strategies, and rhetorical reading strategies.</td>
</tr>
<tr>
<td><strong>Participants</strong></td>
<td>Eight practicing lawyers and two judges, average sixteen years experience, range from three to thirty-six years. Ten law students, all within top 50 percent after one term, who had taken all the same classes in first semester law school.</td>
</tr>
<tr>
<td><strong>Findings</strong></td>
<td>Contrast in default and rhetorical strategies, less in problematizing. Experts connected with prior knowledge and experience, connected to the purpose of the reading, and contextualized within the case.</td>
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<tr>
<td><strong>Conclusion/Discussion</strong></td>
<td>Support prior research on case reading.</td>
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## Interviewing

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<tr>
<td>Question</td>
<td>Examines the effectiveness of the method of learning by experience alone within lawyer-client interviewing and notes where training might best be injected into the system.</td>
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<tr>
<td>Method</td>
<td>One hundred and forty-three live-client interviews were videotaped and analyzed—expert assessors looked at 13 tasks within an initial client interview; how well the lawyers performed on 19 techniques or sub-skills; qualities of 12 categories of information; how well they thought the interview had gone; asked clients how well they thought the interview had gone.</td>
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<tr>
<td>Participants</td>
<td>One hundred and forty-three participants, from trainees through to 40 to 49 years old; mostly personal law attorneys with legal aid funding.</td>
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<td>Findings</td>
<td>Lengthy findings; quantitative charts; minimal differences between experts and novices; two significant differences were: opening question, and summarizing facts and checking back with client. Also gathered more contextual detail.</td>
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<tr>
<td>Conclusion/Discussion</td>
<td>Experience seems to enhance competence in only a few discrete areas of performance; no sequential progression in ability. Speculates that this result may be the result of experience without reflection.</td>
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Do students in clinical program begin to develop the “mental file” of the experienced attorney?

Presented with a problem and a standardized client, with 50 minutes for an initial interview and counseling. Asked to review videotape to elaborate their thinking process and hypothesis. Points awarded for each “fact” elicited.

Experts: four lawyers who practiced immigration law, between three and twenty years of experience. Novices: two students who had taken both immigration course and clinic. One student who had taken only the immigration course.

Novices showed some difficulty in sorting relevant from irrelevant. Experts showed high level of confidence; ended with an outline of a plan of action, with options; agreed with each other on the hierarchical ordering of remedies. Very fast; not misled by red herrings in the facts. Novices got details wrong.

Experts had developed schemas; an organizational system with structure and procedural knowledge.
Problem Solving

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<tr>
<td>Question</td>
<td>What does a lawyer do when faced with a new legal situation?</td>
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<tr>
<td>Method</td>
<td>Initial evaluation of a Social Security Disability case; tape recorded as participants worked through the SSD problem.</td>
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<tr>
<td>Participants</td>
<td>Six law students: three with clinical SSD experience, three with simulation SSD experience. Three lawyers experienced in SSD work. One law professor (sub expert).</td>
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<td>Findings</td>
<td>Inexperienced: attended to information in the order presented; “find something in the regs” search strategy; used less accurate and general formulations; lack of attention to actual language of the regulations, imprecise analysis and characterization of the facts. Experts paid attention to bits of information in a different sequence (as if each had an individual template); used forward reasoning by automatic application of a rule; required less information to reach a conclusion; recall and use very concrete and particular information. Sub expert reached flawed conclusion.</td>
</tr>
<tr>
<td>Conclusion/Discussion</td>
<td>Found experts used two different ways to approach the problem—the “law space” and the “problem space.”</td>
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**Article**

**Question**
Investigating expertise-related differences in conceptual knowledge structures and ontology in law.

**Method**
Novices: twenty-four students. Advanced: twenty-four faculty members. Experts in civil law: twelve lawyers with an average of five to nine years of professional experience.

**Participants**
Card-sorting: thirty different cards relating to torts—asked to create clusters. Concept elaboration task—provided with five different concepts and asked to verbalize everything they knew—two minutes per concept.

**Findings**
Novices showed no particular pattern in the way they clustered the concepts; Experts mentioned more central concepts, more fields of law, and more top concepts.

**Conclusion/Discussion**
Knowledge becomes more hierarchically structured with increasing expertise.
“WRITING AS CONVERSATION”: USING PEER REVIEW TO TEACH LEGAL WRITING

Marilyn R. Walter∗

In 2007, two important reports challenged law school faculty to re-examine the purpose and pedagogy of legal education. The first was sponsored by the Carnegie Foundation for the Advancement of Teaching and is commonly referred to as the “Carnegie Report.” The second, Best Practices for Legal Education: A Vision and a Roadmap, was published by the Clinical Legal Education Association.

The Carnegie Report regards legal education as an apprenticeship of the mind where students start on the road towards assuming the identity of competent and dedicated professionals. The Report identifies three aspects of this apprenticeship:

1. intellectual—focusing on formal knowledge and analytical reasoning;
2. skills used by competent practitioners; and
3. professional values and ethics.

The authors of the Report conclude that the current system of legal education over-emphasizes the first apprenticeship of intellectual skills based on knowledge. They recommend a curriculum that more fully integrates the three apprenticeships in order to do justice to the full range of skills necessary to prepare stu-

2. © 2010, Marilyn R. Walter. All rights reserved. Professor of Law and Director of Writing Program, Brooklyn Law School.
6. Id. at 47. Legal education’s signature pedagogy is the case-dialogue method, id. at 50, and legal education “shows powerful bias in favor of academic values.” Id. at 163.
The Journal of the Legal Writing Institute

students for the legal profession. Moreover, the Report comments positively on the pedagogy used in legal writing programs, with particular emphasis on feedback, and practical lessons. In general, the Report has had some impact on law school curricula and on legal writing curricula, with some schools actively seeking to implement its recommendations.

In Best Practices for Legal Education, the authors’ central message is similar. They emphasize the value of pedagogy that blends the theoretical and practical—recommending “context-based education.” They call on law schools to:

1. broaden the range of lessons they teach, reducing doctrinal instruction that uses Socratic dialogue and the case method;

2. integrate the teaching of knowledge, skills, and values; and

3. pay greater attention to instruction in professionalism.

Both the Carnegie Report and Best Practices urge that law school faculty give students learning opportunities to practice expert performance and feedback to help them improve that performance.

To consider how those opportunities can be provided in teaching legal writing, I looked back to two critical experiences in my own development as a writer. The first was my work as an attor-

6. Id. at 29.
7. Id. at 99. “[L]egal research and writing classes have long practiced ways of integrating the conceptual and the practical.” The Carnegie Report also comments, “The legal writing courses . . . provide a pedagogical experience that in many ways complements what is missing in the case-dialogue classes that make up most of the students’ first year.” Id. at 104.
8. See Robin Boyle, LWI Symposium, Short Survey Responses (Sept. 6, 2009) (on file with Author).
10. Stuckey et al., supra n. 3, at 104–116.
11. Id. at vii, 71–76.
12. Id. at 175–197; Sullivan et al., supra n. 2, at 100.
ney at the National Employment Law Project, a legal services back-up center. Our job was to provide support to local legal service offices by writing appellate briefs representing plaintiffs in federal employment discrimination cases. When I joined, it was a small office with four excellent attorneys. Our common practice was to write a draft of a brief and then circulate it to all of the other attorneys for their comments. That enabled me, as the most junior attorney, to read work by experienced attorneys, to see that I, too, had something to contribute as a reader, and to get comments on my own work. The second critical experience in my development as a writer was, in fact, starting to teach legal writing in law school.

Using peer review as a teaching technique is a way of integrating these two experiences into my classes. I have two main goals for my students. My first goal is to teach students to be good editors of their own work. By editing and commenting on someone else’s work, they can heighten their awareness of the writing process and learn to apply those same skills to become good editors of their own work. The second goal is to teach students to be good colleagues. Law school can be competitive and individualistic. Legal practice can be competitive as well. But it is often collegial, because people must work in teams and even work collaboratively with lawyers on the other side.

Two scholars of composition theory have been highly influential in the use of peer review in the legal writing context. Peter Elbow is Professor Emeritus of the University of Massachusetts at Amherst and was the Director of the Writing Program. He is the author of, among other important texts, *Writing with Power: Techniques for Mastering the Writing Process.* Peter Elbow is Professor Emeritus at Brooklyn College and author of the classic text, *A Short Course in Writing.* For both, writing is social and collaborative.


14. Bruffee, supra n. 1; see also Kenneth A. Bruffee, *Collaborative Learning: Higher Education, Interdependence, and the Authority of Knowledge* (2d ed., John Hopkins U. Press 1999); Kenneth A. Bruffee, *Collaborative Learning and the “Conversation of Man-
Professor Bruffee was a Founder of the Brooklyn College Institute for Training Peer Tutors. Recently, the Writing Center Journal celebrated his contributions to peer tutoring and collaborative learning through a special issue.\textsuperscript{15} Professor Bruffee writes that his basic goal is to “help students learn to read and write better through collaborative learning. Collaborative learning assumes that reading and writing are not solitary, individual activities, but social and collaborative ones.”\textsuperscript{16} He suggests to students that through peer review, while helping other students become better writers, they will learn how to become better writers themselves.\textsuperscript{17} He also states that “to become a good writer, you have to be a good reader.”\textsuperscript{18} His method is to have each student first describe the writing of another student; second, write a peer review of it; and third, discuss the review with the other student.\textsuperscript{19} He suggests that “if students converse constructively with peers about their own and other people’s writing, they will internalize the language of that conversion [and] be able to carry on the same conversation with themselves about their own writing internally when they are working alone.”\textsuperscript{20} 

Professor Elbow, the author of \textit{A Community of Writers} and \textit{Sharing and Responding},\textsuperscript{21} has written extensively on peer response groups.\textsuperscript{22} Focusing specifically on how writers and readers interact, he identifies two types of feedback: criterion-based feedback and reader-based feedback.\textsuperscript{23} Legal writing faculty are

\begin{itemize}
  \item describe their essays with a descriptive outline [what each paragraph does and what is says,]
  \item read their essays aloud to their peers, who are their fellow writers in the class,
  \item exchange their essays with other students and write peer reviews of each other’s essays,
  \item and then confer, comparing the way they have read their own and each other’s essays and negotiating their differences.
\end{itemize}

\textit{Id.} at 3.

\begin{itemize}
  \item Elbow & Belanoff, \textit{A Community of Writers}, supra n. 13; Elbow & Belanoff, \textit{Sharing and Responding}, supra n. 13.
  \item Elbow & Belanoff, \textit{Sharing and Responding}, supra n. 13, at v.
  \item Elbow, \textit{Writing with Power}, supra n. 13, at 240.
\end{itemize}
probably more familiar with criterion-based feedback, given the number of checklists on memos and briefs that appear in legal writing texts. Professor Elbow identifies four basic questions to use in determining how a piece of writing measures up to certain criteria:

1. What is the quality of the content of the writing: the ideas, the perceptions, the point of view?
2. How well is the writing organized?
3. How effective is the language?
4. Are there mistakes or inappropriate choices in usage?

I personally have found that peer review seems to work better with law students when they are given more specific questions to which they must respond. They are less likely to feel uncomfortable and more likely to provide feedback that is helpful.

Professor Elbow finds reader-based feedback even more useful, because it tells the writer how the audience is actually responding to the writing. He suggests asking three broad questions:

26. In discussing his methods of getting feedback, Professor Elbow notes, you can avoid the most common problems in getting feedback: people beating around the bush and not telling you anything at all; or giving you a vague holistic judgment such as “B-plus” or “I liked it”; or going into negative gear and “critiquing you by finding every real and imaginable mistake there could be (“I hope I didn’t discourage you or anything”); or else trying to imitate what they remember from their teachers and talking about nothing but “topic sentences”; or else grabbing it out of our hands and trying to re-write the whole thing the way they think it ought to be . . . )

Id. at 298.
1. What was happening to you, moment by moment, as you were reading the piece of writing?

2. Summarize the writing: give your understanding of what it says or what happened in it.

3. Make up some images for the writing and the transaction it creates with you.\textsuperscript{27}

As legal writing faculty, we frequently emphasize to our students how the rhetorical context (audience, purpose, tone) differs with the types of documents we assign.\textsuperscript{28} A focus on reader-based feedback will heighten this emphasis with respect to audience for students.

These principles have been applied in legal writing courses in different ways in different programs, and their use is increasing. The first is the ground-breaking program at Mercer Law School involving Advanced Writing Groups. Described as a course “based primarily on Peter Elbow’s concept of writing groups, in which writers receive weekly feedback from other writers,”\textsuperscript{29} groups of six students meet one hour a week with their writing professor to participate as writers and readers.\textsuperscript{30}

Another approach is to use peer review to teach skills within a traditional legal writing course. Exercises have been based on writing the statement of facts section of an appellate brief,\textsuperscript{31} the thesis paragraph of a memo, or a summary motion memoran-

\textsuperscript{27} Id. at 240.

\textsuperscript{28} E.g. Nancy L. Schultz & Louis J. Sirico, Jr., Legal Writing and Other Lawyering Skills 106 (4th ed., LexisNexis 2004). The Context and Structure Checklist begins:
- Identify and articulate the goal of your document.
- Identify your audience and any expectations you know or suspect that audience has for your document.

\textsuperscript{29} Id.; see also Shapo et al., supra n. 24, at 172 (audience for a legal memorandum), 365–366 (audience for persuasive writing).


\textsuperscript{31} E-mail from Ruth Anne Robbins, to Author, Peer Editing of Facts (Suggestions on Timing and Kinds of Comments) (Jan. 28, 2009) (on file with Author).
dum. Typically these exercises use criterion-based feedback, with an outline or list of questions given to the students on what to look for. An hour of class time may be divided as follows: five minutes on teacher instructions and context; twenty minutes for each student to work on another student’s paper; twenty minutes for the students to give each other feedback; and five minutes to wrap-up the exercises.

In my own writing class this fall, I used two peer review exercises. I told the students there were multiple purposes for the exercises. They would learn to better edit their own work by editing another person’s work, they would help fellow students improve their writing, and they would begin the process of becoming the person in their law office who others would turn to for help. I used criterion-based feedback, asking them to revise a sample memo Discussion section, exchange their revision with another student, and then read their own revisions aloud and give feedback to one another. For more intensive sessions, see Berenson & Berenson, supra n. 29. See also Davis, supra n. 32, at 5 (one-and-a-half hour class period); e-mail from Teresa Phelps, to Author, Peer Review Feedback; Peer Review Work with Co-Counsel, Work with Opposing Counsel (Aug. 11, 2008) (on file with Author).

In addition, this spring, for the first time I used reader-based feedback as part of an exercise in writing the Statement of Facts in an appellate brief involving the admissibility of evidence on the battered woman’s syndrome. The students had already written a Statement of Facts representing one side. I paired up students on the same side and said I wanted them to read their set of facts to each other. As each student read, the other was to think of how she was responding to what was said and how it made her feel about the defendant and her situation. Finally, I asked them to write down their impressions and share them after each had finished reading. For most students, it was a way of getting an immediate response to their writing from another person, and also getting insight from reading their work aloud.
student, and then discuss their comments with each other. The level of engagement varied.

For example, one question regarding the case analysis was: “Are the facts of your case compared to the facts in the precedent when analyzing each issue?”

**Student Response #1:** In the third paragraph of your discussion, you should talk about the facts of *Suhay* right after the topic sentence. You did this in the second paragraph of the discussion and it makes it clearer for someone who has not read the cases. You do an awesome job of synthesizing the cases in the discussion. Also, you say that a sufficient amount of time hasn’t passed, but you don’t give a concrete enough reason. None of the cases indicates what a sufficient amount of time is. Maybe it would be more effective to talk about what a reasonable amount of time is not with respect to these facts.

**Student Response #2:** “Yes.”

Clearly, not every student was equally engaged in this particular exercise, but many students made careful and thoughtful comments. And the exercise succeeded in beginning the discussion of working with colleagues and planting the seeds. I would certainly use the technique again in selected contexts.

In conclusion, using peer review as a teaching technique is an exciting way to work with students. It is empowering for them, and valuable in developing their skills in becoming competent and dedicated professionals.

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35. As the student comments were anonymous, the authors of these two examples are unknown.

PAYING ATTENTION OR FATALLY DISTRACTED? CONCENTRATION, MEMORY, AND MULTI-TASKING IN A MULTI-MEDIA WORLD

M. H. Sam Jacobson*

I. INTRODUCTION

Success in law school requires intense and sustained cognitive effort. Students must master both the abstract and the concrete. Students must read and process more than 1,000 pages of material for each course, five courses per semester. From that material, they begin with the concrete by extracting a variety of details from each page, including each piece of language parsed from any enacted law involved, as well as the procedure, facts, legal issue, decision, and reasoning of each case. But working with the details is just the beginning.

From this material, students must also master multiple levels of abstraction. They must determine which details are analytically relevant and which are not. They must understand how the details fit together and why they are analytically significant. They must create an analytical framework that establishes and defines the required analysis and any alternative analyses. They must understand the policies furthered by each analysis and critique the relative success at achieving those policies.

All of this, though, is just foundational. Students must then apply the foundational information to evaluate a legal problem. They must sort through the facts of the legal problem to determine what legal questions are presented. They must understand which facts are legally relevant to those questions and which facts

* © 2010, M. H. Sam Jacobson. All rights reserved. Willamette University College of Law. Special thanks to Robin Boyle Laisure for her helpful comments, to Robin and Kristin Gerdy for their patience and support as I finished this piece, to Leif and all his doggy friends for teaching me more about attention than any study I read, and above all to Gray for dutifully “oohing” and “ahing” over earlier drafts and for helping me to imagine when I thought the well had run dry.
are not. They must apply the required analysis for each legal question. To do this, they must structure the analysis and then evaluate each point within each of the relevant tests. When evaluating each point, they must define the point, relying on prior interpretations, and determine if the facts from the legal problem are a good fit or not. In the end, they must answer the question asked of them; whether it is to predict how a court most likely would rule, to achieve a particular remedy, to achieve certain success, to limit damages, to negotiate a settlement, or any of a number of other options.

Throughout these analytical steps, students will be engaged in sophisticated reasoning. Students will engage in deductive reasoning when they extract rules, tests, and policies from judicial opinions resolving individual disputes. They will engage in inductive reasoning when they apply general statements, whether the general language of enacted law or the rules or tests extracted from cases, to facts. They will engage in reasoning by analogy when they evaluate the similarities and differences between the legally relevant facts of a case and the facts of their legal problem. They will draw reasonable inferences and critique unreasonable inferences. They will identify inaccuracies and logical fallacies, and they will work with vagueness, indefiniteness, possibilities, conditions, and probabilities. Students will be engaged in every level of knowledge, from the simplest, memorization, to the most complex, reasoning.

And there's more: The description thus far only identifies the essential cognitive tasks for the law school classroom and the final exam. Even more cognitive effort is involved with clinics, externships and internships, trial practice, negotiations, and other similar law school settings.

To successfully engage in the cognitive heavy-lifting that is required for law school, students must be able to pay attention and to concentrate. Law professors often bemoan that students are not engaged in the classroom discussion when they surf the web, answer e-mail, and play FreeCell instead of marveling at the intricacies of joinder, justiciability, or executory interests. Some law professors respond that this situation is no different from the doodling and mind-wandering of the pre-laptop era. Both are right, and both are wrong. They are right in stating that wandering minds existed before laptops, and they are right that students whose minds are wandering are not engaged in the classroom dis-
cussion. However, they are wrong in thinking that this does not present a problem in learning, or that the problem will be solved simply by banning laptops.

In this Article, I will discuss the role of attention in learning, what limits attention, and how to improve the ability to pay attention and concentrate.

II. ATTENTION AND LEARNING

What is attention and how is it achieved? Generally, attention is the ability to attend to desired or necessary stimuli and to exclude unwanted or unnecessary stimuli. While this may seem simple enough, it is not. Learning involves multiple cognitive processes, including absorbing, processing, remembering, and retrieving information. Attention is needed in each of those processes. Let me illustrate.

Learning begins by absorbing new information through our senses. Whether consciously or subliminally, new information is absorbed through sight, hearing, touch, smell, or taste. These senses are bombarded with stimuli, but we must attend, or pay attention, to those that are relevant to the task at hand. For example, a runner who is attending to breathing and cadence may not notice traffic; a runner who is attending to traffic may not notice the squirrels romping up and down trees with nuts in cheek; and a runner who is attending to the squirrels may not hear the motor of a vehicle or see the pothole in time to avoid it.

Attention also requires ignoring stimuli that are not relevant to the task at hand. For example, a student wanting to read in the library must ignore the conversation at a neighboring table, the dog barking outside the window, and the person walking by.

The stimuli attended to are then processed. Some stimuli are processed without our having to attend to them, such as automatic or highly practiced tasks. Automatic tasks are those tasks that do not require conscious control, such as walking, chewing,
breathing, and the like.\textsuperscript{5} Highly practiced tasks are tasks that originally required attention, but with practice became more automatic.\textsuperscript{6} For example, consider the difference between the beginning student of piano and the pianist in a cocktail lounge. When learning to play the piano, the student must pay attention to the notes on the page, the placement of the fingers, the location of the keys, the use of the pedals, and much more. However, after much practice, the lounge pianist can do all of these things automatically while carrying on a conversation or singing into a microphone.

Highly practiced tasks are only automatic within the scope of what was highly practiced.\textsuperscript{7} For example, the pianist who was highly practiced at playing new age jazz suitable for a cocktail lounge would have to pay attention when playing Tchaikovsky’s First Concerto in B-flat Minor. In addition, highly practiced tasks can require attention when new circumstances occur.\textsuperscript{8} For example, typing may be a highly practiced task, but the typist must attend to the task to correct a mistake or to use parts of the keyboard that are not often used. Similarly, driving may be a highly practiced task that a driver can do automatically, but the driver must pay attention when road conditions change such as when there is road construction, ice, or an accident.

Tasks that are not automatic tasks or highly practiced tasks require attention.\textsuperscript{9} The learner must not only consciously attend to the task to be done, but must also exercise cognitive control of any interruptions and distractions from that task.\textsuperscript{10} Only those


\textsuperscript{6} Johnson & Proctor, supra n. 3, at 175; Logan, supra n. 5, at 492–519.

\textsuperscript{7} See e.g. Richard M. Shiffrin & Walter Schneider, Controlled and Automatic Information Processing: II. Perception, Learning, Automatic Attending and a General Theory, 84 Psychol. Rev. 127, 131–133 (1977) (practice with one response to a task improved speed and recall on that task but when an element of the task was changed, performance was poor and slow, and recall was limited); see also Logan, supra n. 5, at 501–508 (automaticity is specific to the stimuli experienced during training).

\textsuperscript{8} Shiffrin & Schneider, supra n. 7, at 133 (change of an element of an automatic, rehearsed task required controlled attention).

\textsuperscript{9} Johnson &. Proctor, supra n. 3, at 322–323; Shiffrin & Schneider, supra n. 7, at 127, 131–133.

\textsuperscript{10} Cognitive control is needed to stay on task, that is, to monitor and regulate performance related to goal-directed behavior. Johnson & Proctor, supra n. 3, at 200 (“[M]emory processes may be required to actively inhibit irrelevant information.”); David
tasks attended to will be remembered, so if interruptions and distractions are not controlled, the right things may not be remembered. This is because of the limits of working memory or the limits of attention when using working memory, depending on the study or the theorist.

What is working memory? Working memory is a cognitive function that processes information over brief periods of time. Working memory is essential to learning, including inputting information, and it is highly correlated to reasoning ability and intelligence. The information processed in working memory is that which has been attended to and which has not been forgotten. Conventional wisdom has been that working memory can only hold seven bits of information, plus or minus two. However, subse-

P. McCabe et al., The Relationship between Working Memory Capacity and Executive Function: Evidence for a Common Executive Attention Construct, 24 Neuropsychology 222, 222 (2010); see infra nn. 55–76 and accompanying text (discussing how distractions capture our attention and interfere with memory and reasoning).
11. Id. at 153.
17. See e.g. Chris R. Brewin & A. Beaton, Thought Suppression, Intelligence, and Working Memory Capacity, 40 Behaviour Research & Therapy 923, 928 (2002).
18. To illustrate this principle, we can only remember dreams if they are recalled immediately after waking because while we are sleeping, only working memory is available, and because we cannot attend to the information in it while we are sleeping, the information is constantly being replaced by new incoming information until we wake up and can attend to the information in working memory. Jie Zhang, Memory Process and the Function of Sleep, 6 J. Theoretics 1, 5 (2004) (available at www.journaloftheoretics.com/Articles/6-6/Zhang.pdf); see also William A. Johnston & Veronica J. Dark, Selective Attention, 37 Annual Rev. Psychol. 43, 45 (1986) (using the “cocktail-party problem” to illustrate how attention can be selective).
19. George A. Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on
quent studies indicate it may be significantly less than that, perhaps three to five, depending on the type and complexity of information and the degree of chunking, or recoding, of the information. In addition, the larger the chunk, the fewer chunks that working memory can handle. When the chunks are large, working memory may have a capacity of only two chunks.

Chunking involves associating pieces of information, so that the chunk becomes one of the bits in working memory, rather than each piece being an individual bit in working memory. People chunk information all the time in their daily lives, often without giving it a second thought. For example, seven- and ten-digit phone numbers and nine-digit Social Security numbers are chunked into units of two, three, and four; and sixteen-digit credit card numbers are chunked into units of four. Without chunking in some manner, too many bits exist for working memory to handle, meaning some of the information will be forgotten, disappearing into the thought-sphere, that place of limbo for unclaimed thoughts, and will not be available for processing.

Consequently, chunking is important to working memory for inputting, processing, and remembering information. In an early experiment, people were asked to remember these letters: fbi-cbsibmirs. The letters could not be remembered without chunking because working memory could not handle this many individual bits of information. However, if people chunked the letters into fbi, cbs, ibm, and irs, they had sufficient capacity in working memory to recall the letters sequentially and accurately. In this manner, chunking allows more information into working memory where it will be held until it is processed into long-term memory.
In addition to needing attention to absorb the right bits of information into working memory, attention is needed to hold a bit of information in working memory so that it can be processed and retained in long-term memory.\textsuperscript{25} Holding information in working memory requires rehearsal in which the person thinks of the bit of information repeatedly until it becomes sufficiently automatic to not require attention.\textsuperscript{26} This rehearsal is needed to avoid losing bits of information from working memory because a bit remains in working memory only for a very short period of time, say two seconds.\textsuperscript{27} This time limitation also means that processing must occur quickly, because the longer the time taken for processing, the more opportunity for bits of information to be forgotten.\textsuperscript{28}

Next, attention is needed to process the information into long-term memory.\textsuperscript{29} This processing tends to be either verbal (words) or visuospatial (pictures or diagrams),\textsuperscript{30} whichever method of processing a learner habitually prefers.\textsuperscript{31}

Regardless of processing method, information stored in long-term memory generally must be chunked to facilitate retrieval.


\textsuperscript{26} Cowan, supra n. 12, at 93.


\textsuperscript{29} Attention is needed to encode and store information into long-term memory, such as through repetition and chunking, for it to be available for future retrieval. Meyers, supra n. 2, at 347–360; Cowan, supra n. 12, at 93 (coding and rehearsal needed for long-term memory).


That chunking is easiest when new information can be associated with information already in long-term memory. For example, law students who are taking Civil Procedure are often confused about the difference between improper venue and dismissal. I ask if they have ever been to a concert and the answer has, so far, always been yes. If the concert producers do not sell as many tickets as they thought, they might move the concert from a 10,000 seat stadium to a 2,500 seat theater. That is a change in venue, and the concert will go on in the new venue. However, the concert producers might also cancel the performance. That would be analogous to a dismissal. If the concert takes place later, it is analogous to a dismissal without prejudice where the lawsuit can be refiled. However, if no concert will ever take place, it is analogous to a dismissal with prejudice: it is done, finito, caput. With this example, students always understand how the concepts differ simply by connecting the concepts with something they already know.

With the addition of new information, new chunks will form, old chunks will reform to account for the new information, or new structures will form involving multiple chunks. However, when new information cannot associate with any information already in long-term memory, entirely new structures must be created, beginning in working memory. This requires greater attention than associating new information with information already existing in long-term memory. It is also susceptible to more mistakes because of the greater need for attention and because of the lack of expertise in chunking the new material.

As a child, I always envisioned my memory as nearly infinite rows of blackboards with a small gnome, sort of a cross between Dopey and Doc in appearance, scurrying to inscribe each new

32. Cowan, supra n. 12, at 92.
33. Id.
34. Id.
35. For example, in a study involving chess players, superior players could recall random positions of chess pieces after viewing them for sixty seconds at the same level of accuracy as their recall of game positions viewed for about two seconds. Fernand Gobet & Herbert A. Simon, Five Seconds or Sixty? Presentation Time in Expert Memory, 24 Cognitive Sci. 651, 659 fig. 2 (2000). The game positions could associate with information they already knew where the random positions could not.
36. Superior players could recall game positions with 100 percent accuracy after viewing them for ten seconds, but when the positions were random, they could recall the positions of the chess pieces with only about 34 percent accuracy. Id. Even when the players viewed the random positions for 60 seconds, accuracy only reached 70 percent. Id.
Once preserved, I could recall information by retrieving the relevant blackboard, skimming for the relevant subtopic, and updating with the newly inputted information that had not yet been organized by subtopic. Little did I know that my mind’s eye was envisioning the nearly unlimited storage available in long-term memory and the organization of expert memory.

Expert memory is not only well-chunked, either verbally or visuospatially, but the chunks are well associated in a hierarchy that allows attention to shift from higher to lower levels within this hierarchy. Expertise comes from practice that develops domain-specific knowledge. That knowledge is organized by chunks and then the chunks are chunked into templates. Capacity in long-term memory appears to be limitless, but the retrieval of that information is not. Information in long-term memory is retrieved into working memory, which is limited. Just as working memory had limits when holding information going into long-term memory, it has the same limits for holding information retrieved from long-term memory.

Without knowing any of this cognitive research, those studying law already account for these limitations. Consider the process of outlining for law school courses. Outlines organized by case will not be useful because students will not be able to retrieve the information they need in the form that they need it to solve a legal problem, whether in an exam or some other context. Instead, students need to organize the information on a topic so that they know the test and what each part of the test means.

37. K. Anders Ericsson & Walter Kintsch, Long Term Working Memory, 102 Psychol. Rev. 211, 215–222 (1995) (Figure 4, at page 221, nicely illustrates hierarchical organization); Cowan, supra n. 12, at 93–94; see also Fernand Gobet, Chunk Hierarchies and Retrieval Structures: Comments on Saariluoma and Laine, 42 Scandinavian J. Psychol. 149, 149–155 (2001).

38. Gobet & Clarkson, supra n. 21, at 732.

39. Cowan, supra n. 12, at 92; Fernand Gobet & Herbert A. Simon, Templates in Chess Memory: A Mechanism for Recalling Several Boards, 31 Cognitive Psychol. 1, 31 (1996) (templates are also called schemas, frames, or prototypes).

40. Meyers, supra n. 2, at 361 (“Our capacity for storing information permanently in long-term memory is essentially unlimited.”); Cowan, supra n. 12, at 91 (The focus of attention required for inputting and retrieving information is restricted but other mental faculties are not limited except perhaps by time or inference.).

41. Johnson & Proctor, supra n. 3, at 216 (“Retrieval of items from long-term memory. . . seems to be subject to the central bottleneck.”); Cowan, supra n. 12, at 92 (Information retrieved from long-term memory is subject to the capacity limit of the focus of attention.).

42. Id.
Information remembered in this format will be useful when retrieved. In this process of outlining, students are learning how to appropriately chunk their information.

In addition, students are also learning how to establish helpful hierarchies that will enhance their recall of information. Consider the analysis of judicial powers in Constitutional Law. Assume the student needed to analyze standing to answer a question on a Constitutional Law exam. If information was stored with appropriate chunking and hierarchies, the student could go to the mental chunk for judicial powers and then to the chunk for justiciability (or case or controversy) to retrieve the one chunk of information needed, standing. Like a blossoming flower, that chunk would open up into two more chunks, the constitutional requirements and the prudential requirements. Then constitutional requirements would blossom into three chunks, injury-in-fact, causation, and redressability; and injury-in-fact would blossom into two more, concrete and particularized and actual or imminent, and each of those points would blossom into definitions derived directly from statements in the authorities or indirectly from the facts of the authorities.

Mentally maneuvering up and down the levels of hierarchy requires attention, retrieving the right chunk requires attention, and opening up the chunks and their sub-chunks requires attention. In fact, every aspect of learning, beginning with the inputting of information, requires attention. However, attention is also challenged in every aspect of learning. This next section will discuss the challenges to paying attention.

**III. THE LIMITS OF ATTENTION**

Dogs are a wonderful illustration of attention and the limits of attention. Dogs run the gamut from total concentration to total distraction. Total concentration occurs with my dog if I am eating. My dog’s entire being is focused on my food and the possibility

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43. Retrieval from memory requires significant attentional resources. Moshe Naveh-Benjamin & Jonathan Guez, *Effects of Divided Attention on Encoding and Retrieval Processes: Assessment of Attentional Costs and a Componential Analysis*, 26 J. Experimental Psychol.: Learning, Memory & Cognition 1461, 1477 (2000) (attentional resources required to retrieve information was equal to (experiment 1) or greater than (experiment 2) that required encoding).
that he may get some of it. Nothing breaks his concentration, no matter how long he has to wait, no matter what the interruption.

However, if we go for a walk in the forest, then his concentration is not so intense, and he is more likely to be distracted. We can be walking along a path when zip!, he detours off for a new smell. Then he rejoins me when zip!, he detours off to see what was moving in the grass. He rejoins me again, and the process continues until the fun ends.

Even with his occasional distractions, my dog still exhibits some modicum of concentration. Not so much with the dog down the hill. With her, nothing registers for more than a quick second. Everything, and I do mean everything, is a distraction from the task at hand. Actually, she is so distracted all the time that I am not sure there ever could be a task at hand.

These dogs help illustrate well how attention comes in different packages, one controlled and one driven by the latest stimulus, which is also called dual attention. Controlled attention, or top-down attention, involves conscious awareness and requires significant cognitive effort to maintain focus without interruption or interference. The ability to control attention against competing demands is a major predictor of how well a person will perform on complex working memory tasks.

The stimulus-driven attention or bottom-up attention is more instinctual or automatic. This attention is grabbed by novel or sudden changes in our environment. Humans’ evolutionary survival depended on noticing the flash of bright light, the thudding noise, the movement in the trees, the rush of water, or the unusual smell. Novel or sudden changes could indicate an intruder, a food source, or a danger.

46. Johnson & Proctor, supra n. 2, at 221.
Despite the changed circumstances, modern brains react the same way to novel or sudden changes as the brains of the Cro-Magnon of 40,000 years ago.\(^{51}\) Now, however, they represent interruptions or distractions that interfere with our memory and reasoning processes. According to a number of studies, individual differences in working memory are due to differing capacities for attentional control.\(^{52}\) What determines successful performance on reasoning and other higher-order cognitive tasks is the ability to control attention to avoid distractions, not just the ability to hold and quickly retrieve the information.\(^{53}\)

Attentional control, then, is an essential skill for a person to successfully engage in the higher-order cognitive tasks required of legal analysis and reasoning. A person must be able to shut out distractions, including other cognitive work, when attending to cognitively complex tasks. In our multi-media world, the ability to control attention becomes seriously undermined. This occurs for a variety of reasons, including the lack of control over stimulus-driven distractions, mental load, and conditions of stress, anxiety, and fatigue; all of which undermine the ability to concentrate or to pay attention.\(^{54}\) Let me discuss each of these situations.

A. Distractions

We are regularly barraged with visual and auditory cues from a variety of sources, including e-mail, twitter, mobile phones, telephones, text messages, Skype, YouTube, Facebook, and more. They bounce, they flash, they ding, and more. And each is a distraction, one compelling to the Cro-Magnon mind, but not for the task at hand.

Consider what happens when you just want to type a document. You open the file and begin working when a pop-up message says you have a program update. You can attend to it now, and then restart your computer, or you can have the pop-up message return over and over and over again until you give up in frustration, save what you were doing, update the program, and

\(^{51}\) Klingberg, supra n. 48, at 10–11.
\(^{52}\) Kane et al., supra n. 47, at 170.
\(^{53}\) Engle, supra n. 47, at 20; Stephen Tuholski et al., Individual Differences in Working Memory Capacity and Enumeration, 29 Memory & Cognition 484, 491 (2001).
\(^{54}\) Infra nn. 55–167 and accompanying text.
restart your computer. You open the document again and resume working when another pop-up says you have a Skype contact. You do not have time to talk, so you close Skype. Okay, now back to the document. Another pop-up says you have new e-mail messages. You ignore it but it keeps popping up every few minutes and obscuring part of your document. After the fourth or fifth reminder, you give up and check your mail. Then, back to the document. Now an icon is bouncing up and down at the bottom of the screen. Better check it out. You need to run your anti-virus program through all your documents. You get that going and then it is back to the document. Knock, knock. Someone is at the door. And so it goes until hours later, the letter finally is done. To paraphrase a childhood rhyme:

Around, and around,
and around it goes.
Where it ends,
only a scientist knows.

What the scientists know is that each novel and sudden change, whether a motion, a noise, or a flash, affects our brain in three ways. First, these rapid visual and auditory changes capture our attention. Television provides a great example of how this occurs. When my oldest nephew was a young child, he had little interest in television except when a commercial came on. Then he would be mesmerized while someone hawked plastic wrap, soda, or detergent. The minute the commercial ended, he would go back to piling blocks, coloring, or whatever else had engaged him before the interruption.

The television medium controls our automatic processes through cuts, edits, movement, flashes of light, and sound. By increasing the pacing in a message, viewers will allocate more


cognitive resources to the message and the message will increase viewers’ sense of arousal.\textsuperscript{57} Commercials are designed for maximum scene shifting, visually and auditorily, to maintain viewer attention. A thirty-second commercial may contain sixty shifts,\textsuperscript{58} many of which are not noticeable to the viewer because of their short duration. To illustrate, if you close your eyes while a commercial is on, you will notice flashes of light, similar to a strobe light, that you did not notice when watching the commercial. In addition, viewers have long complained that commercials are louder than the program they interrupt.\textsuperscript{59}

Now some programming follows suit. News programming may grab attention by appealing to primal fears: as the saying goes, if it bleeds, it leads. As reported by the non-profit Center for Media and Public Affairs, the reporting of violent crimes on the evening news increased by 240 percent over a five-year period during which violent crimes had decreased nationally.\textsuperscript{60} Entertainment programming may use short cuts and fast shifts to hold your attention.\textsuperscript{61} My husband, an actor and director, commented the other night that a scene in the movie\textsuperscript{62} we were watching had forty-seven cuts (that he could see) in thirty seconds. I had not noticed, because my eyes were too glued to the screen.

Second, these rapid visual and auditory changes interfere with memory and reasoning. With each beep, flash, pop-up, and bouncing icon, our attention can be captured to attend to the novel and abrupt stimuli, rather than to the cognitive task interrupted. Each distraction interferes with memory. Since working memory capacity (or our attention to working memory) is limited,\textsuperscript{63} then a distraction must necessarily bump one of the bits
already in working memory. That bit is then lost from working memory, lost from further review of the information that will move it into long-term memory, and lost from retrieval and future use in the other contexts.\textsuperscript{64}

In addition, each beep, flash, pop-up, and bouncing icon puts our brains in survival mode so that it interferes with any complex cognition. As one doctor put it,

> when you are confronted with the sixth decision after the fifth interruption in the midst of a search for the ninth missing piece of information on the day that the third deal has collapsed and the twelfth impossible request has blipped unbidden across your computer screen, your brain begins to panic, reacting just as if that sixth decision were a blood-thirsty, man-eating tiger.\textsuperscript{65}

When the brain shifts to survival mode, the frontal lobes lose their sophistication, intelligence dims, and the brain is unable to think clearly.\textsuperscript{66}

Third, those rapid and visual auditory changes overstimulate our brains in a way that may even be addictive.\textsuperscript{67} In studies using fMRI, the part of the brain that lights up is the addiction cen-

\textsuperscript{64} Memory involves three essential processes: encoding sensory input, a process that involves working memory; storing information, a process that involves moving information from working memory to long-term memory; and retrieving information from long-term memory, a process that involves moving information from long-term memory to working memory. Richard A. Griggs, Psychology: A Concise Introduction ch. 5 (2d ed., Worth Publishers 2008); Meyers, supra n. 2. Therefore, when incoming information is not retained in working memory because of its limited capacity, supra nn. 19–22, that information is not available for any of the subsequent processes required for memory.


\textsuperscript{66} Id. at 58–59.

This addictive effect is recognized in popular culture as well, where Blackberry phones are called Crackberrys because of their addictive properties, and numerous fora, all online, offer services for internet addiction. Even if not addicting, the overstimulation is certainly acculturating. Most children are exposed to this overstimulation from a very early age. One study reported that 82 percent of children are online by seventh grade and what they enjoy are all the stimulatory bells and whistles: the games, movies, e-mail, IM, Google, and social networking sites. The exposure to this stimulation begins young: children between the ages of six months and six years of age spend as much time before a media screen as they do playing outside. By the time children reach the ages of ten to seventeen, they are spending a whopping 7.5 hours per day using electronic media. Over time, this sustained overstimulation can even result in a temporary condition, attention deficit trait, similar in its effects to attention deficit disorder.

75. See Rideout et al., Generation M, supra n. 73, at 74.
76. Hallowell, supra n. 65, at 56–57. Just like those with ADD, persons with this trait get frustrated and irritated easily, feel impatient and restless, are easily distracted, and
These are just the distractions associated with automatic, and cognitively primitive, reactions to stimuli. Plenty of additional distractions occur by our own making, especially as we attempt to multi-task.

B. Multi-Tasking

Multi-tasking is not a myth. People do it everyday, all the time. What is a myth is that multi-tasking is the most effective way to get more things done faster. Au contraire. The mania about the merits of multi-tasking reminds me of the game of Curses. In this game, players have two responsibilities: to draw a card that asks them to perform a task and to conduct themselves according to the curse cards other players have bestowed on them. While playing with our neighbors, my husband had to play with seven curses: he had to stand up any time someone clapped, he had to sign as he spoke, he had to keep his hands in fists so that his fingers did not show, he had to speak like a pirate, he had to speak like Scooby-Doo, and he had to bow when someone said his name. When he tried to do the task on the task card that he drew, he was constantly interrupted by other players who clapped and called his name, all while he spoke like Scooby-Doo as a pirate and signed with his fists. How he managed to do it all, I have no idea. All that multi-tasking was truly a curse. Maybe that was the point the inventors of the game wanted to make.

So why is multi-tasking ineffective? It begins with attention. Attention is a finite resource. A person may be able to walk and chew gum at the same time, two automatic or highly practiced tasks that require little cognitive effort or attention, but what about walking and talking or walking and texting? Not so much. Cell phone users walking across a square on the campus of Western Washington University largely failed to notice a clown on a unicycle. The clown was brightly dressed in purple and yellow

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77 Curses! by Worldwise Imports, Inc. (board game).
78 Styles, supra n. 45, at 158.
79 Ira E. Hyman, Jr. et al., Did You See the Unicycling Clown? Inattentional Blindness While Walking and Talking on a Cell Phone, Applied Cognitive Psychol. 1, 7 (2009)
(with a hefty dash of polka dots), and wore huge floppy shoes, a big red nose, and an odd little hat. Plus, he was moving and in a novel and unexpected way. Not the sort of thing a person would normally miss. However, only 25 percent of cell phone users even noticed.\(^80\)

On a busy street in London, a directory assistance firm and a nonprofit organization padded the telephone polls to protect texters who kept walking into them.\(^81\) A woman talking on her cell phone walked right into a truck parked in a driveway.\(^82\) Northwest Airlines pilots missed the Minneapolis airport while on their computers.\(^83\) An engineer of a Southern California commuter train was texting when he ran a red light and slammed into a freight train, killing 25 people and injuring more than 130 others; he never hit the brakes.\(^84\) A New York teen fell into an open manhole while walking and texting.\(^85\) An Oregon man who was texting at a wedding walked smack into the bride, notwithstanding her white dress and eight-foot train.\(^86\)

In response to injuries suffered from walking-while-texting, an application is now available for iPhone that will use the phone’s camera to provide a view in front of the camera, allowing the user to see “through” the cell phone while texting and know where he or she is going.\(^87\) Will accommodations like this help?

\(^{80}\) Id. at 6–7.


No. If people cannot see a clown or a truck or even a large city, a peephole through their texting device will not make much difference. In each of the examples, the actors were blind to their surroundings because their attentional resources were devoted to another task. A porthole in their texting device will not change this.

Instead, a person must attend to that which needs attending. If cell phone use requires all of a person’s attentional resources, then that is the only task to which the person can attend at the time. While a person may have enough attentional resources to do more than one automatic or highly practiced task at a time, resources become stretched when doing tasks that require more cognitive effort. For example, assume that you are driving, a highly practiced task, and engaging in light conversation with your passengers, a cognitive task requiring some, but not much, attention. When you encounter a roadblock, an accident, or some other hazard, what is the first thing you say? “Everyone be quiet.” That is because driving has now shifted from a highly practiced task to a cognitive task that requires all of your attention.

If people only have resources for one cognitive task at a time, how do they multi-task? If multi-tasking means doing two or more things simultaneously, things that are competing for the same cognitive resources, they don’t. Instead, the brain divides its attention between the tasks and attention is shifted back and forth between them. This is bad news not only for the quality of performance but also for the time within which the performance occurs. A simple example helps to illustrate this.


89. Styles, supra n. 45, at 158.


Assume that you are having a phone conversation, when a third person begins talking to you. You have a range of choices. At the two extremes, you can attend fully (100 percent) to the phone conversation and ignore (0 percent) the person talking to you, or you can attend fully (100 percent) to the person talking to you and ignore (0 percent) the phone conversation. In between, you can reduce your attention to one of the conversations to attend to the other one. In the latter situation, you will miss some of each conversation, so the quality of your performance will suffer. In addition, you need to have information repeated, which takes more time.

What happens cognitively when people try to do more than one task at a time? Attention is divided between the two tasks. While the theories vary as to why this occurs, studies fairly universally agree that attention shifts back and forth between the two tasks. The shifts occur very rapidly. Each shift takes time, generally about 20 percent longer. The time involved varies considerably depending on the tasks involved, but a good rule of thumb is the time will be longer when the work gets more complex, when the work moves from familiar to unfamiliar, when the tasks must be done quickly, and when the tasks compete for the same cognitive resource, such as talking and reading.

92. One theory is that the tasks are sharing a finite capacity, and so must share that capacity between the tasks in some graded fashion. E.g. Kahneman, supra n. 3, at 7–11; Christopher D. Wickens, Processing Resources in Attention, in Varieties of Attention 63, 69–101 (Raja Parasuraman & D. R. Davies eds., Academic Press 1984). A second theory suggests that a bottleneck exists. E.g. Harold Pashler, Processing Stages in Overlapping Tasks: Evidence for a Central Bottleneck, 10 J. Experimental Psychol.: Human Perception & Performance 358 (1984). A third theory is that crosstalk exists when the outcome of the processing of one task conflicts with the processing of a second task (i.e., the processing streams are not kept separate). E.g. David Navon & Jeff Miller, Role of Outcome Conflict in Dual-Task Interference, 13 J. Experimental Psychol.: Human Perception & Performance 435 (1987).

93. E.g. Catherine M. Arrington & Gordon D. Logan, The Cost of a Voluntary Task Switch, 15 Psychol. Sci. 610, 612 (2004) (tasks took about 20 percent longer to perform when alternating between two concurrent tasks compared to doing one task at a time).


96. Arrington & Logan, supra n. 93, at 612.

97. Alan Baddeley et al., Working Memory and the Control of Action: Evidence from
In addition, the shifts consume more time because performance can be slowed after a switch. This effect is called a restart cost. According to one study, the restart costs are higher when individuals are interrupted from more demanding tasks, like reading. This means that shifting from an easier task to a more difficult task may be more difficult, i.e., it may involve more shift costs, than shifting to an easier task.

Because of the time it takes to perform these cognitive shifts, trying to do more than one task at a time takes longer than doing each task sequentially. This may seem counter-intuitive to die-hard multi-taskers; after all, they are busy, busy, busy. However, most of that busyness is wasted cognitive energy. In fact, the less time available to perform the tasks, the greater the time it takes to do the switch.

That is not to say that multi-taskers cannot improve their performance time-wise. The switch time can be reduced by cuing and by practice. With cuing, people are told what to look for, which can reduce switch time by about one-third or more. Self-cuing through inner speech can also reduce switch time but not nearly as much as explicit cuing. With practice, tasks can become more automatic, so the time it takes to switch tasks is

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Task Switching, 130 J. Experimental Psychol.: Gen. 641, 652-666 (2001); Emerson & Miyake, supra n. 94, at 153 (doing task while talking increased switch cost up to 62 percent); Torkel Klingberg, Limitations in Information Processing in the Human Brain: Neuromaging of Dual Task Performance and Working Memory Tasks, 126 Progress in Brain Research 95, 95–100 (2000).


99. Waszak et al., supra n. 98, at 400.

100. Id.

101. Id. at 402 (shift to dominant task (reading) had higher shift cost than shifting to non-dominant task (picture-naming)). The results on this point are mixed, however, so it may depend on the nature of the tasks involved. Id. (listing studies where similar shift costs were found and other studies where no additional shift costs were found).

102. Rubinstein et al., supra n. 95, at 783.

103. Arrington & Logan, supra n. 93, at 612 (voluntary switch cost was one-third greater when significantly less time was available to perform the task).

104. Rubinstein et al., supra n. 95, at 780.

105. Emerson & Miyake, supra n. 94, at 156 (when did not have to rely so much on self-cuing through inner speech, task switching costs went down by one-third for an indirect cue and 58 percent for a direct cue).

shortened, but not eliminated.\textsuperscript{107} However, the decreased switch time occurs only when practice is extensive.\textsuperscript{108} In addition, regardless of the process used to get faster, the process of shifting still occurs,\textsuperscript{109} with each shift slowing performance and increasing the risk of error.\textsuperscript{110}

The risk of error increases with each shift, so the more switches, the more that accuracy decreases.\textsuperscript{111} Accuracy can be reduced by 20 to 40 percent,\textsuperscript{112} with the greatest interference occurring when a person is doing intellectually demanding work,\textsuperscript{113} such as struggling with problem-solving and reasoning tasks.\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item Nachshon Meiran, \textit{Modeling Cognitive Control in Task-Switching}, 63 Psychol. Research 234, 235 (2000) (preparation reduces switching costs, but does not eliminate them); Stephen Monsell et al., \textit{Reconfiguration of Task-Set: Is It Easier to Switch to the Weaker Task?} 63 Psychol. Research 250, 253 (2000) (reviewing studies supporting that preparation reduces switching costs). While general agreement exists about this conclusion, different theories exist to explain the phenomena. One theory is that residual task costs remain because a person can only plan ahead for one of the two stages of executive processing. William J. Gehring et al., \textit{The Mind's Eye, Looking Inward? In Search of Executive Control in Internal Attention Shifting}, 40 Psychophysiology 572, 580–581 (2003) (most time is involved in the top-down process involving cognitive control); Monsell et al., \textit{supra} n. 107, at 254; Pashler et al., \textit{supra} n. 106, at 642, 646 (residual task costs exist even when a person has a long time to prepare for the shift); Rubinstein et al., \textit{supra} n. 95. An alternative theory is that the residual task costs are due to interference. Monsell et al., \textit{supra} n. 107, at 262.
\item \textit{Supra} nn. 98–103 and accompanying text; \textit{infra} nn. 111–117 and accompanying text.
\item Pashler et al., \textit{supra} n. 106, at 508 (20 percent); Rubinstein et al., \textit{supra} n. 95, at 776 (approximately 20 to 40 percent).
\item Unsworth \& Engle, \textit{supra} n. 111, at 628, 629. Task-switching affects low-ability individuals more than high-ability individuals. A low-ability individual has lower fluid intelligence (gF) and reduced working memory capacity; a high-ability individual has higher fluid intelligence and greater working memory capacity. \textit{Id.} at 618–629. Fluid intelligence concerns the ability to do nonverbal problem-solving and reasoning tasks that are independent of general knowledge. Klingberg, \textit{supra} n. 48, at 148.
\end{enumerate}
\end{footnotesize}
Real world examples abound. When driving while talking or listening on a cell phone, the risk of accidents increases by about 30 percent, driving while dialing nearly triples the risk, and texting while driving a truck increases the risk of an accident a whopping 23-fold.\(^{115}\) When reading while also instant messaging, expect the reading to take 50 percent longer to complete\(^{116}\) and comprehension to take a dive.\(^{117}\)

Multi-tasking not only takes more time and adversely affects accuracy, but it can also adversely affect memory.\(^{118}\) Based on the discussion about working memory, this makes sense: bits are being booted from working memory with each switch. In one study, dual-tasking reduced recall by 25 percent.\(^{119}\) To make matters worse, the recall was 54 percent slower than with single-tasking.\(^{120}\)

So far, multi-tasking is slower, less accurate, and less likely to be remembered than doing one task at a time. Not so great. But, like the refrain of late-night televisions ads, there is more. Multi-taskers are more susceptible to distraction,\(^{121}\) especially when the tasks come from the same broad content domain.\(^{122}\) Multi-tasking tends to overload the brain and overloaded brains are more subject to distraction. Then, if stress and fatigue are added to the mix, the effects of multi-tasking only become “worser and worser.” The next sections will explain why.


\(^{117}\) Fox et al., supra n. 116, at 52.

\(^{118}\) Doug Rohrer & Harold E. Pashler, Concurrent Task Effects on Memory Retrieval, 10 Psychonomic Bull. & Rev. 96, 99 (2003).

\(^{119}\) Id.

\(^{120}\) Id. at 100.

\(^{121}\) Barrett et al., supra n. 44, at 554.

\(^{122}\) Baddeley, supra n. 97, at 655.
C. Stress and Anxiety

Not only is our attention stretched by distractions and multi-tasking, but it is also adversely affected by stress and anxiety. While everyone suffers from stress and anxiety to differing degrees in different contexts, law schools are particularly significant breeding grounds for both.123 While lower levels of stress and anxiety can help concentration and speed,124 as stress and anxiety levels increase, the ability to do sophisticated reasoning,125 like that required for legal analysis, becomes significantly impaired.126 How does this occur?

Significant levels of stress and anxiety affect the entire learning process from perception to memory. First, significant levels of stress and anxiety affect what a person perceives. The world is filled with stimuli that compete for attention with each of our senses.127 Out of necessity, we filter through the stimuli to select what we need for the task at hand. Significant stress and anxiety alter that filtering process: the top-down process that controls

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123. See e.g. G. Andrew H. Benjamin et al., The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, 1986 Am. Bar Found. Research J. 225, 246 (1986) (before law school, law students experience stress and anxiety at levels similar to the general population; during law school, symptom levels are elevated significantly above the general population); Matthew M. Dammeyer & Narina Nunez, Anxiety and Depression Among Law Students: Current Knowledge and Future Directions, 23 Law & Human Behavior 55, 63 (1999) (law students report higher levels of anxiety than comparison groups, including medical students); Ann L. Iijima, Lessons Learned: Legal Education and Law Student Dysfunction, 48 J. Legal Educ. 524, 526 (1998) (empirical and anecdotal reports indicate that law schools contribute directly or indirectly to law students’ dysfunction); Lawrence Silver, Student Author, Anxiety and the First Semester of Law School, 1968 Wis. L. Rev. 1201, 1201–1210 (attributing high anxiety in law school to high expectations, the subject matter and method of study, and the importance of first-semester grades).


126. See e.g. Anne Richards et al., Test-Anxiety, Inferential Reasoning and Working Memory Load, 13 Anxiety, Stress, & Coping 87, 102 (2000) (study participants with high test anxiety performed more slowly and less accurately on an inferential reasoning task).

which stimuli we attend to gets hijacked or overwhelmed by a stimulus-driven, bottom-up process.\textsuperscript{128} This changes the priorities of selecting stimuli from goal-oriented selection—selecting the stimuli necessary to accomplish a task—to threat-oriented selection—selecting the stimuli needed to achieve a safe environment. In this way, the perceptual process is skewed to the negative and the fear-inducing.\textsuperscript{129}

Second, significant stress and anxiety affects working memory. Cues signaling danger are more likely to capture the attention of those suffering from significant stress and anxiety, and stress and anxiety sufferers are more likely to interpret stimuli to be threatening.\textsuperscript{130} The loss of attentional control affects working memory in a number of ways. During task-shifting, the probability increases that the brain will divert processing resources from stimuli relevant to the task at hand to irrelevant stimuli.\textsuperscript{131} This is exacerbated when cognitive load is high\textsuperscript{132} and when processing new tasks.\textsuperscript{133} To compensate for the impaired processing efficiency, anxious individuals may compensate with additional effort\textsuperscript{134} to avoid the impairments to memory that

\begin{itemize}
\item \textsuperscript{128} Michael W. Eysenck et al., Anxiety and Cognitive Performance: Attentional Control Theory, 7 Emotion 336, 338 (2007).


\item \textsuperscript{130} See e.g., Yair Bar-Haim et al, Threat-Related Attentional Bias in Anxious and Nonanxious Individuals: A Meta-analytic Study, 133 Psychol. Bull. 1, 15–18 (2007) (high trait anxiety may be a result of, among other things, a person’s “tendency to automatically evaluate benign or slightly threatening stimuli as high threat” and “tendency to consciously evaluate alert signals as highly threatening even when [all else] may indicate the contrary”); Colin MacLeod et al., Selective Attention and Emotional Vulnerability: Assessing the Causal Basis of Their Association through the Experimental Manipulation of Attentional Bias, 111 J. Abnormal Psychol. 107, 119–120 (2002) (anxious individuals tend to focus on negative information).

\item \textsuperscript{131} Eysenck et al., supra n. 128, at 339, 346–347.

\item \textsuperscript{132} See e.g. N. Y. L. Oei et al., Psychosocial Stress Impairs Working Memory at High Loads: An Association with Cortisol Levels and Memory Retrieval, 9 Stress: The Intl. J. on the Biology of Stress 133, 139 (2006) (stress impaired working memory at high working memory loads).

\item \textsuperscript{133} Daniela Schoofs et al., Psychosocial Stress Induces Working Memory Impairments in an n-Back Paradigm, 33 Psychoneuroendocrinology 643, 650 (2008).

\item \textsuperscript{134} Eysenck et al., supra n. 128, at 340.
would otherwise result. That additional compensatory effort generally requires more time.

Third, significant stress and anxiety affect high-level cognition, such as reasoning. High-level cognition relies on all of the processes just discussed, so if those processes are skewed, the ultimate output will be skewed as well. However, significant stress and anxiety affect high-level cognition independent of those processes. Anxiety generally impairs performance of complex and attentionally demanding tasks. In one study, those who were highly anxious made substantially more errors in analogical reasoning than those who were not anxious, especially when they tried to perform more quickly.

Unfortunately, the study of law is inherently stressful and anxiety producing, for reasons ranging from the institutional design of law schools to the high-level cognitive work. In addition, interruptions while performing those high-level cognitive tasks produce stress, and a perception of higher workload, even after only twenty minutes of interrupted work. To the extent that some of the stress and anxiety can be controlled or limited, the deleterious effects that significant stress and anxiety have on learning can also be controlled or limited.

D. Fatigue and Lack of Sleep

A common reaction to the lack of time to complete a task is to insert more working hours into the day by forgoing sleep. This

135. Id. at 347.
reaction is penny wise and pound foolish. Sleep is critical to attention and learning.

First, sleep is essential to nourish the parts of the brain needed to learn. If ignorance is bliss, the best way to become blissfully ignorant is to go without sleep. One study found that if a person gets fewer hours of sleep than normal, she actually loses IQ points, and those lost IQ points are accumulated with successive nights of lost sleep.141 Have any extra IQ points to spare? Didn’t think so.

Studies of sleep deprivation confirm that lack of sleep will result in more problems with working memory,142 including needing more time to accomplish tasks,143 more effort to do them,144 and more effort to remember,145 all while making more errors.146 The results are similar whether the sleep deprivation was total,147 such as when a person stays up all night to finish a project or cram for an exam; chronic partial,148 such as when a person rou-


143. E.g. Melynda Casement et al., The Contribution of Sleep to Improvements in Working Memory Scanning Speed: A Study of Prolonged Sleep Restriction, 72 Biological Psychol. 208, 211 (2006) (working memory speed was 58 percent faster for those who had eight hours of sleep); Herbert Heuer et al., Total Sleep Deprivation Increases the Costs of Shifting between Simple Cognitive Tasks, 117 Acta Psychologica 29, 59–61 (2004).

144. See e.g. Michael W. L. Chee et al., Lapsing During Sleep Deprivation Is Associated with Distributed Changes in Brain Activation, J. Neuroscience 5519, 5525–5527 (2008) (effort is spent on staying awake and that negatively affects attention); Mindy Engle-Friedman et al., The Effect of Sleep Loss on Next Day Effort, 12 J. Sleep Research 113, 117 (2003) (finding that sleep loss resulted in some participants in the study selecting less difficult tasks to perform).

145. See e.g. Michael W. L. Chee et al., Sleep Deprivation and Its Effects on Object-Selective Attention, 49 Neurolmage 1903, 1908–1909 (2010) (sleep deprivation resulted in poorer recognition memory and slower response times).

146. See e.g. Wei-Chieh Choo et al., Dissociation of Cortical Regions Modulated by Both Working Memory Load and Sleep Deprivation and by Sleep Deprivation Alone, 25 Neurolmage 579, 584–586 (2005) (sleep deprivation resulted in slower response times and reduced accuracy).

147. See e.g. Jens P. Nilsson et al., Less Effective Executive Functioning after One Night’s Sleep Deprivation, 14 J. Sleep Research 1, 3–5 (2005) (study participants showed less effective executive functioning after one night’s sleep deprivation).

148. See e.g. Patricia Tassi et al., EEG Spectral Power and Cognitive Performance During Sleep Inertia: The Effect of Normal Sleep Duration and Partial Sleep Deprivation, 87 Physiology & Behavior 177, 178–183 (2006) (subjects permitted to sleep only two hours showed poorer speed and accuracy in performing tasks upon waking than subjects who slept eight hours); Hans P. A. Van Dongen et al., The Cumulative Cost of Additional Wake-
tinely cuts sleep short by a couple of hours; or interrupted, such as when a person’s sleep is disrupted by noises, even if she’s not aware of the disruption. Cognitive deficits of approximately 30 percent are often reported. In fact, performance while sleep deprived typically approximates the performance of someone who is legally intoxicated. One big difference, though: people know about the impairments of intoxication, but most are probably clueless about the impairments from lack of sleep.

That sleep is needed to learn is nothing new. Sleep is needed before learning so that information can be properly encoded into long-term memory. In one study, subjects who were deprived of sleep before a learning session remembered 40 percent less. New technology allows us to see why. Functional MRI scans show a significant difference in the activation of the hippocampus, an area of the brain important to memory formation, for those who had had a full complement of sleep compared to those who were sleep-deprived. The brain activity patterns revealed in the scans reflect a marked deficit in the neural ability to encode new memories in those subjects deprived of a night’s sleep.

Second, sleep is needed after learning as well. Functional MRI scans show neural and other changes in the brain after

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fulness: Dose-Response Effects on Neurobehavioral Functions and Sleep Physiology from Chronic Sleep Restriction and Total Sleep Deprivation, 26 Sleep 117, 118–125 (2003) (sleep limited to four and six hours per night for up to seven nights negatively affected working memory and cognitive performance).
151. See e.g. Paul Maruff et al., Fatigue-Related Impairment in the Speed, Accuracy and Variability of Psychomotor Performance: Comparison with Blood Alcohol Levels, 14 J. Sleep Research 21, 26–27 (2005) (twenty-four hours of sustained wakefulness equivalent to .08 BAC); A. M. Williamson & Anne-Marie Feyer, Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication, 57 Occupational & Environmental Medicine 649, 653–654 (2000) (seventeen to eighteen hours without sleep equivalent to .05 BAC; longer hours without sleep equivalent to .10 BAC).
152. Encoding strategies are highly linked to intelligence. See generally Rhodri Cusack et al., Encoding Strategy and Not Visual Working Memory Capacity Correlates with Intelligence, 16 Psychonomic Bull. & Rev. 641 (2009).
155. Id. at 386–389.
These changes reflect a process of consolidating and reorganizing memories to facilitate more efficient access to the information and improved recall. For example, correct recall after twelve hours for subjects who had had sleep was reduced from 94 percent with no interference to 76 percent with interference, but correct recall for subjects without sleep was reduced from 82 percent with no interference to 32 percent with interference.

In addition to strengthening individual memories, sleep helps to build relational associations between the memories by integrating them into the templates or schema that will facilitate their recall. Functional MRI scans indicate that the brain “plays back” daytime learning during REM sleep. In addition, the more the playback, the greater the extent of the learning as measured by next-day improvement.

Not only is sleep needed to improve learning, it is also needed to see beyond the explicit knowledge learned, so that one can gain insight. This is when the magic happens. All the neural connections come out to play, creating depth of understanding that would not otherwise exist.

The bottom line is this: performing well requires sleep. For students, sleep correlates highly with grades. Students receiving the highest grades had more sleep. In addition, people who

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159. Id.
166. Pamela V. Thacher, *University Students and “The All Nighter”: Correlates and*
have adequate sleep are better able to cope with stress, to maintain a positive attitude, and to maintain quality in interpersonal relationships.\textsuperscript{167}

\textbf{IV. IMPROVING ATTENTION}

As the preceding discussion suggests, attention will improve when distractions are managed, either by eliminating them or minimizing their adverse effects, when tasks can be divided into manageable pieces and analytical thinking preserved, when stress is controlled, and when sleep is adequate.

\textbf{A. Manage Distractions}

Not every distraction is equally distracting. Therefore, we cannot manage distractions effectively without knowing what makes a distraction so distracting that it will interfere with the attention and concentration required to perform well. Whether a distraction will adversely affect attention and concentration depends on the type of distraction, the person being distracted, and the task being interrupted.

First, distractions that adversely affect attention and concentration vary by type of interruption. When the distraction is auditory, it will be more interruptive than other modes of interruptions, such as visual interruptions.\textsuperscript{168} This is especially the case when reading,\textsuperscript{169} perhaps because the stimuli are competing for

\begin{quote}
\textit{Patterns of Students' Engagement in a Single Night of Total Sleep Deprivation}, 6 Behavioral Sleep Med. 16, 24 (2008) (students engaging in all-nighters had lower GPAs); Amy R. Wolfson & Mary A. Carskadon, \textit{Sleep Schedules and Daytime Functioning in Adolescents}, 69 Child Dev. 875, 884 (1998) (students with grades of C or below obtained twenty-five minutes less sleep per night and went to bed forty minutes later than students with grades of A or B).

\textsuperscript{167} William D. S. Killgore et al., \textit{Sleep Deprivation Reduces Perceived Emotional Intelligence and Constructive Thinking Skills}, 9 Sleep Med. 517, 523 (2008).


\end{quote}
the same cognitive resources. Distractions will also be more interruptive when they are more frequent, and more complex. In addition, distractions will be interruptive even when relatively short in length.

Second, distractions that adversely affect attention and concentration vary by person. Personal variations are a result of personality differences, modality preferences, and motivation. People will be more adversely affected by distractions if they are weak stimulus screeners, are Type A personalities, or have a need for personal structure. However, individuals who are strong stimulus screeners, are Type B personalities, or have an openness to actions will be less adversely affected. In addition to personality, the modality of the distraction will affect how adversely affected someone is, depending on personal preferences. For example, certain noises might be distracting to some people but not others, and certain

174. In addition to the adverse effects that distractions have on attention and cognition, supra sec. III(A), additional adverse effects include stress and anxiety, feelings of being overloaded or overworked, and fatigue. See e.g. Andrew M. Carton & John R. Aiello, Control and Anticipation of Social Interruptions: Reduced Stress and Improved Task Performance, 39 J. Applied Social Psychol. 169, 178 (2009) (study participants who could prevent interruptions reported significantly less stress than those who could not); Gloria Mark et al., The Cost of Interrupted Work: More Speed and Stress, in Proceedings of the Twenty-Sixth Annual SIGCHI Conference on Human Factors in Computing, at 107–110 (2008) (after only twenty minutes of interrupted performance, study participants reported significantly higher stress, frustration, workload, effort, and pressure) (available at http://portal.acm.org/citation.cfm?id=1357072).
177. Mark et al., supra n. 174, at 109.
178. Oldham et al., supra n. 175, at 936.
179. Kirmeyer, supra n. 176, at 622.
181. See e.g. Oldham et al., supra n. 175, at 929–938.
types of music might be distracting compared to others.\textsuperscript{182} Finally, the adverse effects of distractions will vary by personal motivation.\textsuperscript{183} For example, a person who lacks motivation to perform a task may be more open to distraction than someone who is motivated to accomplish a goal.\textsuperscript{184}

Third, distractions that adversely affect attention and concentration vary by the task interrupted. When the tasks are simple, distractions may even be welcome.\textsuperscript{185} However, when distractions interrupt tasks that are complex or new, the effects of the distractions are more significant and adverse,\textsuperscript{186} primarily because a person must rely more heavily on working memory in performing these tasks.\textsuperscript{187}

Regardless of the reason for the distraction, distractions are costly. Recovering from an interruption takes fifteen to twenty-five minutes, even longer when the interrupted tasks require significant concentration.\textsuperscript{188} If distractions in the workplace account for 1.5 to 2 hours of an eight-hour day’s work,\textsuperscript{189} that percentage could be much higher in a less structured work environment, like law school. Ouch.

Based on this information, managing distractions requires a two-pronged approach: limiting the number and type of distrac-

\begin{itemize}
  \item \textsuperscript{183} Jett & George, \textit{supra} n. 169, at 501.
  \item \textsuperscript{185} \textit{See e.g.} Zijlstra et al., \textit{supra} n. 17, at 181 (when performing routine, simple tasks, study participants found interruptions to be a welcome break); Oldham et al., \textit{supra} n. 182, at 561.
  \item \textsuperscript{186} \textit{See e.g.} Cheri Speier et al., \textit{The Influence of Task Interruption on Individual Decision Making: An Information Overload Perspective}, 30 Dec. Sci. 337, 338–353 (1999).
  \item \textsuperscript{187} Gillie & Broadbent, \textit{supra} n. 170, at 249; \textit{supra} nn. 14–28 and accompanying text (discussing working memory).
  \item \textsuperscript{188} Gloria Mark et al., \textit{CHI ’05: Proceedings of the SIGCHI Conference on Human Factors in Computing Systems} 321, 324, 326 (2005) (on average, study participants took twenty-five minutes, twenty-six seconds to return to original task after interruption); Tom DeMarco & Timothy Lister, \textit{Peopleware: Productive Projects and Teams} 69–70, 72 (2d ed., Dorset House 1999) (at least fifteen minutes to recover from telephone call); Thomas Jackson et al., \textit{The Cost of Email Interruption}, 5 J. Sys. & Info. Tech. 81, 85 (2001) (average recovery time of sixty-four seconds from e-mail; frequent checking of email creates many interruptions: employees reacted to 85 percent of e-mails within two minutes of getting them).
  \item \textsuperscript{189} Rini van Solingen et al., \textit{Interrupts: Just a Minute Never Is}, IEEE Software 97, 99 (Sept./Oct. 1998) (reporting study results similar to other studies’ results).
\end{itemize}
tions and limiting the impact of those distractions that are unavoidable or necessary.

**Limiting the number and type of distractions.** To limit the number and type of distractions, people must first know how they are being distracted and what distractions are particularly disruptive to them. Often people lack insight into how often they are being interrupted and how significant those interruptions are to them. Keeping a diary for a few days might provide valuable insight for developing an individualized plan.\(^{190}\)

Even without an individualized plan, everyone will benefit by controlling the distractions created by technology in today’s multimedia, 24/7-access world. The most common distractions are technological distractions including e-mail, telephone calls, and instant communications, such as instant-messaging, texting, and Skyping. These are also the most easily controlled distractions, because people can control if and when they respond to them. However, the reality differs from the possible.

For e-mail, workplace studies indicate that people handle e-mails as they arrive, attending to 70 percent of them in less than six seconds from the time of arrival.\(^{191}\) On average, each e-mail involves two minutes, one minute to handle it and one minute of recovery time.\(^{192}\) The number of e-mails someone receives will vary widely; for example, nearly half of workers in one survey received 50 or more e-mail messages per workday,\(^{193}\) but my average is about 100 per day throughout the school year. The math is not encouraging. However, the time involved in handling e-mails can be cut dramatically by reading them less often. If each e-mail distraction involves one minute of recovery time, then checking e-mail once instead of each time an e-mail arrived would cut the time spent on e-mail in half. Even checking e-mail a few times a day, rather than with each e-mail, would save considerable time. The time can also be cut significantly by deleting and not reading unimportant messages.

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190. See e.g. Czerwinski et al., supra n. 116, at 2–3 (describing diary methodology).
191. Jackson et al., supra n. 188, at 85 (70 percent of e-mails reacted to within six seconds of arriving and 85 percent within two minutes of arriving).
192. Id. (average recovery time from reacting to an e-mail is sixty-four seconds); Thomas Jackson et al., Reducing the Effect of Email Interruptions on Employees, 23 Intl. J. Info. Mgt. 55, 61 (2003) (average of 60 seconds spent per e-mail).
193. See Jonathan B. Spira, The High Cost of Interruptions, KMWorld 1, 32 (Sept. 2005) (45 percent of study respondents received fifty or more e-mail messages per day).
In addition, eliminate any auditory or visual announcements of new e-mails. This eliminates two distractions, the dings and pop-ups, as well as the temptation to attend to individual e-mails. For telephone calls, studies indicate that each call interrupts for the time of the call, plus at least fifteen minutes to recover. The more complex the task that is interrupted, the more recovery time it takes to resume the task. In private practice, I learned quickly that a five-minute telephone call from a client was easily a thirty-minute interruption because of the time it took me to resume my prior task; I adjusted my billing practices to account for that. For telephone calls and other instant communications, the same strategies used to manage e-mail disruptions work here: turn off the prompts, whether auditory or visual, and attend to these communications after completing a task or when it is otherwise convenient.

In addition to managing the distractions of technology, most people will benefit by controlling the distractions created by noise, the most disruptive stimuli. Irrelevant sounds in the environment disrupt concurrent mental activities. A good way to avoid distraction from environmental noise is to mask the distracting noises with a more uniform noise. Headsets provide a simple way to mask distracting environmental noises. In one experiment, employees listening to music while working increased their productivity substantially, not only because the music masked distracting environmental noises but also because it induced a relaxed state.

Limiting the impact of unavoidable distractions. While many distractions can be avoided or managed, some distractions are unavoidable. When distractions occur, the goal is to make them as harmless as possible. The harmful impact of those distractions can be limited by improving the time it takes to recover from them. Simply resuming the prior task does not reflect the total

194. E.g. DeMarco & Lister, supra n. 188, at 62.
198. Oldham et al., supra n. 182, at 560.
time it takes to recover from an interruption, especially for complex work. Let me illustrate.

I have always imagined my complex cognitive activity to resemble the spinning plates entertainer who was on the Ed Sullivan show when I was a child. This man would spin a plate on the end of a stick and keep the plate spinning after placing the stick on his chin, then another stick on his forehead, nose, arms, hands, feet, and so on, until he had about twenty plates spinning around. For me, each of my ideas is a spinning plate, and when I am interrupted, all of my plates crash to the floor. Resuming means starting the process over, one plate at a time, until all the plates are spinning again. That assumes that all the plates (ideas) are available because the broken ones would be lost (forgotten).

In the real world, as opposed to my cognitive imagination, recovery will improve if the timing of the interruptions is controlled and if memory of the interrupted task is improved before attending to the interruption.

First, recovery from a distraction is easier when the distraction occurs at the beginning or the end of a task. At the beginning of a task, the work has not yet begun. For a completed task, the task is more likely to be in long-term memory and, therefore, more easily reinstated by retrieval cues. However, if the interruption occurs in the middle of the task, the recovery costs are much more significant.

Second, recovery from a distraction is easier when the interrupted task is processed in a way that minimizes forgetting. The

199. Now that my cognitive abilities are more fully developed, my sophisticated cognitive work better resembles these Chinese acrobats on Peking Acrobats: Plate Spinning Opening, http://www.youtube.com/watch?v=W6jk8Cu5zZg (video).


201. E.g. Christopher A. Monk et al., Recovering from Interruptions: Implications for Driver Distraction Research, 46 Human Factors 650, 660–662 (2004) (least costly interruptions were those that occurred between tasks or during a repetitive operation such as scrolling); Ericsson & Kintsch, supra n. 201, at 212.


203. See e.g. Monk et al. supra n. 201, at 650–656 (the most costly interruptions were those in the middle of the task); Karin Zimmer et al., The Role of Task Interference and Exposure Duration in Judging Noise Annoyance, 311 J. Sound & Vibration 1039, 1044 (2008) (noise interruptions more significant when in middle of task).
greater that the interrupted task is encoded in memory or associated with information already in memory, the better it will be remembered and the faster it can be retrieved from memory when it is resumed.

One way to better remember information is to improve the way in which it is stored (encoded) into memory so that it will be easy to recall (retrieve) after an interruption. Information is stored in long-term memory by connecting new information to information that is already learned and by creating clumps of related information within a hierarchical structure, such as a template or a schema. While important for creating and retrieving from memory, this system alone will not help resume an interrupted task quickly because of interference from other memories, dubbed mental clutter. Instead, we want to direct attention to the interrupted task. We can do that by encoding goals.

Goals are a cognitive “to do” list. An ultimate goal may consist of many subgoals and each subgoal may consist of further divisions and subdivisions, each of which needs to be completed to achieve the ultimate goal. Each goal is encoded and then cued to retrieve the task. This goal-activation process significantly increases the proportion of interrupted tasks resumed and reduces the time lost in resuming them.

To understand how the encoding and cuing process works with interruptions, envision an interruption as two events, an


205. Altmann & Trafton, supra n. 184, at 45.

206. Id.

207. Id. at 44–49.

208. Styles, supra n. 45, at 236 (referred to as a “goal list”). A goal is “a mental representation of an intention to accomplish a task, achieve some specific state of the world, or take some mental or physical action . . . .” Altmann & Trafton, supra n. 184, at 39.

209. Id. at 41.

210. Id. at 61.

211. Rahul M. Dodhia & Robert K. Dismukes, Interruptions Create Prospective Memory Tasks, 23 Applied Cognitive Psychol. 73, 83 (2009).

212. Id. at 79–80, 84 (reminder cues dramatically increased performance, reducing lag after interruption from 8 to 12 seconds to 2.5 seconds); Richard L. Marsh et al., Activation of Completed, Uncompleted, and Partially Completed Intentions, 24 J. Experimental Psychol.: Learning, Memory & Cognition 350, 359 (1998) (self-initiated cuing heightens goal activation so that goals come to mind more quickly).
alert and the interruption itself.\textsuperscript{213} For example, an e-mail interruption involves an alert, such as a sound or pop-up, that the e-mail has arrived, followed by the interruption of attending to the e-mail. Similarly, for telephone calls, the alert is the sound or vibration of the telephone ringing, followed by the interruption itself in taking the call.\textsuperscript{214}

To lower the cost of an interruption, you use the time between the alert and the onset of the interruption, called the interruption lag, to prepare for the interruption by prospectively encoding cues that will help to retrieve the suspended task later.\textsuperscript{215} To illustrate, assume you are reading a judicial opinion that concerns claim preclusion. As you read, you want to prospectively cue what you are reading by talking your way through the material, for example, by asking whether the opinion provides a test, whether it directly defines each (or any) part of the test, and whether it indirectly defines each (or any) part of the test by inference from its facts. If you were interrupted while you were encoding this information, you could prospectively cue your goal of defining claim preclusion or your sub-goal of defining privity after the interruption alert but before the interruption itself. Then, you would use that cue to resume the interrupted task. Voila! You have created your own version of instant replay.

B. Divide and Conquer

Remember the example of the spinning plates? One way to keep all of the plates from dropping to the floor when interrupted is not to have so many plates in the air. Remember how multi-tasking is slower and less accurate? One way to work faster, to be more accurate, and to remember more is to do one task at a time. Accomplishing this requires deconstructing each task into its component parts so you can do one part at a time, and then preserving your thinking so the ideas (plates) are not spinning in air and cannot fall from memory.

\textit{Deconstructing tasks}. Dividing tasks into their component parts avoids the pitfalls of multi-tasking by allowing individuals to do one cognitive task at a time. Tasks can be divided at a mac-

\begin{itemize}
\item\textsuperscript{213} Altmann & Trafton, \textit{supra} n. 184, at 65.
\item\textsuperscript{214} \textit{Id.}
\item\textsuperscript{215} \textit{Id.} at 65–66; Hodgetts & Jones, \textit{supra} n. 172, at 823, 825 (participants resumed tasks more quickly by prospectively encoding during the interruption lag).
\end{itemize}
ro-level, which helps to avoid cognitive overload that leads to stress and additional interruptions. Tasks can also be divided at the micro-level, so that each cognitive task is separately identified and performed.

At the macro-level, we can avoid the pitfalls of multi-tasking by deconstructing larger tasks into smaller tasks. Consider, for example, the writing of a legal memorandum. If the ultimate task were attempted, chances are high that the writer would feel extremely stressed. The reason is that the task is too big, resulting in a cognitive load that is not manageable. When a task is too big to be manageable, attention will wander to things that are easier to do, like checking to see whose car just pulled up (distraction), answering e-mails (more distractions), or talking on the phone (even more distractions).

To move forward, the writer needs to divide the task into manageable chunks. Once the writer knows the analytical framework, the work can be separated into its individual points and then completed one point at a time. The rest of the memo can be put on hold until all the individual points are developed. Then, the writer can glue them together with thesis paragraphs, transitions, and thesis sentences.

At the micro-level, we can avoid the pitfalls of multi-tasking by deconstructing the cognitive tasks involved in legal analysis. This deconstruction may not always be easy, but the process is essential. Consider the simple and widely-used heuristic of IRAC: Issue, Rule, Application, and Conclusion. The heuristic may be simple, but the cognitive tasks involved are not. In fact, IRAC illustrates well the pitfalls of ambiguity and the multi-tasking that results from that.

Let’s start with Issue. By the time law students learn IRAC, they have already learned how to brief a case. They should know that the judicial opinions they read involve an issue, which would appear in the Issue portion of the case brief, and that a test likely exists for that issue. For example, the issue might involve liability under a dog bite statute for which the test requires establish-

216. Unsworth et al., supra n. 28, at 636.
217. See e.g. Jennifer C. McVay & Michael J. Kane, Conducting the Train of Thought: Working Memory Capacity, Goal Neglect, and Mind Wandering in an Executive-Control Task, 35 J. Experimental Psychol.: Learning, Memory & Cognition 196 (2009) (when working memory loses the capacity to attend to learning goals as a way of sorting through ongoing stimuli, the mind is more likely to wander).
ing an owner, a dog, a bite, lawful presence on the property, and damages. If liability under a dog bite statute is the issue, then IRAC would involve analyzing all five elements of the issue at once. This cognitive multi-tasking would create a mess because each of the elements for liability requires separate analysis.

Now consider Rule. Continuing with the example in the last paragraph, the test for liability would likely appear in the Rule portion of the case brief. If the Rule portion of the case brief had the same meaning as the Rule portion of IRAC, then again, someone would be analyzing five elements at once, rather than each separately. Instead, Rule in IRAC means something different: it refers to rules of interpretation of the point denoted as the Issue. However, these rules serve more than one analytical purpose, such as establishing policy, direct definitions derived from general statements, or indirect definitions derived from the facts of the case. By not separating the different analytical functions of the information, the writer is again multi-tasking.

Similar problems occur with the next part of IRAC, Application. This step also involves multiple cognitive tasks: identifying the relevant facts from the legal problem, analogizing those facts to the facts of the cases, and distinguishing them from the facts of the cases.

For some, the legal analysis represented by IRAC involves a process that happens intuitively and magically. For most, it does not. Instead, mastery of legal analysis occurs only after the process is deconstructed into its individual cognitive tasks, the elimination of detrimental multi-tasking, and the analytical purpose (goals) of each cognitive task are made apparent. Resulting in the facilitation of memory and recall after attention is interrupted.\textsuperscript{218} Without deconstruction and practice, expect frustration;\textsuperscript{219} which

\textsuperscript{218} I have deconstructed IRAC into RAFADC for a neutral analysis: Rule (the specific legal point to be analyzed), Authorities (that define the Rule either directly, through explanation, or indirectly, through their facts), Facts (from the legal problem), Analogies/Distinctions (comparing problem facts with case facts), and Conclusion (how a court will likely rule). For additional discussion of RAFADC, see M. H. Sam Jacobson, Legal Analysis & Communication 237–245 (Author House 2009) [hereinafter Jacobson, Legal Analysis]; M. H. Sam Jacobson, Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing, 2 J. ALWD 27, 66–68 (2004) [hereinafter Jacobson, Learning Styles]. For a persuasive analysis, I use CRAFADC: Conclusion (statement of your argument), Rule, Authorities, Analogies (to favorable authorities)/Distinctions (from unfavorable authorities), and Conclusion (how the court should rule). Jacobson, Learning Styles, supra n. 218, at 67–68.

\textsuperscript{219} See Sheldon Cohen, Aftereffects of Stress on Human Performance and Social Be-
also impedes attention, and loss of motivation to recover the attention needed to learn effectively and thoroughly.

**Preserving thoughts.** In addition to deconstructing tasks, preserving analytical thinking for the tasks completed is important so that work done before an interruption is not lost. While encoding and cuing will aid recovery from an interruption, that process is insufficient for memorializing all the complexities of a sophisticated legal analysis or for recovering from longer interruptions. Memories decay over time\(^{220}\) and, in law, interruptions can be weeks or even months long.

Course outlining is a good example of a tool that preserves analytical thinking over time. For written documents involving legal research and analysis, like a legal memorandum or appellate brief, T-charts are a good tool.\(^ {221}\) Preserving thinking visually may also be effective. For example, studies of master chess players found that these players remembered games by preserving a picture of the chessboard and its pieces; this way they could preserve information about strategy, not just the pieces.\(^ {222}\)

### C. Manage Stress

In addition to managing distractions and dividing tasks into manageable cognitive tasks, attention will improve by managing stress. The leading sources of stress in law school involve legal pedagogy and the workload.

Pedagogically, law school is stressful because students have little context for what they are doing in their casebook courses, either in the classroom or from their materials. The hallmark of the law school classroom is the quasi-Socratic dialogue. Many students become so stressed in this situation that they absorb nothing except the sound of their own internal voice chanting, “please don’t call on me, please don’t call on me.” In addition, nei-

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\(^{222}\) Gobet & Simon, *supra* n. 39, at 1–40.
ther the Socratic dialogue nor the casebook materials provides an overview. Instead, students must create the overview, or analytical framework, on their own.

This leads to the second source of stress in law school, the workload. The workload is unrelenting. Class preparation involves two to three hours for each class and most students have fifteen hours of class per week. Add research, papers, and outlining on to that and the weekly tally reaches sixty to seventy hours. The tally goes even higher if we consider optional study efforts such as study groups, library research workshops, chats with professors or student assistants, and exam preparation activities. It’s no wonder that law students are always tired.

Since unchecked stress adversely affects attention and memory, not to mention health and relationships, managing stress is important. The stress involved with the quasi-Socratic classroom can be reduced through preparation, including collaborative discussions with others. An overview can be created from the course syllabus, the casebook’s table of contents, supplemental materials, such as a hornbook or treatise, and from conversations with professors, so that the details covered in class and in the casebook make more sense. Topics can be divided up so as to avoid brain overload.

In addition, stress can be managed through good time management practices. Everyone has the same twenty-four hours of time. However, not everyone uses their time the same. One year, I had a student who was the single parent of three young children. She was an excellent student who was always prepared for her classes, kept current on outlines for every class, and received top grades on every assignment. At the same time, another student of equal ability but with no family responsibilities often complained that he did not have sufficient time to complete all of the readings for class and he had not yet started on his course outlines.

What accounts for the difference? Most likely the answer lies, in part, in how wisely each of these students was using his or her time. When I asked the single parent how she managed to get everything done, given all of the competing demands for her time, she told me that she was on a time budget. She allocated some time for everything she needed to do, including spending time with her children. She concentrated on making the best use of the time budgeted, so that she wouldn’t have to borrow time
from somewhere else in the budget; time that she probably would not be able to pay back. For her, time was like money: without a strict budget, it would disappear like coins through a hole in a pocket.

Developing a time budget requires determining what time is needed to do all that must be done, determining how time is actually used, eliminating time-wasters, setting priorities among the remaining tasks, and actively managing how time is allocated.\textsuperscript{223} For example, eliminating two hours a day spent on distractions provides an extra day each week to accomplish something greater, whether that means completing coursework or having a social break with family or friends. If noise distracts, wear earplugs or mask the distracting noises with background music or white noise. If movement or sights distract, study in a quiet corner of the library with your back to the room, in a study room, in an empty classroom, or away from a window (better to know the law of negligence than the acorn-stashing habits of the local squirrels). If people distract, manage telephone calls by turning off your phone and retrieving messages later; limit when and how often you check for e-mail messages; and manage in-person interruptions by studying in a quiet corner of the library or by hanging a “do not disturb” sign on a chair, carrel, or door.

D. Get Sleep

Finally, attention will improve by getting sleep. Not only does the lack of sleep before or after learning impair cognitive functioning, but the effects of lack of sleep can be long-lasting. When sleep was chronically reduced over seven days, three days of recovery sleep (eight hours each night) did not restore subjects to their baseline performance before the sleep restriction.\textsuperscript{224}

When a full night’s sleep is not possible, a nap can work wonders,\textsuperscript{225} even if it is just a ten-minute power nap.\textsuperscript{226} In a recent

\textsuperscript{223} For more information about time management, including tools for evaluating time needs, for budgeting time, and for prioritizing, see Jacobson, \textit{Legal Analysis}, supra n. 218, at 35, 37.

\textsuperscript{224} Gregory Belenky et al., \textit{Patterns of Performance Degradation and Restoration During Sleep Restriction and Subsequent Recovery: A Sleep Dose-Response Study}, 12 J. Sleep Research 1, 10 (2003) (brain adapts to chronic lack of sleep, making it more difficult to recover).

study, participants who took a 90-minute nap in the middle of the afternoon did markedly better on subsequent learning exercises than those who had no nap. While caffeine can provide a temporary boost, a nap will do more: it will help to improve cognitive functioning. Maybe we did learn all we needed to know in kindergarten.

Whether managing distractions, minimizing stress, or maximizing sleep, the bottom line is that we must attend to attending. Minds have always wandered, but our attention has never been more challenged than in this multi-media, high-tech world. Media and technology must be our tools, not our masters. Without learning to attend to the things that matter, we will be fatally distracted by every beep, flash, and pop-up, and therefore, be unable to perform the sophisticated cognitive work required of the study and practice of law. If the study and practice of law require attention, then attention needs developing just like any other skill. Developing attention requires practice, self-reflection, and diligence. Developing attentional skills also requires listening. If professors find their students are not attending to the class material, but instead are engaged in computer games, e-mail, instant messaging, and other technological distractions, professors need to ask why. Then, professors need to listen to their self-analysis and their students. The why may be that students are so used to being distracted that they have not yet learned how to pay attention. If so, the professor has a teachable moment. The why might also be that the professor is teaching in a manner that does not engage the students. That too is a teachable moment. In the first instance, the why concerns all the attentional issues raised in this Article. In the second instance, the why concerns the age-old problem of mind-wandering, where the use of the laptop in class is no different from the doodling of pre-tech times. Similarly, if


229. See *e.g.* Jackie Andrade, *What Does Doodling Do?* 24 Applied Cognitive Psychol.
students find themselves unable to attend to the material, they also need to ask why and then to listen to their self-analysis and the assessments of others. As mentioned for professors, the why could be boredom or it could be an acculturation, if not addiction, to distraction. The why also could be that students are avoiding the cognitive heavy lifting required of law school by diverting their attention to things that are fast and easy. While the solutions to each might be different, the problem is the same: the failure to attend to that which needs attending.

V. CONCLUSION

To summarize, hang on just a minute.—I’m coming, I’m coming.—The dog needed to go out. To summarize,—Now where did I put those notes? I’ll just check this pile. Not there. Maybe this one? Oh, the phone. Dental appointment tomorrow.—Where was I? Oh yes, the summary. Well,—just a sec, this e-mail is important. Yes, the appellate brief drafts are due in the morning; sorry, no extensions.—Now, again: To summarize,—Aqua, honey, no barking, okay?—Our brains can only handle so much.—okay, need to edit that. Let me change this to—our brains are easily distracted when—what do you need? No, I mailed that last week.—I’m back. Let me think. Oh, yes: To summarize,—Leif, no treat. Let me type. No treat. I mean it. No. Well . . . okay.—Shoot. I can’t think! Okay, how about this: To summarize, I had a lot more to say but I cannot find the articles I was looking for, I have to prepare for my classes tomorrow, my students need answers to their questions concerning their assignment, my husband would like some attention, and of course, the dogs could use a belly-rub or two. I think I’ll take a nap.

100 (2010). Doodling aids concentration: study participants who doodled when listening to boring information recalled 29 percent more information than those who did not, perhaps because the doodling limited daydreaming. Id. at 102–104.
THE SIGNATURE PEDAGOGY OF LEGAL WRITING

Carol McCrehan Parker

“Learning to write well can be the central focus of an education, including a legal education.”

I. INTRODUCTION

The Legal Writing Institute (LWI) celebrates twenty-five years of teaching and scholarship in legal writing. This occasion offers us an opportunity to reflect on what we have taught each other about teaching—so far—within our remarkable, generous, creative community, and to imagine a few of the places our learning may take us in the next twenty-five years.

Reflecting on this history, I tried to distill what I have learned about teaching writing, and it is simply this: writing is a process and it is social. This learning began for me in the early LWI conferences, which served as a catalyst to move our thinking about writing from writing-is-a-product to writing-is-a-process, and to a more conscious consideration of audience, focusing on the reader’s expectations of and responses to text. I would like to believe that, on my own, I somehow would have moved beyond assigning writing problems based on two-paragraph fact patterns set in hypothetical jurisdictions in which all of the people had cute names. But, I am certain that without the guidance and support of the LWI community, even that small step would have taken much longer, and the journey would have been lonely and sometimes discouraging.

The distance we have traveled on our shared journey of learning in the LWI is evident in the increasing sophistication of the

* © 2010, Carol McCrehan Parker. All rights reserved. Associate Professor and Associate Dean for Academic Affairs, University of Tennessee College of Law. I would like to thank the organizers of the symposium, Legal Writing: The Journal of the Legal Writing Institute and the Mercer Law Review, and all the members of the Legal Writing Institute, who have given me so much and to whom I am more grateful than I can say.

programs at its biennial conferences. In 1984, the first conference featured seven plenary sessions presented by four speakers and eight workshop sessions. In 2008, by contrast, the conference offered more than eighty sessions and identified tracks for new teachers, experienced teachers, and practitioners, and a track focusing on technology. The presentations addressed a wide variety of subjects ranging from “The You-Tube of Professional Practice,” and “Differing Learning Styles in the Classroom,” to “Non-Verbal Persuasion,” to “Comparing Discourse Communities”—and many, many more. The 2008 conference also included poster presentations and a day-long workshop on critiquing student work. The changes in the breadth and depth of the conference programs demonstrate development of the discipline of legal writing and the directions for professional development for legal writing teachers. The 2010 biennial conference will exceed both the number and the diverse range of events of prior conferences.

A look back to the workshop session topics from the 1984 conference, though, is instructive because those topics remain as vital today as then: “Using Student Conferences Effectively”; “Evaluating Student Papers”; “Teaching Students to Write Persuasively”; “Teaching Oral Advocacy”; “Teaching Style and Syntax”; “Using Peer Collaboration”; “Teaching Research Strategies”; and “Integrating Writing into Substantive Law Courses.” The early conferences provided the scaffolding that continues to support our professional growth today.

A second source of history, LWI’s newsletter, The Second Draft, first published in 1985, similarly illustrates both the foun-
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dations of the discipline and its evolution. In a pile of documents that I still consult and could not part with even if I did not, I found a copy—apparently ditto-copied—of The Second Draft from August 1988. The copy I found includes an article making the case for writing specialists;\(^9\) a piece drawing on general semantics to explain how S.I. Hayakawa’s Abstraction Ladder may inform teaching of first-year legal analysis and writing;\(^10\) and an excerpt from Richard Neumann’s then-forthcoming textbook in which he explained the structure of legal argument.\(^11\)

Now, notices arrive by e-mail to announce publication on the Internet of themed issues of The Second Draft, e.g., “Teaching through Technology,”\(^12\) “Teaching to Different Learning Styles,”\(^13\) and most recently, “Teaching Implicit Reasoning.”\(^14\) The depth in which these topics are explored illustrates the evolution of the field.

Finally, LWI’s compendium of teaching resources, the Idea Bank,\(^15\) provides both a record of the development of teaching materials, and an example of the collaborative spirit of legal writing teachers. Where the first Idea Banks involved stacks of assignments for memoranda and briefs, hauled by LWI members to conferences every two years to swap with others, today’s Idea Bank is available on the Internet, reached by a few mouse clicks. Today’s Idea Bank also offers a database of treasures—assignments, teaching ideas, and more—whose contents reflect the developing sophistication of teaching methods in our field. By 2008, nearly all assignments posted in the Idea Bank comprise multiple, authentic documents from which students discern their tasks and the potentially relevant facts—no more two-paragraph fact patterns describing munchkins in the Jurisdiction of Oz.

12. 23 Second Draft (Spring 2009).
13. 22 Second Draft (Spring 2008).
14. 24 Second Draft (Fall 2009).
15. The Idea Bank is available (to contributing LWI members) at http://www.lwionline.org/idea_bank.html.
II. THE SIGNATURE PEDAGOGY OF LEGAL WRITING

Over the past twenty-five years, there has emerged a “signature pedagogy” of legal writing. A recent report from the Carnegie Foundation for the Advancement of Teaching16 (“Carnegie Report”) defines “signature pedagogy” as a method by which “professional schools induct new members into the field,” specifically including those practices that “serve as primary means of instruction and socialization”; “build bridges between thought and action”; and are “invented to prepare the mind for practice.”17 The dimensions of a signature pedagogy include (1) “observable, behavioral features”; (2) their theoretical bases; (3) “values and dispositions that the behavior . . . models”; and, most intriguingly, (4) “its complement, the absent pedagogy that is not or is only weakly engaged—the shadow structure.”18

The hallmarks of the signature pedagogy of legal writing are authentic tasks of an appropriate level of difficulty, undertaken within a collaborative setting guided by a more advanced learner, by way of an iterative process that includes frequent feedback and revision. This approach reflects awareness of the role of writing in constructing thought and of ways in which writers may translate that awareness into deliberate communicative choices that serve their rhetorical purposes.19

The theoretical underpinnings of this approach explain the nature of the bridges by which law students cross between

17. Id. at 23.
18. Id. at 24; see also Susan Bryant & Elliot S. Millstein, Rounds: A “Signature Pedagogy” for Clinical Education, 14 Clin. L. Rev. 195, 195 n. 1 (2007) (noting that “[s]ignature pedagogy has been defined as a pedagogy that is distinctive to a profession and one that ‘functions as “windows” into what counts most significantly as the essence of a profession’s work,’” and that “[s]ignature pedagogies also create ‘strategies and methods that create a “surface structure” for teacher-student interactions.’” (quoting Charles R. Foster et al., Educating Clergy: Teaching Practices and Pastoral Imagination 33 (Jossey-Bass 2005))).
thought and action—that is, between the construction of meaning and communicating within social contexts. This pedagogy has roots in composition theory, and cognitivist (developing schemas within the domain of law) and constructivist (creating understanding by acting within the social context) learning theories, and is supported by research in the acquisition of expertise.

III. LEGAL WRITING PEDAGOGY IN UPPER-LEVEL COURSES

The pedagogy of legal writing developed in first-year writing programs informs teaching in courses after the first year, not only in upper-level courses focusing primarily on writing in advocacy, transactional, and scholarly contexts, but also in upper-level courses with doctrinal focus.

Courses that integrate doctrine and skills may focus primarily on skills, doctrine, or a problem-based synthesis of doctrine, theory, and skills. Law review literature provides numerous examples of such courses. For example, a skill-focused course in the context of consumer bankruptcy may teach advanced legal research and writing based on authentic contexts and tasks by using as its text a practitioner’s book on consumer bankruptcy and by developing assignments requiring students to work with forms to produce a portfolio of writings, including letters, settlement agreements, discovery documents, and pretrial statements.
A doctrine-focused course may employ many of the same methods. For example, a course designed primarily for the purpose of teaching substantive tax law may include various writing exercises that will augment the students’ understanding of doctrine, introduce them to the documents and research tools they will need in practice, and expose them to ethical issues that they may experience in their future careers. Similarly, Michael Madison, who teaches various Intellectual Property courses, has observed that writing assignments offer opportunities to monitor students’ progress and greatly increase students’ engagement with the fine points of statutory analysis. Professor Madison has found that although assigning three memoranda during the semester requires four to six hours of class time, the benefits outweigh concerns about course coverage.

Another model is that of the practicum course taught in conjunction with a doctrinal course, involving cooperation between doctrinal and practicum teachers. A practicum provides opportunities for practical experience and personal feedback using authentic tasks related to a particular area of law and helps students develop writing and lawyering skills as well as their substantive understanding of the doctrine. Examples of such practicum courses include an Employment Discrimination class in which students developed litigation-oriented writing skills and a Federal Taxation course in which students developed transaction-oriented writing skills. Students in an Administrative Law class developed understanding of public law drafting by drafting a statute and regulations to implement that statute. Students then evaluated their drafts by playing the roles of various interest groups affected by the legislation and regulations, arguing for or against the inclusion of certain language.

29. Id. at 839–840.
Clinical courses with a focus on writing incorporate drafts, feedback, and rewriting of documents prepared in the representation of live clients. Clinical courses are particularly well suited to help students develop their professional voice “as they enter a professional discourse community and negotiate its formal structures and idioms.”

Finally, comprehensive writing-across-the-curriculum programs use writing as a means of instruction in most or all classes. In preparation for this panel presentation, Robin Boyle circulated a questionnaire asking, among other things, whether schools have adopted writing-across-the-curriculum programs. Although this survey indicates that few law schools have formally adopted writing-across-the-curriculum, respondents do note that writing tasks are being assigned in a significant number of doctrinal classes in a variety of forms including those discussed above. In schools that have formally adopted writing-across-the-curriculum, the programs have taken various forms. For example, Southern Illinois University law school requires that every course include some type of writing assignment, with the type of feedback left to the professor’s discretion. Detroit Mercy’s writing-across-the-curriculum/writing-in-disciplines program has evolved to include writing assignments in all required courses in the second year and participation in a law-firm program in the third year. CUNY Law School participates in a university-wide writing-across-the-curriculum initiative and offers a “writing based curriculum [that] incorporates writing both to offer practice in the genres in which lawyers and legal scholars write and to support and deepen learning of legal concepts and course material.”

32. See e.g. Angela J. Campbell, Teaching Advanced Legal Writing in Law School Clinic, 24 Seton Hall L. Rev. 653 (1993).
34. LWI Symposium Short Survey Responses (Robin Boyle ed., Sept. 5. 2009) (on file with the Author).
35. Id.
36. Id.
IV. THE SIGNATURE PEDAGOGY OF LEGAL EDUCATION

The Carnegie Report identifies the signature pedagogy of legal education as the case dialogue, that is “dialogue[ ] entirely focused by and through the instructor,” set in a competitive context, to teach “processes of analytic reasoning, ‘doctrine,’ and principles.”39 The Carnegie Report notes two missing elements in this pedagogy: context (e.g., clients’ role) and ethical substance essential to building professional identity and purpose.40

The Carnegie Report identifies clinical pedagogy as law school’s pedagogical “shadow structure,” that is, its “weakly developed complementary pedagogy,” and notes that clinical pedagogy’s “marginality . . . in law schools is striking.”41 The elements noted as missing from the case dialogue are essential features of clinical pedagogy.42

Philip Kissam has noted other elements missing from case dialogue pedagogy:

The discipline teaches instrumentalist habits of reading and writing that both empower and limit future lawyers. These habits consist of quickly productive but often superficial ways of reading legal texts and writing about law, and they are linked to the law school’s distinctive oral culture . . . [which] rests upon the discipline’s case method, its large amphitheater classrooms, . . . and the speech-like forms of effective final examination writing. But this oral culture and the instrumentalist reading and writing habits of law schools tend to subordinate more complicated, more reflective, more critical and more imaginative ways of reading, writing and thinking about law.43

These missing elements—“reflective, . . . critical and . . . imaginative ways of reading, writing and thinking about the law”—are particular strengths of compositional modes of learning, the signature pedagogy of legal writing.

40. Id. at 56–69.
41. Id. at 24.
42. See generally Bryant & Millstein, supra n. 18.
V. WHAT IF THE SIGNATURE PEDAGOGY OF LEGAL WRITING BECOMES THE SIGNATURE PEDAGOGY OF LEGAL EDUCATION?

It may not be entirely far-fetched to imagine contextualized, experiential learning, involving writing throughout the curriculum, as a dominant model in legal education. While legal writing may be taught in the shadow of the case dialogue pedagogy, it is, as James Boyd White has written, at “the center of what one learns: how to read and understand the literature of law . . . ; and how to make compositions of one’s own, oral and written, out of that material.” Professor White stresses that “what one learns in law school is not a set of rules, or even rules, principles, and policies, but a whole way of thinking and talking . . . .”

Changes brought by technology—including the specter of the Google-trained researcher who can search for key words but may not understand how to formulate the question—may also argue in favor of wider use of legal writing pedagogy. Development of conceptual understanding is enhanced by a compositional approach to legal education.

First, as has been true for a number of years, law firms increasingly seek to hire graduates who bring strong professional skills as well as intellectual promise. If the signature pedagogy of legal writing serves that need, demands from the practicing bar may encourage wider adoption of its methods.

Indeed, the American Bar Association (ABA) Section of Legal Education and Admission to the Bar, Student Learning Outcomes subcommittee’s draft standards concerning outcome measurements could point legal education in the direction of this signa-

44. White, supra n. 1, at 31–32.
45. Id. at 31.
47. See White, supra n. 1, at 8–24.
ture pedagogy. The ideas embodied in the draft standards—articulating the knowledge and professional skills that students should learn in courses, designing curriculum to serve those goals, assessing students’ progress with reference to those goals and sharing that evaluation with students—reflect common current practices in legal writing pedagogy.

Similarly, the idea, noted in the draft of the Subcommittee on Student Learning Outcomes of using student learning portfolios as a means of both formative and summative assessment, is familiar to legal writing teachers. The Carnegie Report notes that student portfolios offer a “promising approach to assessing the complex skills of practice . . . .” Learning portfolios provide a means of linking clearly articulated goals to assessment measures, consistent with the learning expectations of just-in-time learners.

Finally, many teachers who would identify themselves as legal writing teachers also teach doctrinal courses, and in at least some law schools, doctrinal teachers also teach writing courses. Adopting the signature pedagogy of legal writing as a method for teaching doctrine would not be a difficult step for these teachers.

In fact, a significant group of law teachers do incorporate writing into their doctrinal courses. According to survey data compiled by the Association of Legal Writing Directors and LWI since 1999, the vast majority of respondents answered that “at least some do” in response to the question asking whether teachers of upper-level doctrinal courses at their schools included writing assignments in their curriculum. Depending upon the year, between two and four schools responded that none do, and the rest (170 in 2008) answered that some do, with the average hovering between roughly 21 and 24 percent of the teachers at each

50. Id. at 3–7 (providing Standards 301–303).
51. Id. at 6–7 (providing Interpretation 303-1); see Steven J. Johansen, “What Were You Thinking?”: Using Annotated Portfolios to Improve Student Assessment, 4 Leg. Writing 123 (1998).
52. Sullivan et al., supra n. 16, at 174.
54. The Association of Legal Writing Directors/Legal Writing Institute Survey Results are available at http://www.alwd.org/surveys.html.
school. Although that group of teachers does not seem to be rapidly expanding, it does seem solid.

If the signature pedagogy of legal writing were to become the signature pedagogy of legal education, what would legal education look like? What would be the shadow of this signature pedagogy—or perhaps more to the point—what might be lost? Would the ABA’s draft standard of “knowledge and understanding of the substantive law” suffer? Would students lack the knowledge base necessary to formulate the “right” questions? Would we one day find ourselves at conferences discussing the feasibility of teaching doctrine-across-the-curriculum?

Concerns expressed in response to ABA draft standards and to a perceived emphasis on skills in the Carnegie Report resemble those heard following the publication of the MacCrate Report in 1992. In general, these concerns centered around the economics of placing greater emphasis on labor-intensive lawyering skills courses and fear that a program that integrates theory, doctrine, and skills and places less emphasis on three-hour final examinations would be less rigorous than the traditional law school program.

But need the pedagogies of legal education compete? If instead they are viewed as complementary, what should be the balance of approaches to teaching in legal education?

55. See id.
59. See Philip C. Kissam, Lurching toward the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education, 60 Ohio St. L.J. 1965, 2006–2016 (1999) (arguing that writing-across-the-curriculum “fits easily with traditional law teaching” and offers an “economical way to reform” legal education); Kathryn M. Stanchi, Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy, 43 Harv. Civ. R.-Civ. Lib. L. Rev. 611 (2008) (suggesting that law schools “increase the number of courses that integrate doctrine, theory, and skills so that students learn to use both doctrine and legal theory, including critical theory, in a practical context”).
VI. CONCLUSION: TAPPING INTO THE INTEGRATIVE POTENTIAL OF WRITING ACROSS THE LAW SCHOOL CURRICULUM

The LWI’s first twenty-five years have brought our discipline to the point where legal writing pedagogy will provide models for legal education in the next twenty-five years. As the Carnegie Report has noted, “legal research and writing courses have long practiced ways of integrating the conceptual and the practical . . . .”60 Indeed, within the signature pedagogy of legal writing, learning the law and writing in law are inextricably linked. In courses through law schools’ curricula, legal writing pedagogy serves the profession by engaging students fully in working to solve legal problems within authentic contexts. A question that might have seemed fantastic twenty-five years ago now seems within reason: what if the signature pedagogy of legal writing really does become the signature pedagogy of legal education?

60. Sullivan et al., supra n. 16, at 99. A section entitled, “Connecting the Apprenticeships through Legal Writing,” id. at 104–106, observes that the “iterative and collaborative” structure of legal writing pedagogy “simulates real legal production quite closely,” and makes “the process of discovery and refinement within a complex context . . . visible to the learners . . . ,” id. at 110.
JILL RAMSFIELD: Chris Rideout had the original idea regarding grant money, and he also came up with two exceptional ideas. One was the Legal Writing Institute and the other was the Journal. When I tried to think of things to say about Chris, it did not take too much effort because he has had such a major effect on my career. I could not have done anything without him.

Chris is, of course, a scholar. That scholarship is what really started the Legal Writing Institute and has infused our profession with a sense of quality and depth, something we need individually and collectively. It was his thinking about writing across the curriculum that started the Legal Writing Institute, and he has continued to be a scholar of high quality. Whenever I get some wonderful idea that I think is so great, I'll talk with Chris and he'll say, “Oh, yes, that was so-and-so in 1974, or that’s so-and-so in 1985.” That is one of the many reasons we can all appreciate Chris, because there is so much that we can continue to learn from him and from scholars across the disciplines. He personifies quality, reflection, and scholarship.

Another thing that really comes to mind about Chris is how much he appreciates working with students, colleagues, and all of us in this profession. That first conference was a grassroots conference. Chris and I have had many conversations about how it felt to be coming together as a group with a common goal—and Laurel described it so well—this reaching out to each other and realizing you’re not alone. I remember being on the boat with
Joseph Williams at that first conference. We were sailing out into Puget Sound, and we were all freezing. The wind was blowing in our ears, we were shivering—and we were talking about writing. Exactly that atmosphere of working together and working with each other has come full circle for Chris and for many of us now, in our summer writing workshops where once again we have that grassroots feeling of coming together and talking about issues that we have in common.

Chris is a scholar, a grassroots organizer, and an innovator. It’s hard to do them all. It took me a while to figure that out. I always thought education was supposed to be innovative, but in fact ours is a reactive profession. Business people innovate, and we try to stop them. That attitude can translate into reactive and overly cautious legal educators. Yet Chris imported writing across the curriculum to law in 1984, and continues to introduce us, through his scholarship, to concepts and scholars from a range of disciplines, including composition theory, linguistics, and anthropology. As an innovator, he has always said that some of the work done in composition theory and in other disciplines does not work in law. He exhorts us, then, to interpret that carefully and deeply—and then to make up our own minds. It’s a worthy challenge.

I just want to end this introduction by sharing the feeling that Chris has always engendered in those of us who know him and work with him. That feeling is one of searching at all times, thinking at all times, being welcomed at the intellectual table at all times, and being liberated. We talk about liberatory writing; in fact, he has liberated all of us who work in teaching legal writing. It is certainly fitting that he should receive the first Mary Lawrence Award. Mary embodies many of these qualities and more. She, too, is a scholar, innovator, and interdisciplinary whiz. She set for us all the original standard of careful teaching, thorough thinking, detailed preparation, and strong political savvy. She always kept her sense of humor while working earnestly to liberate the minds of those of us who have chosen this profession. We thank her for that.

And scholar, grassroots organizer, and innovator, we thank you: Chris Rideout.
What does it mean to speak of legal writing as an academic or professional discipline? This question is one I asked on a sunny fall day in Georgia in November 2009, when a group of legal writing professionals gathered at a Symposium to celebrate the first twenty-five years of the Legal Writing Institute. The question is admittedly broad, and those attending the Symposium answered it themselves, in part and throughout the day, by looking at the role that the Legal Writing Institute has played in the teaching, scholarship, and program design of legal writing professionals. Some of their thoughts are gathered elsewhere in this Volume.

Knowing that others were going to examine areas like teaching and scholarship, I tried to dig a little deeper. This was a humbling exercise, surrounded as I was by a room full of so many talented people, almost all of them long-standing colleagues and old friends. The richness of the occasion reminded me that our discipline of legal writing has grown into a remarkable and unique professional community, one that is as strong and capable as the individuals who belong to it. Those individuals are, in my experience, dedicated, talented, and generous. As a result of this, our legal writing community has thrived. One of the exemplary
individuals in that community has been Mary Lawrence, whom we also gathered to honor that day. A strong community is made up of outstanding individuals, and we marked that by honoring Mary.

Standing in that room, then, I was readily struck by the way in which a professional discipline builds on the talent and energy of the individuals it contains. I think everyone else in the room, reflecting back on the last twenty-five years of legal writing, felt the same. But what else? What else besides our teaching and scholarship, our curriculums and conferences, and our pool of talented colleagues characterizes the nature of legal writing as a discipline? In building our discipline, what have become our disciplinary values? This last question intrigues me the most.

As a way of getting to some of the values of legal writing, I bring up the idea of our “disciplinarity,” because one way of getting at those values is to look at them through this somewhat abstract concept. I also think that our disciplinarity is part of what deserves our celebration as we look back at the past twenty-five years of the Legal Writing Institute. Part of the work of the Institute has been to develop, through the combined efforts of many people, our disciplinarity.

The concept of disciplinarity was first proposed in 1993 in a collection of essays on the same topic. The collection attempts, through this concept, to get at the essence of what makes any academic endeavor uniquely a discipline—or, from another angle, to get at what makes any discipline a site for disciplinary knowledge. I encountered this collection while looking at Lisa Ede’s book, *Situating Composition*, in which she asks questions about the field of composition studies that are similar to some of my questions about legal writing. There, Ede looks at the disciplinarity of composition studies. For example, Ede asks, what does it mean to talk about the field of composition as a field or discipline? Is composition simply a specialized part of English departments and English studies? Is it defined primarily by its curriculum and course offerings? Is it also a scholarly discipline?

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3. See Ellen Messer-Davidow et al., *Disciplinary Ways of Knowing*, in *Knowledges*, supra n. 2, at 1 (introducing the term “disciplinarity”).
5. *Id.* at 3 (phrasing these questions from the opening inquiry of her book).
The corresponding questions for legal writing are obvious. I asked the first one above: what does it mean to talk about legal writing as a discipline? The others follow. Is legal writing simply a specialized part of law school and legal education, with similar pedagogies and values? Is legal writing primarily defined by its curriculum and course offerings? Is legal writing also a scholarly discipline? In the brief space of my comments here, I cannot fully answer these very large questions, but I hope to offer one way of answering them. If we want to understand legal writing as a discipline, we can do so by looking at our own disciplinary practices. As legal writing professionals, we are what we do, and in what we do lies the key to those larger answers about the nature of our discipline—including, for me, some of our values.

So over the years, but especially in the last twenty-five, the field of legal writing has not only built itself as a professional and academic discipline, but, in doing so, the field of legal writing has also developed a set of practices that could be said to constitute its disciplinarity. These disciplinary practices form the boundaries—and frontiers—of what we do as legal writing professionals. They “discipline” our discipline, and in doing so, produce the professional world of which we are all a part. Some of our disciplinary practices are readily apparent, and we engage in them almost every working day.

For example, most of us would call ourselves teachers, and, in that sense, we are practitioners of our discipline. What we do as teachers forms part of our disciplinary practices, and thus those practices are defined in part by our pedagogy. We are not, of course, all alike as teachers. Some of us are classroom teachers, while others work as legal writing specialists, either in law school or in law practice settings. We also approach our classroom presentations somewhat differently—some of us in ways that could be called mainstream to legal writing, but others of us in ways that are somewhat different or even heterodox. We spend time at academic conferences talking about our teaching itself, another disciplinary practice that in turn helps to define our very

6. See id. at 127 (Ede uses the term “situated practices,” while I prefer “disciplinary practices.” The Author borrows her term from a larger body of work on the pragmatic understanding of theory as situated practice).


8. See id. (noting the importance of practitioners’ contributions to the development of a discipline).
teaching practices as being mainstream or otherwise. And to some extent, we have hierarchies as practitioners, delineated in various ways—for example, whether we are experienced teachers of legal writing or newcomers to the field, or by our administrative roles within our respective legal writing programs. Our discipline, and its disciplinary practices, is defined by what we do as practitioners within it.

As practitioners, we also produce—both words and things—and, in so doing, define another important part of our disciplinary practices. In producing, it could be said that we create value, with varying economies to that value. We produce when we sponsor academic conferences and workshops—regional, national, and international—and make countless presentations at those conferences. Many of those presentations lead to articles that we then publish—often in our own journals. We produce textbooks and other teaching materials, which we rely on as classroom practitioners. We also produce reference materials for the legal profession. In addition, our practices produce jobs, ranging from adjunct lecturers to tenured full professors. Finally, we have created professional legal writing organizations, including the Legal Writing Institute, the Association of Legal Writing Directors, the legal writing section of the Association of American Law Schools, and Scribes. Through those organizations, we sponsor programs that help us with the professional obligations of our jobs, including administering workshops for beginning teachers, authoring research and travel grants, or hosting workshops on producing scholarly writing. And also through these organizations, we sponsor newsletters and journals for our profession.

In the sequence that I have been pursuing so far—disciplinarity in general, defined through its practitioners and by the production of value—I have been following the defining features of a discipline as described in the collection of essays on disciplinarity that I mentioned earlier. The fourth defining feature in that collection is listed as the idea of progress within a discipline, but here I depart. Progress, a feature that we can certain-

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9. Id.
10. Including *The Second Draft*; the newsletter from the Legal Writing, Reasoning and Research Section of the Association of American Law Schools; *Legal Writing: The Journal of the Legal Writing Institute*; *J. ALWD: Journal of the Association of Legal Writing Directors*; and the *Scribes Journal of Legal Writing*.
11. Id. at viii.
ly claim as emerging from our own disciplinary practices within legal writing, is, for me, a value—one value among several—and so, I would broaden this fourth defining feature to that of disciplinary values. Given that these remarks are occasioned by a luncheon address, with the accompanying constraints of time and space, I am going to invoke the privilege of chasing to the end.\textsuperscript{12} I want to look at two examples of our disciplinary practices and pull out the values that I see embedded within those practices.\textsuperscript{13} Of the many observations that we could make about our disciplinary practices, I want to celebrate some of the disciplinary values that I find in what we do, using these two examples as a guide.

Both of the examples I will discuss emerge from recent activities among legal writing professionals. The first regards the writing of issue statements for briefs or for office memora

None of us invented, in recent history, the practice of using issue statements in legal documents, but we have all grappled with them. My personal memory of this goes back to the early 1980s, when the form of issue statements seemed to be a given. An issue statement was one sentence long, and it began with the word “whether.” I worked with countless law students who struggled to get the essential information into that single sentence, but the convention went largely unchallenged. Rather, the burning question at that time seemed to be whether an issue statement should have a question mark at the end. On the one

\textsuperscript{12} Given those constraints of time and space, I am taking the short way to disciplinary values, by looking below at examples of disciplinary practices. A longer way lies through the language practices located within those disciplinary practices, language practices making more visible the underlying epistemologies and ideologies that compose those disciplinary values. Elizabeth Mertz has offered this kind of investigation for law school practices in general, although not specifically for legal writing, in her book, \textit{The Language of Law School} (Oxford U. Press 2007). Another route lies through genre analysis, genres being viewed not only textually, but also as sites for the social and contextual dimensions of specific language practices. See John Swales, \textit{Genre Analysis: English in Academic and Research Settings} (Cambridge U. Press 1990); Carol Berkenkotter & Thomas N. Huckin, \textit{Genre Knowledge in Disciplinary Communication} (Lawrence Erlbaum Assocs. 1995).

\textsuperscript{13} I do not intend my investigation to be exclusive. There are, of course, many other practices within the discipline of legal writing, and within those other disciplinary practices that are no doubt other values. I hope, with these remarks, to start us thinking and talking about some of the values that are embedded within our profession.

\textsuperscript{14} I start with this example because in the fall of 2009, just before the Symposium mentioned above, the Legal Writing Institute Discussion List contained a thread on whether multiple sentence issue statements are desirable, or whether issue statements should be limited to one sentence. The thread started on October 20, 2009, when Claire C. Robinson May asked for examples of multiple-sentence issue statements for a research memo.
hand, because an issue statement began with “whether,” it asked a question. On the other hand, again because of the use of the word “whether,” it was an incomplete thought—a sentence fragment. Could a sentence fragment be dignified with end punctuation?15

A year or two later (the mid-1980s), I can recall sitting in a classroom with Laurel Oates and Jill Ramsfield, where we were conducting our annual August instructor training. The topic was how to teach issue statements, and I remember, quite clearly, Jill writing on the board the structure of the “under-does-when” paradigm. This paradigm seemed very teachable, and we quickly adopted it. Among other things, it avoided the archaic-sounding “whether” and resolved the question of the question mark. The paradigm was also instructional since its very form guided the necessary content: the relevant law for “under,” the specific legal question for “does,” and the supporting facts for “when.” Finally, the syntactic structure of the paradigm provided a way of writing a fairly long sentence that stood a strong chance of being readable.

The “under-does-when” paradigm made issue statements more teachable, but it still did not challenge the convention that issue statements be one sentence long. The one-sentence convention, alas, could still produce issue statements that were difficult to read, and many writers (especially students) still chafed at it. Some legal writing teachers experimented with teaching multiple-sentence issue statements, but these often produced issue statements that resembled long paragraphs. In my opinion, Bryan Garner helped with the breakthrough, in his article on “deep issues.”16 Garner labeled the traditional conventions for issue statements—that is, start them with “whether” and keep them one sentence long—as “hogwash”17 and advocated a new convention: issue statements (and questions presented) should consist of separate sentences, contain no more than seventy-five words, end with a question mark, incorporate enough detail to convey a story,

15. Fortunately, we did not spend too much time worrying about this small question. On the other hand, forums like the Legal Writing Institute Discussion List did not exist then for asking questions like this, primarily because the internet did not exist (at least in a form available to the public). If it had, perhaps we would have answered the question.
17. Id. at 1.
and be simple enough for a non-lawyer to understand. Garner encouraged the “deep issue” format because, in addition to being more readable, it resulted in an issue statement that was concrete and summed up the case with sufficient information. He recommended the format not only for office memoranda, but also for briefs and judicial opinions.

More recently, Judith Fischer has offered an empirical study of issue statements and their framing in persuasive briefs. Fischer looked at issue statements as they are written in practice, examining briefs submitted to the highest courts of six states. Not surprisingly, she found considerable variation among these briefs, but she was also able to draw some conclusions about the effectiveness of certain practices. Among her conclusions, she noted that her study revealed that clarity was one of the most important attributes of a well-written issue statement, and that brevity came in “a close second.” She found that single-sentence issue statements still prevailed in practice, but asserted that issue statements beginning with “whether” were declarative statements and authors should eliminate the concluding question mark. She also observed that the multi-sentence deep issue format was gaining adherents, although still not widespread. Like Garner, she emphasized the importance of drafting issue statements in a thoughtful and careful manner.

Legal writing consists of many well-established conventions—some of them desirable and some of them outdated and unhelpful. Challenging such conventions takes time, and an emerging consensus among practitioners concludes that the alternatives are useful. Hence the continuation last fall, on the Legal Writing In-

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18. Id. (placing issue statements at the beginning of the document, rather than after the statement of facts).
19. Id. at 2.
20. Id. at 3.
21. Id. at 5.
22. Id. at 8.
24. Id. at 4.
25. Id. at 25.
26. Id.
27. Id. at 26.
28. Id.
29. Id.
30. Id. at 25.
stitute Discussion List, of the question of multi-sentence issue statements. The responses to the initial query on the discussion list composed a brief history of recent thinking about issue statements, including reference to the “under-does-when format,”\(^{31}\) to the deep-issue format,\(^ {32}\) and to Judith Fischer’s recent empirical study.\(^ {33}\) Many of those posting on the discussion list reported that they had successfully begun teaching the deep issue, or multi-sentence, format.\(^ {34}\)

One contributor offered the Question Presented from the Respondent’s Brief in *Miranda* as an example that he often uses in class of a poorly drafted Question Presented.\(^ {35}\) He then posted the Question Presented from the Petitioner’s Brief, offering it as a better example:

> Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?\(^ {36}\)

This example is a one-sentence issue beginning with “whether,” which prompted another contributor to rewrite it into a multi-sentence issue:

> Ernesto Miranda is a poorly-educated, mentally abnormal indigent. Police officers took him into custody and interrogated him. He did not request counsel and made a confession. Can the confession be admitted into evidence when his counsel specifically objected that the police had not made Miranda aware that he had a right to counsel?\(^ {37}\)

This poster offered the humble conclusion that the revised, four-sentence version of the issue was clearer.

\(^{31}\) Posting to the Legal Writing Institute listserv by Sue Liemer on Oct. 20, 2009.

\(^{32}\) Posting to the Legal Writing Institute listserv by Allison Cato on Oct. 20, 2009.

\(^{33}\) Posting to the Legal Writing Institute listserv by Judith Fischer on Oct. 20, 2009.

\(^{34}\) In addition to the posting by Allison Cato, see e.g., postings to the Legal Writing Institute listserv by Adrienne Brungess on Oct. 20, 2009; Tonya Kowalski on Oct. 20, 2009; and Kathryn Fehrman on Oct. 20, 2009.

\(^{35}\) Posting to the Legal Writing Institute listserv by Kevin R. Eberle on Oct. 29, 2009.

\(^{36}\) Posting to the Legal Writing Institute listserv by Kevin R. Eberle on Oct. 29, 2009.

\(^{37}\) Posting to the Legal Writing Institute listserv by Louis Sirico on Oct. 30, 2009.
I recount this brief history and discussion, not to resolve the question of formats, but rather as a simple example of one recent disciplinary practice among legal writing professionals. And within that practice, I see at least two embedded values. First, we are looking for ways of drafting issue statements (and questions presented) that are clear and readable while still capturing the essence of the legal question. In doing so, we seem willing to challenge older practices that are outdated or unhelpful. One value, then, is that we are professionally progressive. We are looking for ways to improve the way the legal profession writes. Second, because most of us are teachers, we are also looking for ways to help students draft successful issue statements and questions presented. Sometimes this results in simple classroom tips and structuring devices, like the “under-does-when” format. A second value, then, is that we are pedagogically innovative. The two values even seem to go hand in hand. One way to be professionally progressive is to also be pedagogically innovative—to find ways of helping law students master good legal writing that, in turn, will spread to the profession at large.

I do not think that these are the only two values embedded in what we do, however, and so I will turn to a second example of a recent disciplinary practice among legal writing professionals: the movement within the Legal Writing Institute to explore and advocate for applied legal storytelling. As Ruth Anne Robbins recounts the story, the applied legal storytelling movement dates to a conference on the “Power of Stories,” held at the University of Gloucester in 2005. One of the panelists there appealed to his audience for ways to help his students better understand the value of narrative in the practice of law. That appeal lead directly to the idea of a conference dedicated to applied legal storytelling, and two have been held to date. The first, “Once Upon a Legal Time: Developing the Skills of Storytelling in Law,” was co-sponsored by the Legal Writing Institute and City Law School/Gray’s Inn of Court and took place in London in July of 2007. The second, “Chapter Two: Once upon a Legal Story,” also

39. Id. at 4–5 (the panelist was Robert McPeake).
sponsored by the Legal Writing Institute, took place in Portland, Oregon, in July 2009.40

In the course of planning these two conferences, the organizers had to define what they meant by applied legal storytelling and, in particular, they had to carve out the relationship between applied legal storytelling and the existing law and literature movement.41 The word “applied” seemed to guide them, as they looked for proposals that addressed the uses of stories in legal pedagogy and law practice.42 That rubric still allowed for a wide variety of papers at the first conference—from the uses of stories in clinical settings, to the uses of stories to teach Australian tax law or American banking law, to the uses of stories in sentencing in the Australian aboriginal court system.43 This breadth continued into the second conference, in 2009, as a sampling of the paper titles from that conference reveals (with my own added categorizations):44

Theoretical:
“The Science of Storytelling”,45

Empirical:
“An Empirical Study of Storytelling in Appellate Brief Writing”;46

Practice-based:
“Lawyer as Storyteller: The Role of Empathy and Compassion in Telling Effective Client Stories”;47

Pedagogical:

41. Id. at 8.
42. Id.
43. Id.
46. Presented by Kenneth Chestek, Indiana University School of Law—Indianapolis.
47. Presented by Kristin Gerdy, Brigham Young University J. Reuben Clark Law School.
I find it significant that a conference sponsored by the Legal Writing Institute contains papers like these, for they enlarge the scope of how legal writing professionals view what they do and they bring in other perspectives—whether theoretical or practice-based and whether local or global. They enlarge our disciplinary practices. In doing so, they also represent embedded values in what we do; two of them I have already noted, plus two more.

First, these practices are, again, professionally progressive. Although legal argumentation is commonly seen as driven by logic or rhetoric, stories (or narrative structures) are also cognitive and rhetorical instruments and are an important part of legal persuasion, as many of the papers from the Applied Legal Storytelling conferences have demonstrated. Two of the stated goals of the organizers of the first conference were to improve the law—for example, by including the stories of outsiders—and to improve lawyering—not only by demonstrating the place of storytelling in legal persuasion, but also by showing how to use storytelling in, for example, cross-examination or in negotiation. One presentation at the first conference, by Marianne Wesson, directly challenged existing law. Looking at an 1892 Supreme Court case on an exception to the hearsay rule, Professor Wesson used storytelling analysis to question convincingly the reliability of statements of future intentions.

Second, these practices are, again, pedagogically innovative. In fact, a primary stated goal of the Applied Legal Storytelling

48. Presented by Angela McCaffrey, Hamline University School of Law.
49. Presented by Davida Finger, Loyola University College of Law, New Orleans.
52. Id. at 26–27.
55. Foley, supra n. 51, at 24–25.
conferences is to improve law school teaching by demonstrating the place of storytelling in the law—not only in legal writing courses, where persuasion is commonly taught and where applied storytelling naturally fits, but also in clinics and casebook courses.\textsuperscript{56} Brian Foley argues that teaching legal storytelling can help train law students with what he calls “factual realism,” sensitivity to the importance of facts in the overall task of lawyering.\textsuperscript{57} In doing so, legal storytelling can also help to bridge “the great fact-law divide” that he sees between law school casebook courses and law school skills courses.\textsuperscript{58} Teaching storytelling can instruct students on how to address the difficulties of factual indeterminacy in law practice, something at which legal education often falls short.

In addition to being professionally progressive and pedagogically innovative, I note two other values in the disciplinary practices of the Applied Legal Storytelling movement. The first of these is what I would call interpretive and hermeneutic. Many of the papers and articles that have thus far emerged from the movement offer theoretical or analytical frameworks for understanding how storytelling works both in the law and in law school pedagogy, as well as revealing underlying narrative structures or hidden themes within law’s stories. Ruth Anne Robbins, in considering whether Applied Legal Storytelling is a part of the Law and Literature movement or is its own parallel movement, points out that this theoretical aspect of the movement is related to treatments of the law as an ethical discourse and to treatments of the law as a language.\textsuperscript{59}

And finally, I would observe that our disciplinary practices are, at times, reformist or political. Brian Foley argues this directly for the Applied Legal Storytelling movement,\textsuperscript{60} again using the relationship between factual realism and applied storytelling as a basis for pointing out the need for a shift in the pedagogy of law schools.\textsuperscript{61} Noting that he is in part acting as a provocateur,
he asserts that greater attention to factual realism can change both legal education and the law itself and that “[Applied Legal Storytelling] can be at the forefront of this (r)evolution.”

Here, then, are four values that I see within our discipline: professionally progressive; pedagogically innovative; occasionally interpretive and hermeneutic; and, at times, political and reformist. I can identify these values within just two examples of our disciplinary practices. I am confident that you could offer many other examples of what we do that would also contain these values. And I am equally confident that my list is not exclusive and that you could identify other values. The point of these remarks has been to offer one way of thinking about what we have been doing for at least the last twenty-five years, as legal writing has grown not only as a professional community but as a discipline. We have been creating disciplinary values.

This takes me back to the beginning. Since 1985, many talented and valuable legal writing professionals have joined our ranks, in part because many law schools have added or have enhanced their legal writing programs and, in part, because we are a professional community worth joining. We have not only built this professional community, but also have proudly constructed a discipline. We have enhanced our legal writing programs and curriculums. We have developed many ideas for teaching within those programs and shared those ideas with each other. And we have produced scholarship—from papers that we deliver at conferences to articles and books that we publish. We have, in short, built a discipline, one that we can be proud of. And in the process of building that discipline, we have engaged in disciplinary practices that could be labeled progress, although I prefer to break that notion of disciplinary progress down into some of its underlying values. At the twenty-five-year mark of the Legal Writing Institute, we should allow ourselves to celebrate our discipline—and its values—for a moment.

I hope you feel about this the way I do. Then get back to work. I'm looking forward to the next twenty-five years.

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62. Id. at 45. I should add that, within legal writing, it is easy to point to other disciplinary practices as well that could be called political or reformist, but I am confining myself to the two examples here.

63. I hope you think about this and add to the list. That is part of the point of these comments—to encourage us to think and talk about this.
PRESENTATION OF MARY S. LAWRENCE AWARD

KIRSTIN GERDY: The Legal Writing Institute’s Journal is very proud to announce today the creation of the Mary S. Lawrence Award for Excellence in Legal Scholarship. Mary became the director of the University of Oregon’s first legal writing program in 1978 and served for twenty-two years in that capacity. She technically retired in 2000, but I’m not sure that really is the case since she is still one of the most vibrantly involved people that I know. I have been honored to have Mary serve as a senior editor on our editorial board for the last two years. I have been overwhelmed by her insight, her mentoring, and everything that she has done for us. So, we are very proud to announce this award. I would like Mary to come up and be recognized.

In the Journal volume that will contain the proceedings of this Symposium from the Legal Writing Institute side, we have a series of tributes that have been written about Mary by people who have known her over the years and we are happy to memorialize her in this way. I’d like to bring Mary and Ruth Anne Robbins, the president of the Legal Writing Institute, up to the front.

PAMELA LYSAGHT: We have this award that we’ve named after Mary, so we should bestow it upon the person who we think is very appropriate, and Mary believes this as well. The first recipient of the Mary Lawrence Award is Chris Rideout.

Chris is a wonderful scholar who personifies many of the things that this award symbolizes. I have benefitted from Chris’s scholarship, and I have also benefitted from his work in the writer’s workshops he has facilitated. I’ve also had the privilege of editing his work, including his most recent, “Voice, Self, and Persona in Legal Writing,” in Volume 15 of the Journal of the Legal Writing Institute.1 It is always a pleasure to edit the work of someone who produces such thorough scholarship. We are very proud to bestow this award on Chris.

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How does one describe Mary? What has she meant to all of us and to our profession? When I have asked others these questions the answers I got included words like: “Extraordinary”; “Inspiring”; “Generous”; “Innovative”; “Elegant”; “Kind”; “Methodical”; “Creative”; “A Superb Mentor”; “A Grand Lady”; “A Role Model”; . . . well, you get the idea. She truly is one-of-a-kind.

Mary instituted the Legal Writing program at Oregon in 1978. Coincidentally, that was the same year I instituted Chicago-Kent’s three-year program, though I had taught the course many times before then. At that time, there were very few Legal Writing “programs” at American law schools. Legal Writing as a distinct course was not even taught at every school. At many schools, Legal Writing classes were taught by upper-level or graduate students. And there was almost no vehicle for those teachers actually in the field to meet one another, share ideas, and help with problems. The AALS section on Legal Writing and Research was of recent vintage, and membership was almost entirely librarians.

In 1980, as chair of the AALS Section on Legal Writing, Reasoning and Research (as it now was to be called) I induced the AALS to put on its first ever Workshop on Legal Writing and Research, in Louisville, Kentucky. It was at that conference I had the pleasure of meeting Mary for the first time. Forty-two people attended, including several other young people who became the early leaders in the field—e.g., Marilyn Walter, Chris Kunz, Helene Shapo, Norm Brand, James Bateman, and Grace Tonner. The conference was very good. But I learned so much more by the informal conversations we had within the group, similar to what goes on now at the Legal Writing Institute meetings. Remember, in those days there were only two or three student-oriented books, no listservs, and no regional conferences. Most of the teachers did not stay in the field, but either moved on to doctrinal teaching or left legal education entirely. I was so impressed by Mary and her
program at Oregon and, of course, by her personally. She had so many really great ideas.

At the second AALS Workshop, held in Chicago, in 1985, Mary brought along her dean, and they got to hear Marge Rombauer, Terry Phelps, George Gopen, and Laurel Oates, among others. Marge Rombauer and her innovative program especially impressed Mary, and they had become best friends. It was at that meeting that a group of people, including Mary, met to begin the formal creation of the Legal Writing Institute; as an informal group, Puget Sound had hosted what now is listed as its first program a year earlier.

In 1986, the now incorporated Legal Writing Institute held a terrific program at Puget Sound. Mary was a key presenter. Susan Brody and I shared the same thought: we were simply blown away by her talk about the process of legal writing she called “spiraling.” By that time, I had taught Legal Writing to approximately 1,000 students, and thought I knew what I was doing, but Mary’s talk made me reconsider and rethink everything I did.

The 1986 conference also marked the beginning of a lovely tradition of Mary’s. She hosted an incredible brunch at an exquisite hotel in Seattle for Chris Kunz, some other friends, and me. She arranged for us to have the best table, and one of the finest meals I ever had at that time. She has topped that one so many times since, at LWI meetings, or ALWD meetings, or AALS meetings, or just on visits to Chicago. She researches, plans well ahead of time, and chooses the finest restaurants. She keeps track and accommodates the tastes, preferences, and problems of all her guests. Thus, there always is salmon on the menu for Richard; wonderful vegetarian food for Lou and Jill; no shellfish or olive oil for me because of my allergies; and bottles of fine wine for all. We have to try to bribe the maitre d’s to not give her the check, but she always has outfoxed us by arranging payment before our arrival. She gets on the waiters if she feels the service is not up to her high standards, and enjoys to the fullest our enjoyment of her choice for the evening. The finest meal I’ve ever had in my life was arranged and hosted by Mary, at the Windsor Grill in New Orleans. The six of us who were her guests talked about that meal and Mary’s incredible hospitality for years thereafter.

Mary’s elegance is also apparent in her choices of hotels. When she visited Chicago several years ago, she chose a suite in the Peninsula Hotel, where visiting movie stars stay. Her suite
was the ultimate in class, with more electronic gizmos than I thought possible. For her next visit, she made very clear to the management of the classic Drake Hotel that her suite had to be on a high floor, overlooking Lake Shore Drive and Lake Michigan, and she got exactly what she asked for.

Professionally, Mary’s program at Oregon clearly became one of the best in the country. She supervised full-time teachers, most of whom she had previously taught as students, and whom she personally trained to her high standards of excellence. As chair of the AALS Section for two years, she put on two excellent programs. She also persuaded the AALS to hold another Legal Writing Workshop. I’m sure very few people can understand how difficult that was to accomplish, for the AALS had a policy against frequent workshops on the same subject matter, other than the annual one for clinical legal education. Mary planned the meeting to the “nth” degree to make sure that everyone who attended would take away something pedagogically useful, and would not just be exposed to a bunch of talking heads.

Unfortunately, about ten years ago, physical ailments affected Mary, and she almost lost use of her vocal chords. Her disability did not stop her from continuing to present her wisdom to the growing professionals in the field. Sometimes she had to use electronic enhancement for her whispered voice to be heard, but any strain we felt in listening was amply rewarded by the wisdom she spoke. She never failed to impress with some great idea, some wonderful insight.

I feel so honored to have known and learned from Mary Lawrence for all these years. As I said at the outset, she is one-of-a-kind—the very best kind.
I met Mary in the mid 1980s, a period of time when those of us committed to legal research and writing were first mobilizing our efforts to get the field recognized as a discipline. The first large-scale legal writing conference was held; the Legal Writing Institute was born; a relationship with the AALS section was established; and interdisciplinary topics were explored. We couldn’t get enough time together: to discuss ideas; to share methods and materials; to dream of and envision curricula; and most importantly to establish a network and organization for us all. It was such an early time in fact, that—believe it or not—politics and status were actually not yet tackled head on, as we later would do so vigorously and zealously.

In those early years, Mary Lawrence stood among us as one of our greatest leaders, indeed as the quintessential “mentor,” “mobilizer,” and even “mother” so-to-speak. We held conferences as often as we could find the necessary resources, and every time, without exception, I learned something new and exciting from Mary, our mentor. Her presentations always taught me some new and innovative way of thinking about legal research and writing, materials to teach with, techniques for communicating, or methods of grading. There was always something—some idea or technique that she presented—that would make me want to rush back home to review my notes, apply them to the courses I taught, and master whatever it was as best as I could.

But Mary was not just a mentor for teaching, she was a mobilizer for the discipline; she pushed us to think and act like professionals. She preached the importance of creating an entity to give us status and professionalism. Indeed Mary was instrumental in the creation of the Legal Writing Institute. When it came time to tackle head on status and other political issues, she played an important leadership role. Her insights into how these issues could be uniquely tackled at different institutions became a topic for some of her presentations. Her ideas about the discipline together with her professional and political insights made her a perfect role model for all of us.
But it was Mary the colleague and friend—Mary the “mother,” so-to-speak—who would always make certain we actually had fun and developed lasting friendships and support. In each city where we met, she always found the most unique and inviting restaurants—at which she often held a party at her own expense—and asked many of us to dinner or lunch. Throughout the years, it has always been Mary who would let us know when one of us was in need of help or assistance. It was always Mary who kept in touch, who let each and every one of us know that we are on her mind and in her heart. To this day—indeed even through these tributes—it is Mary who brings us close together.

I can think of no other person in the field of legal research and writing who has played all these important and integral roles and who has given so much of herself—not merely professionally—but personally, unwaveringly, and deeply. It is an honor for me to express my gratitude to, admiration of, and respect for Mary Lawrence, who has had a profound impact on my career and my life.

With much love and appreciation, Susan Brody.
Mary was one of our earliest pioneers. She created and directed Oregon’s legal writing program—a program far ahead of its time. She envisioned and exemplified professional standards that were rare in those days but that have become the core of our discipline today. When our early battles were being fought, Mary was there, lending support, wisdom, and encouragement. She is still there today, calling and emailing those she knows might need a friendly word. She is and always was an expert listener. When you come away from a conversation with Mary, you find that your own thoughts and plans are clearer and your courage is restored. As the issues in our discipline have shifted over the years, Mary has helped us keep our perspective, and she always reminds us that we must work together if we expect to make lasting progress.

Mary is particularly special to me because she was the first person to invite me into the legal writing community. In the late 1980s, I was teaching and coordinating a legal writing program, but I knew no other teachers outside my own school. I met Mary at an AALS Section program she had planned. After the program ended, I approached her with a timid question. She introduced me to others and made me feel welcome. She found a place for me on a committee and included me in future plans and communications. It is no exaggeration to say that Mary gave me this wonderful community of friends and colleagues. Then when I moved to Mercer, Mary stayed in touch with her encouragement and her advice. When I was least expecting it, Mary would email or call, just to let me know that she was thinking of me. She still does it today, over twenty years after I first met her. Mary exemplifies the best in all of us, and we are a far better, stronger community because of her long years of service and her faithful, caring friendship.
For three decades, Professor Mary Lawrence has shaped the infrastructure of the still-young profession of teaching Legal Writing and its associated skills. In 1977, she began to teach Legal Writing at her alma mater after graduating. In fledgling Legal Writing courses around the country, many other Legal Writing teachers (myself included) were hired directly out of law school, often to teach at their own schools. But Mary brought a particular expertise to her teaching. She already had a M.A. in English, twelve years’ experience in teaching English (including English as a Second Language), and an ESL textbook to her credit. That cross-disciplinary strength allowed Mary to take an early leadership role in the growing Legal Writing community and to become fast friends with many colleagues who continue to stay in touch with her decades later. She served at length in every organization connected to the teaching of legal writing—the AALS section, the Legal Writing Institute, the Association of Legal Writing Directors, Scribes, the Perspectives editorial board, and several ABA committees.

In spring 1980, I attended my first Legal Writing conference in Louisville, after I had taught Legal Writing for two years at my alma mater. It had been a fast initiation into the ups and downs of teaching Legal Writing, as another faculty member and I had designed a new Legal Writing course from scratch and had, together with the librarians, taught the entire class and graded their assignments. Our student-faculty ratio on the writing assignments was 100 to 1. Until that conference, my only contact with the small community of Legal Writing teachers nationwide was my perusal of the few textbooks that had been published in the field. I was poised to move to my next job that summer, after landing a co-directorship (that also became a tenure-track position) in the Twin Cities.

When I met Mary Lawrence at the AALS Legal Writing conference in Louisville, I would never have guessed that she had been teaching Legal Writing for just a year more than I had. Her assurance and her grasp of the field made her seem far more sen-
ior than her recent graduation and three years of law-related experience would indicate. She was already a thoughtful and sought-out speaker at conferences, and she was calmly and steadily building the quality of her program at University of Oregon.

As I encountered her at subsequent conferences, I looked forward to her wry sense of humor and her seasoned grasp of the trickier issues that confront every Legal Writing teacher and director. I also came to appreciate the eagerness with which she set out to explore various conference cities (San Francisco, Washington D.C., Seattle, San Antonio, etc.), finding some great eating spots and enjoying the company of fellow teachers. Before many conferences, she contacted her friends in advance, arranging some legendary dinners and lunches at her favorite places. But it wasn’t food or wine that took front stage. The camaraderie of colleagues eclipsed the food, as impassioned discussions of skills education were laced with the personal stories, building warm friendships on the scaffolding of professional acquaintances. Mary was the catalyst for many of these friendships and so found herself at the hub of many professional networks.

Even her published writings have focused on building and strengthening connections among the Legal Writing community, as she has written reviews of new textbooks, published interviews of Legal Writing colleagues who were instrumental in moving the discipline of Legal Writing ahead, and assembled the historical material to document that growth.

The Mary Lawrence moment that I repeat most often occurred at one of the early conferences of the Legal Writing Institute, then located at University of Puget Sound. Mary’s presentation was focused on debunking the idea that students could learn a skill or concept well in a single encounter. Instead, she said, students will learn a skill or concept much better if they initially encounter it in a simple setting, then spiral past it again and again at increasingly more sophisticated levels, throughout their education. That “spiraling” concept of pedagogy has influenced my teaching design over and over again, as I intentionally reintroduce familiar skills and concepts in new settings, so that students have to spiral over the same material in a new setting, integrating their new-found knowledge with previous lessons learned. And each time I recount this spiraling strategy, I can see Mary beaming at me, saying wryly, “Well, they’ll never learn it well if you teach it just once!”
I first met Mary Lawrence on a beautiful summer day in 1992. She was giving hugs at an LWI meeting in Tacoma, and had more than enough to spare for the large group that had gathered around her. A recent illness had made it difficult for her to speak, but had not diminished the firmness of her handshake, the wisdom of her words, or the warmth of her smile. She was a giant in the legal writing profession, and she loved both the academic discipline and the people who taught it. She became an instant and treasured friend.

Mary radiates generosity. I have met many of her former students over the years, and all tell the story of a woman who, as a teacher, touched their lives. This is not surprising, given that her eyes are always bright, but never so much as when she recounts the accomplishments of one of her own.

She has been generous and more to her professional colleagues. When good things happen, one knows that the first congratulations will come from Mary, always in the form of a beautifully written note on an exquisite card. She is also a steadfast friend in times of indecision, and in times of adversity. She takes her mentor role seriously, and always puts all else aside to concentrate on the problem at hand. When I confided in her in 2008 that I was considering retiring and asked her advice, she called immediately. “Dear Molly,” she said softly, “if you are thinking about going, then you should go. You deserve joyful work, and one isn't joyful when one is looking longingly at the door. If you need time to think about what will bring you joy, take the time.” (Wise words, Mary.)

Mary cares about us all, and is mother to us all. Every legal writing function has included a lunch or dinner arranged by Mary to get groups of her colleagues together. Her choice of restaurants and menus for these gatherings reflects legendary culinary expertise, but the purpose is more than social. She has single-handedly built a support network for an entire generation of writing professors.

In May 2010, I had the privilege of visiting Mary at her home in Corvallis, Oregon. Both my husband and I came away from the visit inspired. Her home was, of course, welcoming, beautiful,
elegant, and tranquil, but what struck us was how much at home Mary herself seemed there. She also honored us with a visit to her award-winning garden. It can only be described as a holy space that celebrates life, beauty, and the wonders that can be created by a nurturing and patient hand. To see her garden is to understand her teaching.

Dearest Mary, congratulations on all you have done. You are not only a consummate professional, but also the personification of all that is wise, gentle, and kind. Thank you, Mary. With love, Molly Lien.
Over many more years than I can count, Mary has been one of the kindest, warmest, and most generous and caring people I know or anybody can know. She has also had a profound effect on the field of legal writing. Here are a few of her many influences:

About four decades ago, Mary wrote a book for higher education generally called *Writing as a Thinking Process*. At the time, writing was generally considered to be purely a compositional skill focused mostly on style, conciseness, and clarity. And the field of legal writing did not yet exist. Legal writing developed after Mary published this book, and in the field’s first decade or two legal writing teachers lived mostly within the compositional model.

Gradually, a consensus developed among us that writing is a form of thinking as well as a method of expression. But Mary knew that all along. She knew it before most of us were law students, much less teachers. And she gently explained it to us.

At the University of Oregon, Mary built one of the first programs centered on full-time teachers who specialize in legal writing, which is now the nationally predominant model. She was one of the pioneers of this method of teaching, and her sense of program structure was emulated at other schools.

Legal writing teachers are unusually supportive of one another, with a strong sense of community. That culture is one of the deepest characteristics of the field. It reflects Mary’s personality, and through her own example she strongly influenced it.

She also found quiet ways to bring people together, through which bonds grew among them. I don’t know whether that was her goal. But some friendships exist today largely because Mary got people together to enjoy each other’s company.
In an article published in this journal several years ago, Mary Lawrence described legal writing as “unique in academic disciplines.” She wrote, “It is not hierarchical; its members support each others’ careers. It is not parochial; its members strive to improve legal writing instruction nationally. Legal writing is more a community, a family.”

Mary is right. Although in too many schools, the status accorded to legal writing teachers still has not caught up with the value of those teachers to their schools and to the profession of law, we have been sustained by our vibrant, encouraging, smart, warm, honest, and courageous intellectual community. In describing our community, I realize that I am describing Mary Lawrence.

I first came to know Mary in the spring of 1991, when she was serving as chair of the AALS Section on Legal Writing, Reasoning, and Research, and I was the section’s program chair. I had no idea what to do. Through our many telephone conversations in the months that followed, Mary welcomed me into the discipline and its professional organizations—and became a dear friend.

Reflecting on my experiences in legal writing since then, I see Mary’s contributions everywhere, apparent—sometimes in ways I didn’t recognize at the time. For one example, I recently came across materials for the AALS Mini-Workshop on Writing throughout the Curriculum, which I attended in 1991. The workshop was the catalyst for my writing in that area over the past fifteen years, but only last fall did I discover—of course—that Mary had been one of the workshop’s organizers.

I am especially grateful to Mary for introducing me to so many treasured colleagues, whom she has likewise supported and inspired, and who cherish her friendship as I do. Her gifts to each of us—her laughter, her wisdom, her thoughtful message at a

personally challenging time—also are her gifts to our community. In law schools throughout the country, legal writing teachers are the people who really talk about teaching and, not coincidentally, the people who bring energy and imagination to the curriculum. Without Mary’s leadership and humanity, without her light touch and wonderful sense of humor, without her welcoming kindness, we could not have become who we are.
Mary Lawrence is a “pillar” of legal writing. Her training in second language learning and her experience and insight as lawyer and teacher are fused into a solid, unbreakable pillar of intellectual and political fortitude. At a time when legal writing was considered remedial and secondary, Mary said, “not so.” She insisted on developing a new field of inquiry, legal writing, and teaching it as an introduction to a new community, the legal discourse community—long before that terminology was invented or in vogue. Alone in the great Northwest, she also insisted on the proper status for teaching this complex and intellectually challenging subject: as a law professor. Among the first to be tenured in this field, with no help from others, she personified what we all hoped to become: full law professors advancing and developing this exciting discipline.

I first met Mary in the summer of 1984 at the first Legal Writing Institute Conference. A second-year instructor at the time, I was leading a focus group on topics of interest to the community. As a trained teacher, I anticipated participants would want to discuss such topics as planning classes, developing good assignments, teaching well in the classroom. Not so. Immediately and insistently, the topics were status and salary. As many know, we developed then and there the first statement on status for legal writing professors and promptly sent it to every dean of every law school. During those discussions, we took a break, and Mary approached me in a stairwell outside the classroom. “Have you thought of directing a legal writing program?” she asked. I was curious. Not only had I not thought of it, but I was also getting increasingly discouraged as our meeting continued. “You would be very good at that,” she said in her quiet, matter-of-fact way. That conversation inspired me to keep going, to pursue legal writing as a career—and to become a director at that.

Mary is almost shy about her immense talents and her passion for teaching. I have seen her do presentations only a few times at our conferences. Each time, the hallmarks of good teaching and thinking are there, subtle but unmistakable: excellent preparation, perfect organization, excellent use of teaching techniques, and practical advice. She exemplifies excellent teaching;
she inspires focused thinking; she promotes practical applications; and she personifies professionalism.

Since our first summer chat, Mary has been mentor, friend, advocate, and cheerer-upper. We talk regularly, and each time her focus is not on her own work, but on mine; not on her own plans, but on mine; not on her own issues, but on mine. Ever the giver, ever the promoter, ever the teacher. How might she respond to such praise? Turning her head slightly to the side, widening her eyes, and looking down, she would probably say, “Well. I don’t know about that.” We do, Mary. We do. Thank you for all you are, all you have been, and all you inspire us to be.
Mary Lawrence caught my attention years before I met her. In 1978, I was a young college teacher, fresh out of graduate school and looking for a textbook to use in my writing course. Mary’s book, *Writing as a Thinking Process*,\(^2\) caught my eye. Here, it seemed, was someone who thought about writing the way I did. For its title alone, the book earned a prominent spot on my office bookshelves, a reminder for me of what lay at the center of teaching writing. I did not know Mary, but always felt that somewhere out in academe lurked a kindred spirit.

Six years later, we met. My professional energies had moved in the direction of legal writing, and as it turned out, so had Mary’s. When, in the spring of 1984, a colleague and I were organizing what became the first conference of the Legal Writing Institute, Mary Lawrence responded, offering to conduct one of the workshops. It was the Mary Lawrence of the book in my office. Mary was teaching at the University of Oregon School of Law by then, and characteristically, she offered her help. When she came to the conference that August, I finally had the privilege not only of meeting Mary, but also of starting a professional association and personal friendship that continues to this day.

Since that summer twenty-four years ago, Mary and I have served together countless times on committees, on boards, and in working groups, and we have been to many, many more conferences together. Throughout all of it, she has been an exemplary colleague. Mary is smart, insightful, pragmatic, and hard-working. I always enjoy serving with her, and I always learn a great deal from her. Mary’s many qualities have made her a leader in the field of legal writing.

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2. Mary S. Lawrence, *Writing as a Thinking Process* (2d ed., U. Mich. Press 1996). The book is still available. I was also impressed because, unlike so many other writing textbooks, this one had a serious publisher—The University of Michigan Press. I should note that although the focus of the book—on writing instruction for ESL students—did not match my own course, I kept it for the inspiration of its title.
But of Mary’s many qualities, which others will note, I must underscore her generosity. Perhaps this has to do with her Celtic spirit, or perhaps she just has a larger heart than the rest of us. Mary has given selflessly to those around her, starting, I know, with her students. Regarding her generosity with her professional colleagues, I can speak first-hand. Mary gives more than most, and as a consequence, the profession of legal writing would not be the same without her. She has given generously not only of her energy, her time, and her ideas, but also of her gift for encouraging and advising her colleagues. Many of the accomplishments in the field of legal writing bear Mary’s stamp, either directly or through her quiet work behind the scenes. This has been especially true for the Legal Writing Institute. Mary has mentored and guided us, and we are in her debt.

But there is more, because if you work closely with Mary, you find that her professional generosity also comes with the gift of her friendship and her loyalty. In that, she has truly been a special colleague—and a dear friend. I am honored to have known her as both.
Mary Lawrence is a talented, dedicated professional. My one complaint against her is that she did not become a Director of Legal Writing until 1978. That was the year I stopped teaching the subject to first-year law students at the University of Washington Law School. Oh, how I could have used her insights and her creative ideas in my eighteen years of that teaching before 1978! But, I will ever be grateful that she did become a Director, because I had the benefit of those insights and ideas in teaching my Legal Analysis, Research, and Writing course to our foreign graduate students—and I had her friendship.

The professional relationship was important to me. Beginning as early as 1979, we prepared and participated in many panel presentations together. On each occasion, my appreciation of her creative thinking, her dedication, and her stamina grew. She was imperturbable, and I always knew I could rely on her.

Soon after I met her, she faced a challenge that would have put most of us out of action. In the year before Mary was to lead the AALS Legal Reasoning, Writing and Research Section, she lost her voice. Doctors were not immediately helpful in diagnosing the problem. That did not stop her. Wearing a device to enhance and amplify a small voice, she appeared in Louisville in March 1980 to participate in an AALS workshop on “Applied Legal Reasoning: The Research Setting.” Thereafter, she applied herself to learning to speak again, and she continued her contributions to panels and meetings.

Over the years, Mary became a central figure in introducing new teachers to members of the professional organizations. She provided social occasions that enhanced professional and inter-school relationships. On such occasions, she also helped to strengthen bonds among many of the early directors and teachers of Legal Writing programs. And most important to me after I retired, she kept me (and many others, I am sure) updated on developments in the profession.
By Suzanne E. Rowe
University of Oregon School of Law

One of my fondest memories of Mary Lawrence was a time when I couldn’t see her at all. We were attending the 2001 conference of the Association of Legal Writing Directors, and I returned to the conference hotel one afternoon to see a large group of distinguished legal writing professors from around the country clustered in the lobby. As I inched forward to investigate, I realized that Mary Lawrence was at the center of the circle. I couldn’t see her, but I heard her name and I heard her voice. Surrounding her were friends and colleagues, a few of the people she had mentored over the years. They pressed close to get a chance to say hello, share an idea, or relay a personal story to a woman whom they admired like a parent. At that point, I knew better than ever before that Mary is a legend. Beyond what she means to me and beyond what she means to the University of Oregon, Mary is a nationwide legal writing legend.

The program that this legend founded at Oregon thirty years ago was groundbreaking. And through Mary’s never-ending, back-breaking work, the Legal Research and Writing Program at Oregon flourished and achieved wide recognition. With few resources beyond the vision of Dean Chapin Clark and her own creativity, dedication, and tenacity, Mary established at Oregon the beacon on the hill for legal writing. It is no exaggeration to say that Mary and her program helped establish a new discipline in American law schools. I have had the great privilege of building on the foundation she laid, and I have been fortunate in my efforts to have had the support of many people at Oregon and nationwide. Among my fondest hopes is that Mary will continue to be proud of her program and that she will appreciate the care with which we have nurtured her legacy.
We all know that Mary is a pioneer in our field in so many ways, and I am sure that the other testimonials in these tributes will recount her endless efforts at mentoring and making the legal writing world a better place to make a living. I doubt that I would be able to add much of significance to what will undoubtedly be more profound thoughts than mine, so I chose to focus on Mary the person, and especially on aspects of her personality that may not come up as much in the other tributes.

“Life is too short to be so polite.”

Many would be surprised that the above statement came from the revered Mary Lawrence. But this is the Mary I know and am so inordinately fond of. She said this to me at one of the many collegial group meals she organizes at legal writing conferences. It is always an honor to be invited to meals with Mary, but I think sometimes people treat it as a more formal occasion than she intends it to be.

Mary is always eager to celebrate the accomplishments and honors of others, as well as the many friendships she has accumulated through the years. She is generous to a fault, always insisting on paying the entire tab, no matter how many people she has gathered. (I think she did let me share the bill once.) She is just a gracious and gentle soul, which I think everyone knows, but it is that other, slyly humorous side of her that surprises and delights.

As many people know, I have a bad (or entertaining, depending on your point of view) habit of playing with my food and trying to find artistic things to do with it. At one AALS meeting, at a LexisNexis authors’ dinner at Mardi Gras World in New Orleans, I sat with Mary and at some point started doing my food art thing. Mary not only watched and wondered as many do, she was very helpful and made significant contributions to the finished work (smile). At other subsequent gatherings, she would ask if we could sit together to create more artwork.

I tell this story to demonstrate again that Mary is a wonderfully playful individual. I love the mischievous twinkle in her eye.
when she says or hears something funny. She has a dry, intelligent wit, and loves to laugh.

Mary once told me that I was a “joyful person who makes others happy; at least that’s the effect you have on me.” This is one of the nicest things anyone has ever said to me and wonderful if true. It would thrill me to have that effect on someone who inspires so many, through what she has accomplished and especially through her personal courage and grace in dealing with the adversity life has thrown at her.

I am so pleased to be her friend, and wish only that we could manage to find more time to spend together.
One of my favorite movies is “My Dinner with Andre,” in which Wallace Shawn and Andre Gregory, two figures in the New York theater world, talk over dinner for two straight hours. Their topics of discussion range from the value of the scientific method to the state of western civilization. The discussion is fascinating, although I must admit that I have difficulty staying awake throughout their entire dinner. But I never doze off when I have dinner with Mary Lawrence. Those dinners are too much fun.

Although we never talk about the cosmic issues that seem to plague Wally and Andre, we enjoy our common-sense talks about the practicalities of Legal Writing and whatever comes to mind. Of course, Mary selects only great restaurants with the best food; she prizes quality. More importantly, she selects the best company. She presides over meals with the most interesting and enjoyable people. Her dinners have permitted me to create and cement friendships with people I like and admire. At her table, there are no long silences or tedious debates, but plenty of talk and lots of good humor.

In reviewing “My Dinner with Andre,” critic Roger Ebert wrote, “I think I made a lot of notes about Andre’s theories and Wally’s doubts, but this is not a logical process. It is a conversation in which the real subject is the tone, the mood, the energy.” This description also fits my dinners with Mary.

As with the conversation in the movie, Mary’s relationships with people have a special tone, mood, and energy. Mary’s style tells us much about her influence in the Legal Writing world. As with her meals, she insists on quality in pedagogy. Teachers should think carefully about how they teach, and students should devote themselves to their work. More importantly, just as she cares about her dinner guests, she cares about her professional colleagues. She is always sensitive to their needs and well being. Her warmth and fondness for people always shines through.

I cannot remember when I first met Mary. In my memory, she has always been there. Knowing Mary has been a continuing feast.
Mary Lawrence is my dear friend. We have been friends now for more than thirty years, overcoming the restrictions that geography has imposed. We both began teaching legal writing in 1978, and we were then very new directors of legal writing programs. Since then, we have shared the frustrations, the difficult decisions, the disappointments of our professional careers and our personal lives, as well as our successes and joys. During the early years of our teaching, the AALS section was the only professional organization and the only source of a newsletter for legal writing teachers, and Mary and I worked together on many programs and newsletters. In fact, one of the newsletters that Mary put together as section secretary was so long (and full of important information) that the AALS imposed a page limit on future issues for all sections.

Mary very early had a well-developed concept of a first-year course that integrated writing, analysis, and research, and she generously shared her ideas with others. I still have the copy that she sent me of her massive, meticulously constructed course materials dated 1984. They are breathtaking in their inclusiveness, their level of detail, their perfectly thought-through explanations and assignments, their examples and exercises, and their flow charts and diagrams, and they are accompanied by thoughtfully constructed instructor’s manuals. Mary used what she called a spiraling process: her materials progress step-by-step from simple steps in which she introduced novices (our beginning law students) to the world of law and legal communication, and they add a new complexity at each step. She provided review questions along the way until her students became rather sophisticated legal writers. She emphasized a process approach before most of the rest of us grasped its meaning. She emphasized self-editing, careful reading, and relationships among materials, for example, research materials.

Besides benefitting professionally from our association, I have profited from Mary’s friendship. We have gone to many meetings together. We shared early morning breakfasts. We took walks when we had free time between sessions. Mary graciously learned to deal with the fact that I have no sense of direction.
whatsoever. We enjoyed lovely dinners, usually with a group of friends that Mary had organized. We keep in touch by telephone as often as possible.

We in the legal writing field have become an extended family. We now have organizations in addition to the AALS section, and several journals and newsletters. As the field has grown, with many new relationships being developed, Mary continues to be an essential member of that family. She keeps in touch with a number of people, and continues to play an important role. Someone recently described her to me as "beloved." She has been so especially to me. I can’t imagine what these years would have been like without her encouragement and friendship.
By Ruth Vance  
Valparaiso University School of Law  

In 1986, after completing my first year teaching legal writing at Valparaiso University School of Law, I sat listening to Mary Lawrence speak about evaluating students’ legal writing during the second conference of the Legal Writing Institute at the University of Puget Sound. Oh, how I wished I’d heard her presentation before I’d muddled through my first year of teaching.

The many people I met at that conference, including Mary, brought me out of the isolated feeling that I had experienced; finally, I discovered that I was not alone in my search for a legal writing pedagogy and a voice in the legal academy. I could commiserate with most of my new-found friends, but Mary Lawrence provided us the pedagogy we sought and the support we needed to find our voices in the academy. Mary Lawrence was one of a handful of pioneers in the field of legal writing in 1986 who had started developing the teaching of legal writing as a profession.

Mary Lawrence played a vital role in introducing legal writing teachers to the wealth of relevant knowledge in the fields of English and rhetoric. She provided part of the foundation on which the Legal Writing Institute was built. She was among the founders of the Legal Writing Institute and the Association of Legal Writing Directors. The AALS Section on Legal Writing, Reasoning, and Research benefitted from her leadership. Mary authored books and articles, planned programs and workshops, and made numerous presentations that advanced the field of legal writing. She gave the necessary continuity of knowledge to legal writing professors while the struggle to promote legal writing as a legitimate discipline within the legal academy continued. Her tireless dedication to the discipline continues even after her retirement from the University of Oregon School of Law.

More importantly, Mary taught us and continues to teach us, by example, to be part of a supportive community. Without any prompting, Mary began calling me periodically to offer recognition, encouragement, and support. I am most thankful for her mentoring and thoughtfulness over the years.

Mary also knows how vital it is for us to celebrate our discipline and our colleagues’ successes. She documented the history of the Legal Writing Institute and its accomplishments in a recent
article. She prompted us to take the time to reflect and celebrate that twenty year history. With her phone calls, notes, and visits during conferences, Mary makes sure we take time to celebrate our relationships and our achievements.

What lessons Mary has taught me! I hope I never forget her lessons to include, support, encourage, and celebrate my legal writing colleagues.

3. Lawrence, supra n. 1.
I cannot claim the status of “colleague” of Mary Lawrence. During the time I have known Mary (more than twenty years), I have not held an academic position of any sort. Nevertheless, I hold fiercely to my status as a friend and comrade-in-arms.

I met Mary in the mid 1980s, at one of the early biennial conferences of the Legal Writing Institute, then held at the University of Puget Sound. I knew little about the legal writing community at that time, but I quickly learned of Mary’s stature as one of the pioneering advocates, a Founding Mother, of an ongoing drive for clearer communication in law and, indeed, in all fields where written work remains, all too often, opaque. You could hardly participate in (or eavesdrop on) a conversation at LWI without hearing a reference to Mary: “You should talk with Mary Lawrence about that”; “Well, here’s what Mary said”; or some other similarly estimable reference. Upon meeting Mary, I understood immediately the deep affection and admiration the then-small corps of legal writing teachers held for her.

Over the years, I have had the pleasure of many conversations with Mary—conversations always enjoyable and enlightening because of Mary’s intelligence, thoughtfulness, experience, and generosity of spirit. In those conversations, one thing always came through without qualification: her dedication to making the world increasingly inhospitable to crummy legal writing. We would discuss seemingly intractable obstacles to improving the quality of legal writing, brainstorm ideas for ways to eliminate (or at least circumvent) those obstacles, and ponder examples of writers’ and teachers’ “light bulb” moments for the deeper lessons those moments might hold for others. Throughout, she maintained an unrelenting focus on the goal of sending law students into the world with the strongest possible foundation of the communications skills essential to high-quality lawyering and advocacy. In the end, the magic of Mary lies in the unassuming, gentle manner by which she inexorably draws others into her commitment—indeed, her crusade—to raise the legal writing stand-
ards of not just law students, but of those who teach those students and of those of us whose day-to-day employment keeps us scribbling madly on behalf of clients and for the benefit of courts. As a beneficiary of that magic, I happily claim the title of “disciple,” even if I cannot claim the title of “colleague.”
This Article welcomes a new generation of legal writing scholars.

In the first generation, legal writing professors debated whether they should be engaged in legal scholarship at all. In the second generation, assuming that they should be engaged in scholarship, legal writing professors discerned and defined different genres of and topics for the scholarship in which some or all of us were or should be engaged. In this Article, we map the contours of a third generation of legal writing scholarship—one that integrates the elements of our professional lives and engages more effectively with our professional communities.

The core of such study and practice is rhetoric, and in particular, the rhetorical concept that meaning is constructed out of...
the interaction of reader and writer, text and context. As a result, our work as readers and writers matters. The study and practice of “law as rhetoric” is a thread that can run through the fabric of a professional life, weaving together the legal writing professor’s work in scholarship, teaching, and professional service.

Part I of the Article takes a look back at our developing discipline. Part II addresses the rhetorical communities we are constructing through our scholarship, as well as some ways we might think about re-imagining them. Part III sketches a possible map for our future, discussing the reasons why legal writing professors should be writing and suggesting that rhetoric provides topics, theories, and practices for teaching and scholarship that can guide academics, lawyers, and law students as they interpret, imagine, and compose legal arguments.

By arguing that rhetoric provides resources for the third generation of legal writing scholarship, we set out on a natural path for those who teach students how to construct rhetorically effective texts. But we recognize that there are risks to suggesting that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience.” Edward P.J. Corbett & Robert J. Connors, Classical Rhetoric for the Modern Student 1 (4th ed., Oxford U. Press 1999). For Steven Mailloux, “Rhetoric deals with effects of texts, persuasive and tropological. By ‘texts,’ I mean objects of interpretive attention, whether speech, writing, nonlinguistic practices, or human artifacts of any kind.” Steven Mailloux, Disciplinary Identities: Rhetorical Paths of English, Speech, and Composition 40 (Modern Lang. Assn. of Am. 2006). Aristotle’s often-quoted definition of the practical art of rhetoric was “the faculty wherein one discovers the available means of persuasion in any case whatsoever.” Aristotle, The Rhetoric of Aristotle 224, bk. I, ch. I 1355b, line 26 (Lane Cooper trans., D. Appleton & Co. 1932).


6. This section attempts to emulate Steven Mailloux’s advice that we should be “using rhetoric to practice theory by doing history.” Mailloux, supra n. 3, at 40.


that we should apply rhetorical theories and approaches to our scholarship, and especially to our study of the “effects of texts.” Focusing on legal rhetoric may nurture scholarship so diverse and fragmented that we cannot claim that it constitutes part of a discrete discipline. Turning to other disciplines may subject our scholarship to criticism that it is both too theoretical and not thoroughly enough grounded in the theory we apply. Engaging in provocative conversations about our ideas will require us to be critical at times of one another’s work, something that may seem damaging to our discipline’s need for community-building and community support. Meeting the expectations of “inside” and “outside” communities will test our political astuteness as well as the strength of our emerging field. All these risks accompany the maturing of a discipline, and so we hope that the conversation about them will continue.

I. A RHETORICAL HISTORY OF LEGAL WRITING SCHOLARSHIP

The path of legal writing scholarship has been marked by twists and turns, the occasional rockslide or dead end, and what we can now see as a series of steps in a purposeful direction. As Pierre Schlag points out, legal scholarship is an “institutionalized social practice.”8 Enforcing the canons of this, like any other social practice, “is invariably a sort of policing action, no matter how benign its motivations, and police often step up their vigilance when they fear that social order is breaking down.”9

When legal writing professors took a turn towards scholarship, the prevailing view in the legal academy was that scholarship examining theory and doctrine was to be preferred over pedagogical scholarship or scholarship examining skills and practice.10 At the same time, within academia more generally, the

10. What we think of as typical or traditional legal scholarship has changed a great deal during its short history. In the 1950s, law schools began to move from relying on part-time teachers who were also practicing lawyers or judges to hiring full-time professors who created a “community of scholars.” Richard Buckingham et al., Law School Rankings, Faculty Scholarship, and Associate Deans for Faculty Research 5 (Suffolk U. L. Sch. Research Paper, Working Paper No. 07-23, 2007), available at http://
interpretation of “texts” was favored over the composition of texts. In both cases, the more respected professors were those whose scholarship focused not on how to write or how to teach, but instead on how to interpret, analyze, and critique the written artifacts of legal processes. The status, expectations, and workloads of legal writing teachers constituted what could have been an insurmountable roadblock to scholarship; legal writing teachers were not expected to publish, and the numbers of students they were assigned, as well as the teaching and commenting practices they engaged in, made it difficult to find the time to study and write.

The twists and turns toward interdisciplinary legal scholarship opened up a new direction for legal writing scholars. Since the late 1960s, articles featuring interdisciplinary applications to the law have proliferated, from law and economics to law and literature. Some have traced the intense focus on faculty scholarship in law schools “back to 1959 when the AALS adopted an official research standard. The standard noted that faculty members had an important responsibility to advance and share ‘ordered knowledge’ [and that] AALS member law schools had an obligation to assist their faculty and encourage research and scholarship.” Id. at 5–6.

Much of the subsequent legal scholarship was doctrinal and descriptive, or theoretical and prescriptive; the purpose of most scholarship was to prescribe a better outcome to a judge. As Judge Posner put it, the task of “doctrinal” legal scholarship was simply to “extract a doctrine from the line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for ‘sensible’ results in light of legal principles and common sense.” See Richard Posner, Legal Scholarship Today, 115 Harv. L. Rev. 1314, 1316 (2002). The prescriptions were predominantly based on policy arguments derived from beliefs about the way society should be organized or operated.

Typical of the criticisms of this kind of legal scholarship were Judge Edwards’s comments that law faculties had abandoned scholarship directed to judges, practicing lawyers, and legislators in favor of producing scholarship that primarily engages in theoretical dialogues with academics in other fields. Harry T. Edwards, The Growing Disjunction between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 34–36 (1992).

In the early twentieth century, the study of oral rhetoric split off from the study of written rhetoric in American universities. At the same time, literary scholarship came to dominate English departments at the expense of pedagogy and composition study, which were often conceived as more rhetorically oriented than either historical research or critical interpretations of literature. By the middle of the twentieth century, rhetoric as the study of the language arts found itself radically fragmented into separate disciplinary domains with faculties that did not and, for the most part, still do not talk with each other. With minimum modification, this unfortunate sorting continues: speech criticism into communication departments, literary reading into English departments, and writing research into composition programs.

Mailloux, supra n. 3, at 32.

Some of these disciplines lend themselves to arguments that come naturally to legal writing professors, arguments about what language means or what decision-makers intended or how a decision was reached and how it should be interpreted. Still, as legal writing scholars draw on other disciplines, another obstacle may appear. As has been noted elsewhere, the scholarly traditions of other disciplines sometimes differ from the traditions of scholarly writing in law reviews. Those differences may be perceived in ways that are damaging when legal writing scholars are evaluated.

A. Putting the First Foot on the Path: Descriptions of Programs and Curricula

Early in the twentieth century, critics discovered that lawyers did not write clearly, and legal writing programs were established in law schools. The ensuing legal writing scholarship described the programs and curricula that had been developed by individual law schools. Most of that scholarship was published in a single journal, the *Journal of Legal Education*.

These trends can be seen in an early chronological bibliography of “teaching lawyers to write”; the bibliography began with a 1921 article published in the *ABA Journal* that focused on *Defects in the Written Style of Lawyers*. Next, Harry Kalven de-
scribed the University of Chicago Law School’s “training” program in Research and Exposition in the Journal of Legal Education.\textsuperscript{19} This article was followed by a series of descriptions of legal writing programs, including several that addressed what appeared to be the most significant issue for law school administrators, the cost of such programs. So it was only to be expected that A Low-Cost Legal Writing Program: The Wisconsin Experience,\textsuperscript{20} published in 1959, was followed in 1973 by Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience.\textsuperscript{21}

In the midst of this flow of descriptive and instrumental scholarship, there were some early signs of more evaluative and theoretical scholarship about the teaching of writing. Marjorie Rombauer published a comparison of First-Year Legal Research and Writing Programs: Then and Now in 1973,\textsuperscript{22} and Reed Dickerson suggested that writing might even be viewed as helpful to thinking.\textsuperscript{23} And legal writing scholarship would soon find the voice to express what they had learned about teaching from their research and their experiences.

\section*{B. Leap One: Finding a Voice}

Descriptions of legal writing curricula and programs were necessary for the field to discover itself and begin to define its boundaries. But legal writing teachers took a status-changing leap when they began to write interdisciplinary articles about how to teach writing. Recognizing that people who taught undergraduates to write might know something useful about teaching lawyers to write, a few law schools had hired professors with degrees in English composition or literature. The subsequent interdisciplinary richness of the early legal writing scholarship owes much to those teachers who entered the field with advanced degrees in English composition and literature and became devoted

\begin{itemize}
  \item \textsuperscript{19} Harry Kalven, Jr., Law School Training in Research and Exposition: The University of Chicago Program, 1 J. Leg. Educ. 107 (1948).
  \item \textsuperscript{22} Marjorie Dick Rombauer, First-Year Legal Research and Writing: Then and Now, 25 J. Leg. Educ. 538 (1973).
  \item \textsuperscript{23} Reed Dickerson, Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It, 29 J. Leg. Educ. 373 (1978).
\end{itemize}
to legal writing, working as writing advisors and legal writing teachers, designing programs and curricula, writing articles and legal writing textbooks, and helping to found the Legal Writing Institute.24

Out of the disciplines of English composition and literature, legal writing scholars first found the voice and the vocabulary—as well as the theories and practices—that were necessary to study their topic and to write about their teaching. In time, articles about the teaching of legal writing would draw not only on composition and literary theory but also on linguistics, classical and contemporary rhetoric, and critical theory, including feminist theory.

The view of legal writing as fertile ground awaiting substantive insights from other disciplines was realized in Terry Phelps’s 1986 article, The New Legal Rhetoric.25 This article suggested that applying composition theory to the teaching of legal writing would provide the beginnings of “a substantive pedagogy that can teach law students to write well.”26 As the article predicted, composition theory heavily influenced the teaching of legal writing, and the article became an essential introduction to the idea that legal writing was itself a field worthy of serious study.

An early alternative route, pointing toward interpretation as well as composition, was discovered when literary theory was applied in Betsy Fajans and Mollie Falk’s article, Against the Tyranny of Paraphrase: Talking Back to Texts.27 Through this article, the authors pushed legal writing scholarship beyond the composition of documents, and into the interpretation of texts, suggesting that the application of interpretive techniques—such as close reading—might help produce better legal writers. The article explicitly linked interpretation to composition by suggesting “classroom activities and writing assignments which encourage law students to read closely in order to write strongly.”28

26. Id. at 1089.
28. Id. at 166, 193 (reading for jurisprudential and interpretive posture, reading for context, reading for style, reading for narrative, reading for omission).
C. Leap Two: Building a Room of Our Own

Much of the early discipline building was designed to create a community of legal writing professors who were excellent teachers. Drawing on their experience in other disciplines, professors trained in those disciplines helped establish the formal organizations and publications that provided the essential institutional base and information-sharing mechanisms for legal writing teachers.29

First came the “Conference for People who Teach in or Administer Legal Writing Programs,”30 organized by Chris Rideout and Laurel Oates at the University of Puget Sound School of Law in August 1984. Out of that conference, the Legal Writing Institute (LWI) was founded, followed closely by the first Idea Bank and Second Draft newsletter. In 1988, the LWI established Legal Writing: The Journal of the Legal Writing Institute to serve as a forum for encouraging and publishing scholarship within the developing discipline of legal writing.31 Chris Rideout served as the Journal’s first Editor in Chief, and the first issue served its discipline-building purpose by bringing together the first survey of the field32 with a bibliography of books and articles in the field,33 as well as substantial articles by rhetoric and composition scholars about the effects of teaching and writing practices. These articles about teaching legal writing built not only on the experience of teachers in the field but also on research studies of the development of writing competencies and of the effects of briefs on professional audiences.34

30. The speakers were interdisciplinary; they included law professors, judges, and professors of English from the University of British Columbia, Oregon State University, the University of Texas, and the University of Chicago. See Conference Brochure, Teaching Legal Writing (1984) (available at http://www.lwionline.org/about/history/brochure1984.pdf).
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The LWI’s biennial conferences, surveys, and collections of materials and ideas were essential to the establishment of the community of teachers, as they brought together diverse teachers, concepts, and experts for continuing extensive conversations about how we could improve the teaching of legal writing in law schools.

D. Leap Three: Other Voices, Other Rooms

The next great leap was powered by early sightings of distant and expansive vistas for legal writing scholarship: out there, some legal writing professors envisioned new purposes, new audiences, and new sources of theory and research. When we changed direction from focusing exclusively on how to teach legal writing to the broader view of how to study and write about legal writing, we imagined a perspective for our professional lives as legal writing professors. Several projects helped legal writing professors at this crossroads, including the series of legal discourse colloquia organized by Terry Phelps and Linda Edwards; these introduced authors to scholarly habits, knowledge, and mentors that would guide their subsequent work.

New disciplines provided modes and methods for enriching our teaching and our understanding of our students. For example, linguistics theory was applied to the composition of legal documents in the Fajans and Falk article, *Linguistics and the Composition of Legal Documents.* Feminist theory was the starting point for Kathryn M. Stanchi’s analysis in *Feminist Legal Writing.* There, she suggested that the exploration of feminist legal writing might enrich “the conventional wisdom that defines legal

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writing, persuasion, and persuasive writing.” Similarly, Jessica E. Price, in *Imagining the Law-Trained Reader: the Faulty Description of the Audience in Legal Writing Textbooks*, explored critical theory, in particular, the ideas of a “situated legal writer’ who must ‘instead learn to write in a new institutional setting, learn a whole new local practice, and react positively to new and changing circumstances.”

In addition to supporting scholarship about teaching legal writing, the new disciplines helped other legal writing professors shift their scholarship from composition to interpretation. By applying theories derived from linguistics, classical and contemporary rhetoric, social science, and cognitive science, this scholarship explained how and why particular texts were rhetorically effective.

Connecting and engaging with other professional audiences was one part of Michael Smith’s argument that our scholarship should address the “substance” of legal writing and be written for the broader audience of professional legal writers, including lawyers, judges, students, and other academics. The mission of encouraging and publishing scholarship based on the study and practice of professional legal writing was reflected in a new peer-edited journal established in 2002, the *Journal of the Association of Legal Writing Directors* (J. ALWD).

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38. *Id.*


42. All issues of the *Journal of the Association of Legal Writing Directors* are available at the ALWD website, http://www.alwd.org/jalwd.html.

For a description of ALWD’s efforts to establish legal writing as a discipline and as a profession, see Smith, *supra* n. 2, at 2. The article describes five initiatives: (1) organizing legal writing directors and creating mechanisms to share information; (2) offering support to established and new legal writing professionals; (3) seeking to improve the status and working conditions of legal writing professionals; (4) revolutionizing legal citation with the publication of the *ALWD Citation Manual*; and (5) founding J. ALWD. *Id.* at 2–4. Noting that “[t]he purpose of the Journal of the Association of Legal Writing Directors (J. ALWD) is to develop scholarship focusing on the substance of professional legal writing and to make that scholarship accessible and helpful to practitioners as well as to legal writing teachers,” the article characterizes as a bold move the decision against “producing a journal on legal writing in general” and instead “to dedicate this Journal to one specific genre of legal writing scholarship: scholarship that explores the substance of legal writing.” *Id.* at 3–4; see also *Erasing Lines: Integrating the Law School Curriculum—Proceedings from the 2001 ALWD Conference*, 1 J. ALWD 1 (2002) [hereinafter *Erasing*
Finally, the expansion of our scholarship to “other voices” and “other rooms” prompted conferences and workshops whose point was to encourage scholarship and to discuss specific subjects associated with professional legal writing, such as rhetoric, persuasion, and storytelling. Supporting the creation of this community of scholars are such efforts as the LWI Writers’ Workshops, held every summer, and the ALWD Scholars’ Workshops and Forums, conducted as part of regional legal writing conferences.

E. Glimpsing the Presence of a Discipline

Establishing common ground is the basis of a discipline. In different ways, traditional scholarly publications—especially peer-reviewed journals—and the newer, essentially unedited, electronic forms of distribution help build this foundation. They are the way that we establish a consensus among scholars about what we are studying as well as the sense that we have shared beliefs and methods, common ancestors, and some agreement on canonical components. In recent years, publication of many legal writing bibliographies, as well as LWT’s establishment of a monograph series, reflect the beginnings of such agreements. Our journals foster a sense of common beliefs and methods. As we expand from legal writing texts to writing extensively about the subjects of our study and practice, for audiences including other academics and practicing lawyers as well as students, we more firmly establish the knowledge base of a discipline.


44. SSRN distributes subject matter eJournals containing both draft and published articles, essays, and comments on Legal Writing and Law & Rhetoric.

Through their rapidly increasing size, shifting subject matter, and expanding scope, our bibliographies show how far we have come—from building a community of teachers to constructing an intellectual community of scholars. The purpose of the early bibliographies was to help teachers learn to teach; now, legal writing bibliographies focus also on providing a knowledge base for our scholarship. In the first issue of *Legal Writing*, George Gopen and Kary Smout listed 409 articles and 103 books, more than half published between 1980 and 1991. When Linda Edwards and Terry Pollman published their compilation of scholarship by legal writing professors in *Legal Writing* in 2005, their bibliography contained entries for more than 300 authors, including more than 350 books, book chapters, and supplements; more than 650 articles in student-edited law reviews; and at least that many articles in peer-reviewed journals, specialty journals, and other kinds of publications. At that time, only about 25 percent of the law review articles legal writing professors had published were about legal writing topics.

By some measurements, legal writing already has established itself as a discipline. Among the marks of a discipline, legal writing can claim the following: (1) dedicated and peer-reviewed journals (*Legal Writing* and *J. ALWD*, as well as related journals, newsletters, and other publications); (2) two flagship organizations (the LWI and ALWD, as well as a number of related organi-
organizations); (3) a listserv supporting the community (again, we have two as well as a blog); (4) dedicated conferences (a major conference every year, sponsored by either LWI or ALWD, as well as many regional and specialty conferences); and (5) people who call themselves professional legal writing teachers and scholars. In the next section, we turn to building that community of scholars.

II. OUR PRESENT AND OUR PRESENCE: MID-COURSE ASSESSMENT

Now that we are seriously engaged in building our discipline, we should consider the kind of scholarship that can help us with that project. What are its characteristics? What is the nature of the enterprise, and how we are doing with it? In the first part, we described the paths so far taken, the inherited language and context of our scholarship. In this part, we suggest some ways in which legal writing professors are modifying and re-arranging what they have inherited, and we begin to explore the “rhetorical community” that is created by our scholarship. What kind of person is speaking here? To what kind of person? What kind of voice is used? What kind of response is invited or allowed? Where do I fit in this community?

A. Writing as Conversation

Because writing is usually done alone, it may seem that writing is an individual enterprise—a lone writer at a keyboard thinking and recording great thoughts. But in fact, everything we write is generated from a body of ongoing work by others and will be presented to others to become a part of a shared discourse.

Perhaps a helpful metaphor is to think of writing as conversation rather than as speech-making. Imagine a room full of

50. See White, supra n. 7, at 695.
51. Id. at 701–702.
52. Although not the source of the image in this article, it may be interesting to compare Kenneth Burke’s unending conversation metaphor: Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while, until you decide that you have caught the tenor of the argument; then you put in your oar. Someone answers; you answer him; another comes to your defense, another aligns
people engaged in a conversation. The door opens and a hypothetical professor (let’s call her Professor Akin) walks into the room. The conversation continues as Professor Akin takes a seat. If we think of the ongoing conversation as our scholarship, what is the best way for Professor Akin to join that conversation? How can both she and the assembled group best help the shared conversation progress?

First, Professor Akin should take a seat and listen for a while. She should find out what the group is discussing and who is saying what. Perhaps she should ask the person sitting next to her what was said before she entered the room. Once she has a good idea of the content of the conversation so far, she can begin to participate. When she does, she should try to add something new. The conversation will not progress if she merely reports to the group what others have already said. Imagine Professor Akin taking the floor, saying “X said this; Y said that; Z made this other point” and then sitting down. That would be rather strange conversational behavior. In a conversation, the speaker is taking up talking time, during which no one else can speak. Part of her implicit promise to her listeners is that she will make good use of the time by moving the discussion forward somehow.

But Professor Akin should mention part of what has already been said because she should relate her new points to the points already made. She might agree with some points and offer new reasons in support. She might agree with part of a prior comment but disagree with another part. She would, of course, explain her reasons for agreeing and disagreeing. She might make a new point entirely, saying that the conversation so far has not considered a significant aspect of the topic. When she finishes her comment, she should listen again, waiting to see what others will say about her thoughts and what impact those thoughts will have on the direction of the conversation.

The other members of the group have conversational duties as well, duties that will help advance the shared conversation. Group members should listen to Professor Akin when she stands himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally’s assistance. However, the discussion is in-terminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.

to speak. They should not be busy working on what they will say next and therefore ignoring the conversation going on around them. They should listen with an open mind, willing to be convinced of something new. But they should also be willing to offer a different perspective, perhaps tweaking the new idea or perhaps disagreeing entirely. If a listener disagrees (let’s call him Professor Brown), he should share his perspective and explain his reasons. The group is searching for the best answer, after all. Perhaps the best answer is somewhere between the ideas offered by Professors Akin and Brown. The group may never reach the best answer if Professor Brown is not willing to share his different perspective.

Disagreement in a conversation can be uncomfortable, of course, so Professor Brown will be sure to treat both Professor Akin and her ideas with respect. In fact, Professor Brown may affirm the importance of Professor Akin’s ideas explicitly. He also affirms their importance implicitly by taking them seriously enough to warrant further exploration. After Professor Brown finishes speaking, Professor Akin may speak again, responding to Professor Brown’s comments. She will treat Professor Brown and his ideas with respect as well. Being human, she may feel some discomfort, but she is also grateful for the chance to further explore her own perspective, a chance she may not have had if no one had disagreed. Other members of the group will offer their own thoughts on the disagreement between Professors Akin and Brown, and they will share their own new ideas as well. And on the conversation goes.

B. The Duties of Writers and Audiences: A Mid-Course Check

All of us have participated in oral group deliberations like this one. With this kind of full, thoughtful, broad, and respectful participation, all of the participants will know a great deal more and will understand the topic much more deeply than any one of them ever could alone. This model works well for our scholarship too. A number of characteristics at work in the model conversation apply equally to scholarly writing.

First, the writer has responsibilities to others. She does thorough research, finding out what has been said before she entered the conversation, but she does not simply repeat what already has been said. When she writes, she impliedly promises her future
readers that she will make good use of their reading time, so she makes new points rather than merely filing a transcript of the conversation to date. She does not ignore the points of others, however. Instead, she places her own new points in the context of what has already been said. She knows that others may disagree with part of all of her idea, and she is willing to hear disagreement. In fact, she welcomes disagreement as an opportunity to delve even more deeply into the subject.

Readers have responsibilities as well. They should read openly and from within the text, hoping to be persuaded of something new. Even if they have written about the topic themselves, they welcome a new participant to the conversation. They know that no one owns a topic. The more the topic is explored, the deeper the group’s ultimate understanding will be and the more important each writer’s own contributions will be to that understanding. But readers should be willing to disagree too, in order to assist with the group’s shared goal of finding the best answer to an interesting question. When the readers again write, they place their own new comments in the context of the new comments of recent writers too, treating those comments with respect as well. Readers have the responsibility of remaining current in the literature of the field, for productive response to a writer’s new work must be grounded in a broad knowledge of the field’s preexisting scholarly work. Keeping current in the literature is necessary not only to respond professionally to new published work but also to fulfill the crucially important responsibility of mentoring new scholarship before it is published. Mentoring requires the willingness to read drafts and to provide honest and thoughtful feedback based on literacy in the field itself.

How are we in the legal writing community doing with these criteria? Are our articles well researched? Many are. Certainly professors who teach research should produce well-researched articles, and often that is the case in our community. But we are still in the midst of a transition from an earlier era, when research was not always deemed so important. Perhaps in that earlier era, the literature was not as developed as it is today.

53. Maksymilian Del Mar has written eloquently of this ethic of reading, suggesting that we should enter the world of the text, assuming the role of “companions around a dinner table, sharing wine amongst inquisitive friends, as in Plato’s symposiums.” Del Mar, supra n. 5, at 7.
Perhaps we were still taking the first steps toward becoming a discipline, so we had not yet established the necessary research ethic. But those early days are past, and today it is critically important to read and cite thoroughly. Today's work builds on the work of those who came before us. Our challenge is to extend the national conversation by citing to relevant work produced both inside and outside our own field.

Are we making new points? Largely, yes. The second generation of legal writing scholarship is vastly more sophisticated and creative than was the first generation as a whole. Part of what makes legal writing scholarship so exciting today is the amount of new territory to be explored, and as a community, we have begun that exciting work. No doubt the third generation will produce even more new ideas, relying upon the work that has gone before but deepening the level of analysis and understanding.

Are we recognizing the shared nature of scholarship by seeking feedback from a variety of readers before publication? Collectively, we may need some improvement on this score. We expect our students to use the feedback process to improve their work, but we do not always listen to our own teaching. In recent years, one of the authors has had the opportunity to observe well-mentored new faculty members in other fields. They have learned to use the writing process to perfect a work. These new scholars write a first draft that may be so rough that many legal writing teachers would be embarrassed to show it to a mentor. But these inexperienced authors choose carefully how to send the draft around: first to the two or three most trusted friends who will not judge them on the basis of bad beginnings; then to ever more sophisticated circles of friends, colleagues, and mentors. By the time the article gets to the author's most discerning and experienced mentor, it looks very good. The mentor is impressed and in a good position to praise the author to others. Even more important, the paper is developed enough to evoke a sophisticated response, and the author is intellectually and psychologically ready to understand and incorporate these more sophisticated responses. In each round of comment, authors take suggestions seriously. And those drafts—that started out as terribly written as any second-semester law student's zero draft—become wonderful articles published in prestigious journals.

We know from our teaching that this is how feedback works, but legal writing teachers often do not take full advantage of the
rhetorical community we are building. We hesitate to ask someone to read a draft because we know it is imperfect, thus foregoing the help of those we could trust. The unfinished draft invites comment; the “perfected draft” says to the responder, “I’ve put so much work into this already, I just want some trifling comments that will be easy to fix.” Seeking feedback earlier in the process gives both author and responder space to grow. The responder can (and definitely should) provide honest substantive feedback, not just a cosmetic edit and a note saying what the responder thinks the author wants to hear. As any first-year student knows, we in the legal writing community are a notoriously discerning audience, with plenty of suggestions for how to improve a document. Our scholarship will only get better if we remember to seek feedback from others in the field.

Are we welcoming new scholars into the shared conversation, glad when they make points we had not considered? Almost always, yes. Our community is clearly one of the most supportive academic communities in existence. It is, of course, an understandable human reaction to feel a little threatened when a new voice enters the discussion on a particular topic, making new points or taking a different approach, but as members of this warm and welcoming community, we put that momentary feeling aside. We know that there is far more knowledge to be uncovered and explored than anyone can manage alone. We are, after all, in this together.

But not surprisingly, we have trouble with the hardest part of the conversational model—being willing to disagree with each other and be disagreed with in return. The provocative voice is not always welcome within our community. We are reluctant to disagree with each other, particularly in print. Mature disciplines are not afraid of disagreement. In fact, the more scholars disagree, the more good scholarship is produced. As our discipline moves toward maturity, we need to become more accustomed to healthy professional disagreement.

Of course, every individual author, no matter the discipline, would prefer unequivocal praise of her ideas. No doubt the same is true within the legal writing community. But the problem is greater and far more complicated in marginalized academic communities struggling for full acceptance—communities like ours. In our example above, if Professor Akin is on a tenure-track or working toward a long-term contract, how should Professor
Brown feel about disagreeing with her contribution to the scholarly conversation? If he takes issue with some of her points, might his disagreement be used by others to advance an agenda in opposition to legal writing professionals at Professor Akin’s personal expense?

We must be honest and say that this fear can be legitimate. The same kinds of scholarly disagreements that would be expected as a matter of course in mainstream disciplines can be made to appear much more serious in the hands of those hostile to equal status for legal writing. This fear should not prevent us from undertaking a vibrant scholarly conversation in which we speak our views honestly, but it should inform the way in which we frame our disagreements.

Like all marginalized communities, legal writing professors have two distinct audiences, one inside the discipline and one outside its membership. The rhetorical task of writing truthfully with these two audiences simultaneously in mind can be difficult. In that situation, Professor Brown should walk a carefully balanced line, stating his disagreement honestly but underlining the value of Professor Akin’s own points so the outside audience does not misunderstand his point. The value of an article, after all, is not a question of agreement or disagreement with content. Some of the most important work in a discipline can be work that challenges commonly held beliefs. If the work is well-researched and filled with creative new insights, the work deserves high praise, no matter whether any particular reader is ultimately persuaded on each and every point. And for her part, as difficult as it may be, Professor Akin should not consider disagreement a breach of loyalty to the discipline but rather a sign that the discipline is growing up and taking its rightful place in the academy.

Finally, are we encouraging a vibrant rhetorical community by staying current in the legal writing literature? Reading and writing are connected. Both are negotiated processes as readers and authors engage in an inner dialogue to make meaning. In fact, some in describing the writing process talk about assuming different roles—becoming different people—as the writing takes shape. If this inner dialogue is to be useful to the intellectual

life of the field, however, it must lead to the public dialogue, the conversation. The legal writing community has a strong ethic of sharing. As we understand the value of collaboration in sharing teaching ideas, we should recognize that transforming the writer’s inner dialogue to a public conversation is critical for the intellectual life of the field. And as noted earlier, unless one is familiar with the body of legal writing literature, it is difficult to make useful contributions.

Many of the barriers that make it difficult to write also impede reading. It is easy to put aside the responsibility to read scholarship when you are busy reading literally thousands of pages of student work each semester. And perhaps it is because the legal writing community has had frequent and vibrant conferences, and an active listserv, that we have not always depended on reading articles for the national conversation. Those who have been in the field a long time may decide there is little new for them in scholarship—they have “seen it all before.” This feeling is exacerbated in legal writing because for many years, caps on the number of years teachers could stay in a position led to turnover and a continual influx of new teachers. New teachers rediscovered old ideas and often presented the already explored ideas as if they were new and fresh. Now that the second-generation legal scholars have begun to produce more sophisticated and original work, experienced legal writing professors may

Garner describes four roles an author assumes in the writing process, as they have been delineated by Dr. Betty Sue Flowers: The Madman, The Architect, The Carpenter, and The Judge. Garner writes about the roles almost as if the author were four, different people who serially assume responsibility for the piece of writing. This metaphor supplies a vivid image of the internal dialogue that occurs as we write.

56. One example of this ethic is the “Idea Bank,” a site to share assignments and teaching ideas on the Legal Writing Institute’s website at http://www.lwionline.org/idea_bank.html.

57. 2008 Survey Results, supra n. 49, at 63. The average pages of student work read by legal writing professors is 1,483, but some read more than 4,000.


59. Capping the number of years that a legal writing professor could stay at one law school was a common practice that has begun to disappear in the last fifteen years. See e.g. Jo Anne Durako, A Snapshot of Legal Writing Programs at the Millennium, 6 Leg. Writing 95, 112 (2000); Mary Lawrence, An Interview with Marjorie Rombauer, 9 Leg. Writing 19, 29 (2001). Recently, economic pressures appear to have encouraged a few law schools to again establish short-term positions for legal writing professors as visitors or teaching fellows.
have failed to develop the habit of reading new work. Novice teachers stand to gain even more by reading regularly in their field. Developing a habit of reading the emerging third generation of legal writing scholars will offer rewards to both the individual reader and the greater rhetorical communities individual readers will create.

C. Rhetorical Communities

1. Our Audiences

Choosing an audience is a key question for any scholar. In the legal academy, the question of who makes up the primary audience for legal scholarship has been controversial. Many assume that authors intend the primary audience of scholarship to be judges, because scholars hope to influence the courts. Others argue that scholars should write for other scholars in the legal academy, perhaps because they are eager to join the national conversation among scholars that shapes the education of generations of lawyers. Erwin Chemerinsky and Catherine Fisk accept both of those audiences as important, but urge scholars to broaden their view of possible audiences for their work.

In the legal writing community, when the question of audience arises, we most often identify only two audiences—an “inside” audience and an “outside” audience. The “inside” audience is the legal writing community, in which members have traditionally placed a high value on uncritical support. The “outside” audience, in contrast, is other law professors and members of tenure committees, who are more likely to be critical, adversarial, and even threatening to job security. The outside audience is often feared.

60. The often-cited article articulating this viewpoint, and lamenting the lack of interest in the academy about writing for judges is Harry T. Edwards, supra n. 10.
63. Other “outsider” groups, such as critical race scholars, have written about two audiences referring to the “imperial scholar” who writes high theory compared to more
This fear of a critical audience is destructive on many levels. The fear of a critical or derisive response may be one of reasons some legal writing professors do not write. It may also inspire the paradoxical position of some legal writing professors who deny the value of scholarly writing. Like the law professor who comes to teaching to escape the practice of law and cannot avoid showing students disdain for practicing lawyers, some legal writing teachers teach writing but do not write and cannot avoid showing their disdain for academic legal writing.

Those legal writing professors who do engage in scholarship may face frustrations regarding their choice of audience. If they choose to focus on either the “inside” or “outside” audience to the detriment of the other, they will limit the scope and reach of their project. Some will write only for the “safe” audience of the legal writing community of scholars. Others will write only what is acceptable to a tenure committee, ignoring the rapidly developing body of literature in the legal writing field. Each of these choices may make sense at various times because the rewards and dangers posed by “outside” audiences are real. Thus, despite how stultifying “we/they” thinking can be, sometimes it may be necessary for a group like legal writing professors who often still encounter barriers to full status within the legal academy.

Further, differences in the “inside” and “outside” audiences go beyond the usual dichotomy faced by scholars in more established areas. One of the difficulties of writing for an “outside” audience is that many in the legal academy never had the experience afforded by a modern legal writing program. Law schools hire most of their faculty members from elite schools. Elite schools are traditional doctrinal analysis. See e.g. Kevin Johnson, Race Matters, Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique, 2000 U. Ill. L. Rev. 525.

In addition to the fear of harsh criticism, legal writing teachers face other difficulties that also explain why they may not write. Teaching writing is extraordinarily labor intensive. Marking papers, conferencing with students, and creating new assignments year after year takes time. Finding time to write during the school year is difficult, if not impossible. Summers are often devoted to developing assignments or to summer teaching to supplement salaries that as a rule are lower than the rest of the permanent faculty’s. See generally 2008 Survey Results, supra n. 49, at 62.


A study of new faculty hired between 1996 and 2000 found that just over 86 percent of them came from the top 25 law schools. Richard E. Redding, Where Did You Go to
often least likely to offer a well-developed legal writing program. Thus, many law faculty who received their law degree from elite schools are just not familiar with the kinds of rhetorical and communication theories now being applied in the legal writing classroom.

While the perils involved in writing for an “outside” audience are real, significant hazards also complicate writing for the “inside” legal writing audience. Although inroads into the mainstream of scholarship are evident, one risk may be a smaller and less influential readership, a risk that will not have escaped the thinking of faculty in other fields. Anecdotal evidence supports the conclusion that tenure committees and faculties sometimes discount legal writing articles; even more troubling, it is possible that some faculties when considering tenure for legal writing professors discount evaluative letters from other legal writing scholars.

“We/they thinking” limits audiences, which limits choices. Legal writing scholars may miss the chance to influence judges and practitioners. And legal writing scholars do write articles that matter to judges and practitioners; in fact, scholarship written for the professional legal writing audience of judges and lawyers is a target audience for several of our journals (J. ALWD and Scribes). Another important phenomenon is that judges themselves often choose to write about legal writing when they


67. Jill J. Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image, 2 Leg. Writing 1 (1996) (summarizing the results of Legal Writing Institute’s survey with a heading reading: “The Higher the Tier, the Less Professionalized the Legal Writing Program”). This may be changing as more top-tier schools have re-evaluated legal writing programs in the last ten years.


69. There are too many to list. See e.g. Ruth Anne Robbins, Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents, 2 J. ALWD 108 (2004); Kathryn M. Stanchi, Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy, 60 Rutgers L. Rev. 381 (2008).
publish articles and books. It is logical to assume that when judges write these articles and books, they hope for a broader audience beyond other legal writing scholars.

Pleasing a tenure committee or traditional faculty may lead legal writing professors to choose topics outside the field, and this choice may stunt the growth of the national conversation on legal writing. A similar danger lies in legal writing scholars choosing only topics that the legal writing community will support and find non-threatening. Avoiding the “provocative voice” impoverishes the entire legal writing community.

Thus, a new generation of legal writing scholars may wish to reserve the notion of “insiders” and “outsiders” for those political times that make such thinking necessary, such as when a legal writing professor is in the middle of a troubled tenure process. But in other times, we can seek opportunities to expand our imagined rhetorical community with the choice of an audience beyond the “we/they” duality that has grown out of years of second-class citizenship in many law schools. Some speak of evaluating and defining scholarship through the “validation of our peers.” If this is true for the legal academy, legal writing professors must begin to think of themselves as peers of non-legal writing faculty in the legal academy, and of our rhetorical community as larger than the legal writing world. Recent social science research into questions of motivation may suggest other important factors to consider about ourselves as writers.

2. Ourselves

Social science research on motivation suggests that in addition to the more conventional factors involved in beginning a work of scholarship, legal writing professors should consider choosing a topic and audience that personally satisfies them, and they should strive to maintain autonomy in their work. Choosing a personally satisfying topic will ignite their curiosity and internal

70. See e.g. Ruggero J. Aldisert, Opinion Writing (2d ed., AuthorHouse 2009); Antonin Scalia & Brian Garner, Making Your Case: The Art of Persuading Judges (Thomson/West 2008).

71. Other disciplines often use this “peer validation” as defining scholarship. See e.g. Corly Brooke, Defining Scholarly Teaching and the Scholarship of Teaching and Learning (SOTL), http://www.ag.iastate.edu/agcoll/PDF/Brooke%20College%20of%20AG%20SOTL%2007.pdf (Apr. 5, 2007).
desire to learn about the topic, to contribute to a particular community of scholars, and accordingly will make them more productive scholars, more likely to succeed.

A key branch of motivational theory examines whether motivation is internal or external and whether the difference affects the level of motivation. Intrinsic motivation derives from the task itself and the actor’s reaction to it. It is “manifested both as enhanced performance, persistence, and creativity and as heightened vitality, self-esteem, and general well-being.” It may involve more interest, enjoyment, and confidence. Conversely, when actors are externally motivated, they respond primarily to secure a reward, or to avoid a loss or harm. Studies in this area suggest that those who engage in tasks based on internal motivation are likely to spend more time on the task and experience more success with it, while external rewards often hinder motivation.

Applied to the context of legal writing scholarship, these studies suggest that scholars will flourish when they respond to their intrinsic desires regarding what they have to say and to whom they wish to say it. Specifically, legal writing scholars are likely to write more and find greater satisfaction in scholarship if they write to please themselves. Intrinsically motivated scholarship is more likely to be creative and complete. This comports, for example, with the often repeated advice to choose a topic that one

72. In the 1960s, social scientists examining motivation in the workplace developed models to examine the difference between intrinsic and extrinsic work motivation. Marylene Gagne & Edward L. Deci, Self-Determination Theory and Work Motivation, 26 J. Organiz. Behav. 331, 331 (2005). Although this article focuses on self-determination theory, there are many theories of motivation. See generally id. at 340–345 (comparing Self-Determination theory to other motivation theories). Psychologists Edward L. Deci and Richard M. Ryan have written extensively about the differences between intrinsic and extrinsic motivation. See e.g. Edward L. Deci & Richard M. Ryan, Intrinsic Motivation and Self-Determination in Human Behavior (Plenum Press 1985). Their work on intrinsic and extrinsic motivation is closely allied with their self-determination theory, which posits that individuals who feel they are in control rather than constantly responding to outside demands enjoy more satisfaction and a better sense of well being. Id. at 29–32.


74. Id.

75. Id.

76. Extrinsic motivation can also vary in how much it evokes a feeling of choice. See generally id. at 71–73.

77. Id.; see also generally Deci & Ryan, supra n. 72.
should be passionate about, because she will need that passion to fuel the long process of thoroughly exploring a topic. It also suggests that because choosing an audience is part of the process of writing, scholars should choose audiences based on their intrinsic desires to join the conversation of a certain rhetorical community.

Extrinsic incentives in the legal academy can be high, however. For example the rewards offered for writing scholarship can include earning more money, more autonomy, colleagues’ admiration, and job security; the harm may be second-class citizenship or even the loss of a job. Thus, the legal writing scholar who begins work based on an intrinsic interest in a topic or an intrinsic desire to contribute to the national conversation can find that intrinsic motivation evaporates under the extrinsic pressures of either a tenure process or another threat to job security.

An outgrowth of motivation studies, self-determination theory, may provide insight into mitigating this potential motivation loss. In contrast to goal-based theories, self-determination theory posits that fulfilling human needs can influence motivation. Specifically, fulfilling the needs of competence, relatedness, and autonomy positively affects motivation. Of these three needs, autonomy can be of particular importance because it can lead individuals to internalize motivation.

Psychologists Edward Deci and Richard Ryan have found that while extrinsic motivation impedes overall motivation, it is more complex than a simple finding that it uniformly destroys intrinsic motivation. They posit that extrinsic motivation operates on a continuum and that given the right circumstances, extrinsic motivation can become perceived as internal. Although autonomy does not literally transform extrinsic motivation into intrinsic motivation, changing an individual’s perception of where motivation originates may allow extrinsic motivation to mimic or

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79. Deci & Ryan, supra n. 72, at 237.

80. Gagne & Deci, supra n. 72, at 331, 334.
increase intrinsic motivation.\textsuperscript{81} In short, preserving autonomy may thus mitigate the erosion of motivation created by external rewards, and may help fuel motivation.\textsuperscript{82}

Self-determination theory has been extensively explored in legal scholarship by Larry Krieger and other scholars who explore “humanizing legal education.”\textsuperscript{83} These scholars contend that both students’ learning and professors’ teaching benefit from support for autonomy and intrinsic motivation.\textsuperscript{84} Legal writing scholars have applied self-determination theory to the topic of teaching legal writing and have explored ways of increasing the opportunities for intrinsic motivation to improve the legal writing classroom.\textsuperscript{85}

In the context of motivating legal writing professors to write scholarship, this needs-based analysis implies that when authors feel competent to write, connected to the rhetorical community that will receive their communication, and most importantly, in charge of their writing decisions, they are more likely to succeed. Extrinsic rewards will not extinguish intrinsic motivation as readily when authors experience “autonomy support” for their writing decisions.

This research thus suggests that those in the best position to write and support writing are professors outside the reach of the

\textsuperscript{81} Id.
\textsuperscript{82} Deci & Ryan, supra n. 78, at 237–239.
\textsuperscript{84} Barbara Glesner Fines, Competition and the Curve, 65 UMKC L. Rev. 879, 911 (arguing that law school teachers should model intrinsic motivation for students).
rewards and threats of the tenure process; those already tenured professors whose motivation was not damaged by the tenure process or those for whom tenure is not an option. It also suggests that those in the tenure process surrounded by extrinsic rewards and threats may want to focus instead on the parts of the process where they exercise autonomy. Likewise, these scholars can be supported by increasing their feelings of autonomy, competence, and relatedness. For example, efforts to persuade traditional faculty to give pre-tenure scholars the freedom to write in any area they choose should be helpful. The legal writing community should remain open about how legal writing professors choose topics, whether inside or outside the legal writing field. Further, we should continue workshops and mentoring systems to encourage scholars to feel competent and connected. We must encourage legal writing professors, whatever their situation, to write.

III. THE FUTURE OF LEGAL WRITING SCHOLARSHIP

So far, this Article has surveyed our past and taken stock of our present. It is now time to look down the road, toward the horizon. If, as this Article has suggested, the future of our discipline is inextricably linked to our scholarship, then we should think carefully about what we will write in this next generation and what purposes that scholarship should serve.

A. Why Write?

Scholarship is expensive, after all, requiring significant institutional and personal resources. So we should remind ourselves of the purposes to be achieved by that investment. Perhaps the most important purpose of scholarship is the obligation to advance human knowledge. Scholars owe that obligation to identifiable legal constituencies like judges and lawyers, who will put

86. The costs of scholarship may range from economic to emotional: There are large economic costs—support for the ever-growing host of law reviews, research grants, research collections of law libraries, and compensation for student research assistants. There are time and opportunity costs—the hours that faculty spend on scholarly research and writing leave less time available for teaching, counseling students, and engaging in university and community service. Finally there are substantial psychic costs to professors who worry about the quality and quantity of their writing.
the knowledge to good use in the world of practice. Law teachers have both the opportunity to engage legal questions from a relatively objective perspective and the time and resources to study professional skills and responsibilities more deeply than can those outside the academy. Scholarship can and should help judges and practitioners think more clearly about thorny legal problems and their own professional responsibilities.88

But the obligation to advance knowledge extends more broadly than these predominantly instrumental uses imply, for humanity itself advances in often unpredictable ways when human understanding grows. Members of the academy are optimally situated to discover new information, identify unrealized effects, and make new connections—to “understand as fully and as fundamentally as possible,”89 even if purely for the sake of doing so. Scholarship does not require an instrumental justification; scholars teach and learn purely for the sake of understanding our world and sharing that understanding with others. If legal writing professors are to take our place as full members of the academy, we too must undertake a responsibility to advance human understanding, taking the intellectual inquiry wherever it leads us.

Perhaps we might think that the responsibility to advance knowledge need not apply to legal writing teachers because other professors who are not as busy can fulfill this responsibility. As tempting as this idea may be, though, it is not a satisfactory answer. First, many law professors who do not teach legal writing are extraordinarily busy, just as busy in fact as most legal writing professors. Are they exempt as well? Does the responsibility to advance human knowledge fall only on those with leisure time? That would mean that some of the very best minds would be taken out of the game, and human knowledge would be the poorer for it. Second, and perhaps more important, scholarly contributions are not generic. Legal writing professors have a unique perspec-

89. Archer, supra n. 88, at 279.
tive, a unique set of skills, and a unique knowledge base. Realistically, some contributions to knowledge will be made only if they are made by a legal writing professor. To exempt legal writing professors from any responsibility for scholarship would be to choose to forego the contributions no other group is likely to make.

Another important purpose of scholarship is the enhancement of teaching. Obviously, the more a professor knows, the more the professor can share with students, but that simple correlation does not fully describe the relationship between teaching and scholarship. Writing also enhances teaching when it contributes to students’ moral education, when it provides examples of excellence, and when it enhances the professor’s own analytical abilities, and is then put to use in teaching. For legal writing professors, though, perhaps the most important link to teaching is the discipline of doing what we expect our students to do. We can forget how excruciatingly difficult writing can be; how frustrating it can be to try to master a new subject and present new material in a logical way; and how intimidating it can be to expose oneself in print. We can forget how confusing and disorienting it is to write in a new language or voice or in a new genre, or to a new audience. If we ask our students to do these things, can we ask less of ourselves? Tennis coaches play tennis. Cooking teachers cook. And for the same reasons, writing teachers should write.

If legal writing professors should write because we teach writing, what exactly is it that we should write? One might respond that the teaching rationale for writing leads to the conclusion that we should write briefs and office memos, not scholarship. If part of the value of writing is our own practice of what we

90. See Brown, supra n. 88, at 49–51; Clark Byse, Legal Scholarship, Legal Realism and the Law Teacher’s Intellectual Schizophrenia, 13 Nova L. Rev. 9, 29–30 (1988).
92. Anthony T. Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 968 (1981) (A scholar’s pursuit of the truth can “preserve in his students an attitude of friendship, or goodwill, towards those who seek the truth and indeed toward the truth itself.”).
93. David L. Gregory, The Assault on Scholarship, 32 Wm. & Mary L. Rev. 993, 1003 (1991) (“So why write? Fundamentally, the answer is a matter of vocation and ethics. The aspiration to excellence breeds excellence in students and in legal audiences.”).
94. Id. at 999 (“Although scholarship as an intellectual pursuit is commendable for its own worth, that is not its raison d’etre in the professional law school. If professors do not engage in scholarship, they cannot fully foster critical analytical skills in their students, because their own skills will atrophy.”).
teach, then perhaps we should write primarily examples of the precise genres we teach. That argument has a certain appeal, but ultimately, it misses the primary value our writing can have for our teaching. Most of us can write an office memo or a brief quite easily. Most of us have to work much harder and experience much more confusion and insecurity in order to write a law review article. The greatest teaching value in our writing is experiencing again the kinds of difficulties our students experience. For us, it is most likely that we will experience those difficulties if we write in a genre other than the genre we teach.

Scholarship carries another obligation—the obligation to speak truth to power.95 Face to face with power, the only options are to retreat into an ivory tower; to speak on behalf of and therefore to serve the structure of power; or to confront that power, that is, to speak the language of prophetic confrontation.96 A scholar might be called to confront governmental power or the practices of the profession, but a scholar is called also to speak truth to the powerful structures of legal education. The purposes of scholarship are well served when legal education is critiqued, and no one is better situated to critique and improve legal education than those on the inside, those who know it best.97

95. As James Boyd White writes, the activity of expression not only “is the heart of intellectual and ethical life,” but also has a public and political dimension, for there is always the question whether we shall find ways to insist upon our own freedom and responsibility in a world of constraint, to respect the humanity and reality of other people and their experience, and to contribute to the formation of a culture and a policy that will enhance human dignity—or whether we shall instead lead lives imprisoned in dead modes of thought and expression that deny the value of ourselves and other people, and the activities of life we share. James Boyd White, Living Speech: Resisting the Empire of Force, at preface (Princeton U. Press 2006).


97. Much legal writing scholarship has critiqued legal education on issues ranging from status to curriculum design. On status issues, see e.g., Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs, 70 Temp. L. Rev. 117 (1997); Jo Anne Durako, Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal, 73 UMKC L. Rev. 253 (2004); Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Leg. Educ. 562 (2000); Pamela Edwards, Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy, 4 Cardozo Women's L.J. 75 (1997); Emily Grant, Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession, 27 Vt. L. Rev. 371 (2003); Jan M. Levine, Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs, 45 J. Leg. Educ. 530 (1995); Jan M. Levine & Kathryn M. Stanchi, Women, Writing & Wages: Breaking the Last Taboo, 7
Scholarship brings individual rewards as well. Writing can be personally and professionally transformative.\textsuperscript{98} Scholars should write for the sheer pleasure of doing a difficult task well\textsuperscript{99} and for the excitement of the new territory to be explored. This personal and professional pleasure and transformation have value beyond the scholar’s own enjoyment. The best teachers are curious, constantly learning and adapting, and intellectually engaged. Students, institutions, judges, and lawyers are well served by such energized teacher/scholars, whose own transformation can spark transformation in others as well. This transformative pleasure may be especially important for legal writing professors whose teaching load is both heavy and unchanging. Many legal writing professors teach nothing but legal writing: two sections of memo writing in the fall of students’ first year and two sections of persuasive writing in the spring. Law professors who do not teach legal writing usually teach courses on three or four different topics each year. It would not be surprising to find that it is the

\textsuperscript{98} James Boyd White described this transformation when he wrote, 

\textit{The task the course set me, then, was the direct analogue of Thoreau’s task: to write my way out of Concord, out of false and inauthentic forms of speech and thought, to a kind of Walden, to a voice and language of my own. Writing to me thus became a way of creating a voice with which to speak and be, with which to represent and transform my own experience.}

\textsuperscript{99} Arthur Leff, claiming the last word at the Yale symposium, wrote, 

\textit{And of course, for all that, legal scholarship is also something that produces pleasure. I do not want to end this symposium on the note of pure Yellow-Book aestheticism, but I defy any of the symposiats (and at least many of the readers) to deny that they’re also in the game . . . for those occasional moments when they say, in some concise and illuminating way, something that appears to be true. . . . [T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it’s the joy of that too.}

legal writing professor who is most in need of the excitement of
learning new material and exploring new intellectual territory.

These purposes are compelling in and of themselves, and the
desire to fulfill them is a powerful internal justification for the
practice of scholarship. Ideally, these are the reasons we will
write. But the legal writing community has an additional exter-
nal reason to write. If we are ever to achieve full membership in
the academy, we will need to take our places as scholars as well
as teachers, engaging fully in important ongoing conversations
and initiating some new conversations as well. If we expect to be
subject to reduced professional expectations, we will always be
subject to reduced status. Inferior status results in unfairness for
individual legal writing professors personally, and even more im-
portantly, it often reduces our effectiveness with our students.

Yes, scholarship is hard. It takes significant personal and in-
stitutional resources. But even for legal writing professors, may-
be especially for legal writing professors, these purposes for
scholarship justify the institutional and personal costs good
scholarship requires. The spectrum of scholarship we produce
should serve these articulated values. If it does, we will be ful-
filling our responsibilities to our students, to the practice, to other
scholars, to humankind, and to ourselves as well.

B. Why Rhetoric?

Making the rhetorical turn to (1) study the “effects of texts”\textsuperscript{100}
and to (2) practice and (3) teach the construction of “effective
texts” places our professional work in new lights and relation-
ships. Because rhetoric explores a meaning-making process in
which the law is “constituted” as human beings located within
particular historical and cultural communities write, read, argue
about, and decide legal issues, it provides an attractive picture of
what we do in our scholarship, teaching, and professional interac-
tions.\textsuperscript{101}

\textsuperscript{100} Mailloux, supra n. 3, at 40.
\textsuperscript{101} For discussion of “law as rhetoric” generally, see White, supra n. 7. For discussion
of teaching “law as rhetoric,” see Linda L. Berger, \textit{Studying and Teaching “Law as Rheto-
ric”: A Place to Stand}, 16 Leg. Writing 3 (2010).

The “rhetorical turn” in legal scholarship has been much discussed. See e.g. Stanley
Fish, \textit{Rhetoric}, in \textit{Doing What Comes Naturally: Change, Rhetoric, and the Practice of
Theory in Literary and Legal Studies} 471, 485–494 (1989) (discussing disciplines in which
rhetoric has been “on the upswing”); Francis J. Mootz, III, \textit{Rhetorical Knowledge in Legal
Rhetoric makes it possible for us to view our teaching and scholarship as creative, constructive, and productive while still grounded in law, language, and reason. Adopting rhetoric as the focus for our study and practice seems like a straight and narrow path to some: “Lawyers are rhetors. They make arguments to convince other people. They deal in persuasion.” Proposing “that the law is a branch of rhetoric,” James Boyd White wrote, “Who, you may ask, could ever have thought it was anything else?” In this view, rhetoric is not “merely” a tool or a set of techniques, nor even the art or craft of persuasion, but instead, it is an interactive process of persuasion and argumentation that is used to resolve uncertain questions in this setting and for the time being.

For many, however, rhetoric remains suspect, on the grounds that rhetoric is not reality, but trickery, or that it is “cookery” and not science. For them, we offer these arguments.

First, although rhetoric and law have a long relationship and a rich history, their relationship is often denied and remains a relatively unexplored field of study. Second, rhetoric provides
a middle ground between the views that law is all rules (reason) or all power (politics). In this way, rhetoric offers the possibility of “improving life within one’s community in temporary and incomplete, but nonetheless meaningful, ways” as well as more positive ways of re-envisioning the concept of agency and the status of science.

For legal writing teachers, both our teaching and our reading have a natural relationship to the study and practice of rhetoric. Moreover, because the academy prefers reading over writing and the interpretation of text over the composition of text, we can only benefit by marrying the two: “rhetoric [can be used] as a rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved.”); Barbara J. Shapiro, Classical Rhetoric and the English Law of Evidence, in Rhetoric & Law in Early Modern Europe 54 (Victoria Kahn & Lorna Hutson eds., Yale U. Press 2001) (“Given the long-standing association between law and rhetoric, there has been surprisingly little real study of the impact of rhetoric on the Anglo-American legal tradition.”).


110. Id. at 610–613.

111. Professors who teach legal writing have long argued for rhetoric’s place in legal writing pedagogy. See e.g. Fajans & Falk, supra n. 27; Neil Feigenson, Legal Writing Texts Today, 41 J. Leg. Educ. 503 (1991); Phelps, supra n. 25; J. Christopher Rideout & Jill Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35 (1994).


Articles advocating more use of rhetorical teaching throughout the law school curriculum include Leslie Bender, Hidden Messages in the Required First-Year Law School Curriculum, 40 Clev. St. L. Rev. 287 (1992) (arguing that the traditional focus on appellate cases and authority underscores the hidden message that specific facts, contexts, and people are nearly irrelevant); Elizabeth C. Britt et al., Extending the Boundaries of Rhetoric in Legal Writing Pedagogy, 10 J. Bus. & Tech. Comm. 213, 213 (1996) (proposing a new conception of rhetoric’s role in the law school curriculum); Leigh Hunt Greenhaw, To Say What the Law Is: Learning the Practice of Legal Rhetoric, 29 Val. U. L. Rev. 861 (1995) (suggesting that legal writing is “not something distinct from what is taught in other law classes” but instead that both doctrinal and legal writing courses “can and do teach the practice of legal rhetoric”).
guide for composing and as a stance for interpreting.”112 Finally, having been on the “outside”113 of the legal academy and having been relegated for the most part to teaching the housekeeping details of rhetoric (arrangement and style), legal writing professors can find many uses for rhetoric’s most creative and thoughtful component, invention.114

Because of the decline of formalism and the advent of a particularly cynical form of realism, this seems an opportune time for us to participate more fully in building better understandings of “how things work” in the law. If formalism, the idea that judges simply apply the rules like umpires do, is in decline, this decline should also be a blow to traditional legal scholarship because such scholarship “focuse[s] on the careful, comprehensive, and precise analysis of relatively abstract doctrinal standards found in the legal forms of cases, statutes, administrative rulings, and legislative histories.”115

In contrast to the view that legal outcomes are determined solely by the rules (formalism) or only by politics and power (the current brand of realism), the rhetorical perspective affords a richer possibilities. That is, it envisions lawyers, teachers, and law students as being engaged in a process of making meaning by the back and forth of conversation and argument. Rhetoric opens the lens for legal writing scholars because it allows us to concentrate on the kinds of textual analysis lawyers already engage in, but to introduce as well the kinds of broader contextual analyses recommended by rhetoricians.

More than any other teacher in the law school setting, legal writing teachers explicitly teach legal rhetoric—the analysis, interpretation, criticism, and composition of legal arguments. We help students learn to read legal texts; we help them learn how to use legal authorities; and we help them learn how to articulate legal rules and construct legal arguments.

112. Mailloux, supra n. 3, at 40.
113. “Rhetoric is often about who’s in and who’s out, what’s included and what’s excluded, who is placed inside and who outside a cultural community, a political movement, a professional organization.” Id. at 124.
When we work with students who are struggling to state the rule that a case stands for, or what that rule means, we recognize what an intensely creative and intellectually difficult activity legal reading and writing can be. This is even more the case when students grasp the concept that opinions are not rulebooks but instead are pots full of rhetorical possibilities, that language is not so much ambiguous as it is “resourceful.” When we work with students struggling to write persuasively, who want to know the “one right way” to achieve a particular purpose, we realize how complex and imaginatively demanding is the work of persuasion.

Moreover, legal writing raises troubling questions about the practice of legal rhetoric in concrete form—the lives of our students. What kinds of rhetoricians are we teaching our students to be, and what kinds of rhetorical communities are we asking them to join? This question shows up as the fear that in writing the torture memos, John Yoo was conducting himself the way he had been taught; as a really good law student, he was doing exactly what we taught him to do, manipulating language and meaning. Or from a different perspective, it shows up in James Boyd White’s concern that in much of legal writing, no one is at home because of the kind of voicelessness we encourage students and lawyers to adopt. As we teach students to master the forms of speech and writing that they need to know in the culture into which they are moving, are we guiding them toward becoming alienated from their own minds and experiences and teaching them to produce an imitation of expression?

For law professers, rhetoric offers a way to bring together the objects of their study (the variety of legal “texts” that are the “objects of interpretive attention”) with the subject matter of their teaching and the composition of their scholarship. For example, the professor who use a rhetorical approach to analyze a judicial opinion will be better able to teach students how to interpret and

116. Wetlaufer, supra n. 101, at 1560.
118. See e.g. James Boyd White, Legal Writing, in From Expectation to Experience: Essays on Law & Legal Education 27 (U. Mich. Press 2000) (Legal writing “will often seem to be a training in forms of expression that are rigid, mechanical, or dead; to allow no room for the work of the individual mind or the expression of the individual imagination.”).
119. Id.
120. Mailloux, supra n. 3, at 40.
construct legal arguments because she has taken apart the structure of an argument and evaluated the effectiveness of an author’s rhetorical choices. Similarly, the law professor may directly apply rhetorical theory to the classroom conversation, treating the semester’s work as a series of rhetorical transactions between student and teacher, reader and writer, inherited texts and current arguments, individuals and social contexts.\footnote{See e.g. Linda L. Berger, *A Reflective, Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57 (2000).}

Beyond suggestions for the individual scholar, focusing on rhetorical theory and analysis can help build an intentional framework for meeting institutional goals. Rhetoric lends itself to the further evolution and building of our discipline. For example, rhetorical study is a device for transforming “practical wisdom into accredited techniques.”\footnote{Mailloux, supra n. 3, at 5.} Such rhetorical scholarship would describe and evaluate interpretive practices, that is, ways to read, research, and teach about legal documents; it would help us derive theories for categorizing and studying texts; and it would allow us to describe, compare, and evaluate traditions.\footnote{See also Stratman, supra n. 6, at 210. These might include the kinds of arguments most often used by members of the discipline, characteristic approaches and questions of the discipline, stock stories and myths, and canonical examples. For examples, see Smith, supra n. 40.}

C. What Would It Mean to Focus on Rhetoric?

This section provides initial suggestions for using the modes and methods of rhetoric in our teaching, scholarship, and professional outreach. For this purpose, we divide “rhetoric” into (1) the study of legal texts, (2) the process of composing legal documents, and (3) the use of rhetorical perspectives to spur invention and imagination.\footnote{This categorization comes from Berger, supra n. 101.}

1. Rhetoric as the Study of Legal Texts.

Rhetoric provides many alternative methods for interpretation, analysis, and criticism; in both our teaching and our scholarship, we can apply these to better understand all forms of legal argument. Among its other benefits, rhetoric suggests that to effectively read a legal document, we must read beyond the text
itself, recognizing that we cannot find meaning in the language alone without reference to the context provided by history, culture, language uses, author, and audience.

Both classical and contemporary rhetoric offer methods for teaching students to engage in close or critical reading and for engaging in such reading ourselves. These methods range from reading to identify appeals based on classical rhetoric’s modes of persuasion (logos, ethos, and pathos) or topics to applying James Boyd White’s questions for rhetorical analysis (context, art of the text, rhetorical community). Similarly, understanding narrative structure and argument framing (categories and metaphors) aids students in their interpretations and assessments of the opinions they read as well as the briefs they write and respond to.

Such rhetorical approaches not only enrich our teaching—and they can be applied to “teaching” practicing lawyers as well—but also can result in valuable scholarship. For example, legal writing scholars have used these approaches to evaluate the effectiveness of briefs, opinions, and oral arguments and to study par-

125. See Corbett & Connors, supra n. 3, at 1.
126. White, supra n. 7, at 701–702.
127. For helpful descriptions of narrative theory and structure, see Anthony G. Amsterdam & Jerome Bruner, Minding the Law 110–142 (Harv. U. Press 2002) and articles cited in Stanchi, supra n. 46, at 77–79. For articles describing how narrative theory may be used to interpret legal arguments, see for example, Linda H. Edwards, Once Upon a Time in Law: Myth, Metaphor, and Authority, 77 Tenn. L. Rev. ___ (forthcoming 2010).
ticular author practices and audience responses. Such scholarship, in turn, may apply directly to our teaching.

2. Rhetoric as the Process of Composing Legal Texts.

Perhaps the most obvious application of rhetorical theory and analysis for legal writing teachers is its usefulness in teaching the process of composition. Contemporary rhetoric, specifically the New Rhetoric, is the source of much of our understanding about how to teach writing as a process for making meaning through the interaction of reader and writer, text and context. As for specific applications, classical rhetoric provides frameworks for invention as well as guides that help law students and lawyers check their logical arguments for validity and effectiveness; classical rhetoric also is the foundation for all later advice about arrangement (organization) and style. Other rhetorical methods well suited for the legal writing classroom include those associated with Joseph Williams, in which students are asked to read samples, extract vocabulary to describe the good and bad aspects


131. See e.g. Kate O’Neill, Rhetoric Counts: What We Should Teach When We Teach Posner, 39 Seton Hall L. Rev. 507 (2009).


133. See e.g. Corbett & Connors, supra n. 3, at 33–71 (logic), 84–130 (topics for invention), 256–292 (arrangement), 376–411 (style); Frost, supra n. 129, at 411–423 (arrangement), 423–431 (style); Robbins-Tiscione, supra n. 111, at chs. 5–7 (invention), ch. 8 (arrangement), ch. 9 (style); Kristen K. Robbins, Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning, 27 Vt. L. Rev. 483 (2003); Smith, supra n. 111, at pt. II (logos strategies), pt. III (pathos strategies), pt. IV (ethos strategies), pt. V (rhetorical style).
of the models, and then apply the insights to diagnose and revise their own work.134

As for scholarship centering on the rhetorical processes of composition, legal writing scholars have used rhetorical theory to describe and evaluate the development of the field.135 Similarly, composition and rhetoric theory has been the basis for articles written about law school applications of the use of reading journals;136 writers’ memos;137 peer review;138 feedback, drafting, and revision;139 portfolios;140 writing conferences;141 and other forms of self-evaluation and reflection.142 More recently, legal writing scholars are turning to rhetorical theories to provide advice to students and lawyers about how to construct arguments.143


139. See e.g. Leg. Writing Inst. Monograph Series, supra n. 45.

140. See e.g. Steven J. Johansen, *“What Were You Thinking?”: Using Annotated Portfolios to Improve Student Assessment*, 4 Leg. Writing 123 (1998).


3. **Rhetoric as Perspective or Lens.**

Finally, and perhaps most fundamentally, legal writing professors may use rhetoric as a perspective or lens to guide the process of imagination and invention. Rhetoric’s ability to unearth embedded pathways and to unsettle preconceptions can be tapped in a number of ways. Thus, rhetoric can help writers see through new eyes, make the familiar strange, look from the outside in and the inside out, and link abstractions to concrete images and stories.\(^{144}\)

As already noted, classical rhetoric’s general and special topics can serve as a heuristic for generating lines of argument.\(^{146}\) Other special topics that lend themselves to re-seen legal arguments may include those identified with literary criticism,\(^{147}\) such as contrasting appearances with reality; finding a previously overlooked, but “ubiquitous” argument; discovering a paradigmatic structure in a literary text that provides form and framework; and arguing that previous interpreters have repeatedly overlooked some important characteristic. Contemporary rhetorical approaches that can be used to encourage invention include such

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144. For example, to use metaphor to resolve problems, Donald Schön suggested that the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to “see” one situation “as” other situations. Donald A. Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in *Metaphor and Thought* 150–161 (Andrew Ortony ed., 2d ed., Cambridge U. Press 1993); see also John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* 196 (Henry Holt & Co. 1922) (“T[he] elaborate systems of science are born not of reason but of impulses at first sight and flickering; impulses to handle, move about, to hunt, to uncover, to mix things separated and divide things combined, to talk and to listen.”).

145. The concept of making the familiar strange comes from Amsterdam & Bruner, *supra* n. 127, at 1 and throughout the book; the concept of looking from the outside in and the inside out comes from bell hooks, *Feminist Theory: From Margin to Center*, at preface (S. End Press 1984).

146. *See* Corbett & Connors, *supra* n. 3, at 84–130.

concepts as Kenneth Burke’s pentad for examining narrative action\textsuperscript{148} (narrative structure) or his suggestions for metaphor modeling (try to consider the many different ways in which a concept could be described);\textsuperscript{149} bell hooks’s “from the margins” perspective;\textsuperscript{150} Chaim Perelman’s “starting points”;\textsuperscript{151} and Stephen Toulmin’s layout of practical argument and “good reasons” approach to ethics.\textsuperscript{152}

As always, rhetoric as a perspective becomes both topic and tool. That is, we can write about the use of invention methods themselves, and we can write about what we discover when we use these methods. In other words, rhetoric again brings us new ways of looking at things that can bring about change in our academic and professional lives and communities.

\textbf{IV. CONCLUSION}

Rhetoric tells us that our reading and writing can be used to construct meaning, and it allows us to engage in research and scholarship that informs and enriches our understanding of how the law works as well as our teaching of current and future lawyers. Because of the topics we teach, “[t]he meaning-making view of writing [should] appeal to those [of us] who view reading and writing as ways to live, not just as ways to make a living.”\textsuperscript{153}

For legal writing professors, as well as for our students, “writing creates situations in which [we] learn to think.”\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{149} “If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc.” Burke, \textit{supra} n. 148, at 504 (discussing metaphor, metonymy, synecdoche, and irony in connection “with their role in the discovery and description of ‘the truth’”).
\item \textsuperscript{150} hooks, \textit{supra} n. 145.
\item \textsuperscript{152} See Foss et al., \textit{supra} n. 148, at 117–153; see also Saunders, \textit{supra} n. 143, at 568–572.
\item \textsuperscript{153} Berger, \textit{supra} n. 4, at 159–160 n. 35.
\item \textsuperscript{154} Elaine P. Maimon et al., \textit{Thinking, Reading, and Writing} 3 (Longman 1989).
\end{itemize}
FROM POLAROID SNAPSHOT TO 3-D MOVIE:
UPDATING THE ANNUAL SURVEY OF LEGAL WRITING PROGRAMS

Suzanne E. Rowe

I. INTRODUCTION

For almost twenty years, an annual survey has tracked the development of legal research and writing (LRW) programs.
With a response rate frequently topping 90 percent, the survey demands respect even from reluctant deans and doubting colleagues. In 2009, legal writing faculty at 113 schools reported using data from the survey to improve their LRW programs.

The survey is one of the most influential documents of its kind. It has a long history and has enjoyed many successes. Nevertheless, it is due for an overhaul. Some questions are simply outdated. Other questions need to be refined to capture more specific information. New questions are needed for emerging issues. Part II of this article provides a brief overview of the survey and its history. Part III assesses the survey and offers suggestions for change.

II. BACKGROUND: THE SNAPSHOT

Legal writing has been the subject of numerous surveys over the years, though none was systematically administered over


4. Id. at 77 (question 100). At seventy-eight schools, the survey data helped improve the status of legal writing faculty, at seventy-three schools, the survey helped improve legal writing salaries, and at thirty schools, the survey was used for “other” purposes. Id. Those submitting responses for their schools were instructed to mark all applicable answers, creating some duplication. Id. However, only twenty-five schools reported that they had not used the survey data for any purpose. Id.

5. See Rowe, supra n. 1 (examining trends shown through the legal writing surveys and celebrating successes in LRW program design over the last twenty years).

6. In 1970, Marjorie Dick Rombauer, the legendary professor of legal writing at the University of Washington School of Law, conducted a survey to test generally accepted assumptions about the low status of legal writing teachers and to collect information about the objectives of legal writing courses at schools nationwide. Marjorie Dick Rombauer,
time until the Legal Writing Institute (LWI)\textsuperscript{7} began its surveys.\textsuperscript{8} At the national LWI conference in 1988, LWI members voted to conduct a survey of all law schools to gather data that could be used to develop new programs and improve existing programs.\textsuperscript{9} The first survey was conducted in 1990, and biennial surveys continued in even years through 1996. Annual surveys began in 1997 and continue.\textsuperscript{10} Beginning with the 1997 survey, LWI has shared sponsorship with the Association of Legal Writing Directors (ALWD).\textsuperscript{11} The joint sponsorship of these two leading organizations of legal writing professors has given the survey wide visibility, broad support, and expanded resources.

For many years, the surveys were conducted by one or two professors, who mailed paper copies to colleagues nationwide and then painstakingly compiled the results by hand.\textsuperscript{12} In 1999, a committee assumed control over the workload.\textsuperscript{13} Since 2004, the survey has been conducted online, taking advantage of the financial support of both LWI and ALWD to pay an outside consult-

\begin{footnotesize}
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\item[7.] The Legal Writing Institute is a non-profit organization with more than 2,100 members drawn from 38 countries. Leg. Writing Inst., Welcome, http://www.lwionline.org (accessed May 3, 2010). Its mission is to improve legal writing by encouraging discussion and scholarship about legal writing, research, and analysis. Id.
\item[8.] The first survey sponsored by LWI was conducted in 1990 by Professor Jill Ramsfield, then at Georgetown Law Center and now at the University of Hawai'i at Manoa, William S. Richardson School of Law. See Leg. Writing Inst., 1990 Survey Results (1990) (on file with Author). She was also author or co-author of the next three surveys. Leg. Writing Inst., 1992 Survey Results (1992) (on file with Author); Leg. Writing Inst., 1994 Survey Results (1994) (on file with Author); Leg. Writing Inst., 1996 Survey Results (1996) (on file with Author).
\item[9.] Ramsfield, First Images, supra n. 1, at 123.
\item[10.] Durako, supra n. 1, at 95 n. 1 (referencing 1997 and 1998 surveys conducted by Louis J. Sirico, Jr.); see also Gerdy, supra n. 1, at 228 (referring to annual surveys from 1999 forward). Technically, the 1997 survey was conducted by the Association of Legal Writing Directors, and the questions focused on the director's experience.
\item[11.] The Association of Legal Writing Directors is a professional association of legal writing directors and teachers. Its members represent over 150 law schools in the United States, Canada, and Australia. See ALWD, About, http://www.alwd.org/about.html (accessed May 3, 2010).
\item[12.] Jill Ramsfield conducted the first four surveys. Louis J. Sirico, Jr., conducted the survey in 1997 and 1998.
\item[13.] The committee chairs since 1999 have been Jo Anne Durako (1999–2002); Kristin Gerdy (2003–2005); Philip Frost and Kenneth Chestek (2006–2009); and John Mollenkamp and Karen Koch (current).
\end{itemize}
\end{footnotesize}
The consultant designs the online survey instrument and the software needed to allow LRW faculty to respond to the survey, and it maintains and reports the data collected to survey administrators. The survey administrators (i.e., the survey committee) perform the calculations necessary to convert the raw data into the charts shown in the survey results. The electronic data makes it easier for survey administrators to answer queries from LRW faculty that require reorganization of data or use of subsets of data (a fact the survey committee should publicize more widely, for example, by noting it in the survey’s executive summary).

The survey has always sought the same essential information—number of credits and semesters in the required LRW curriculum, student-teacher ratios, status of those teaching, etc.—although the questions changed somewhat over the first decade. Since 2000, the survey has contained 100 questions, and those questions have remained consistent (with some tweaking as situations change) to allow comparison over time. The broad categories covered by the current survey are (a) submitter\(^1\) and law school information; (b) staffing model; (c) curriculum; (d) upper-level writing courses; (e) technology; and (f) the workload and status of those teaching legal writing (i.e., directors, full-time teachers, adjuncts, writing specialists, and student assistants). These categories are explained briefly in an appendix to this Article.

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14. Cicada Consulting has provided technical assistance beginning with the 2004 survey.
15. E-mail from Ken Chestek, Co-Chair of Survey Committee 2006–2008, to Author, Survey (Feb. 26, 2010, 12:58 p.m. PST) (on file with Author).
16. The 1999 survey was the shortest, with 63 questions. See ALWD & Leg. Writing Inst., 1999 Survey Results (1999) (available at http://www.alwd.org/surveys/1999.html) [hereinafter 1999 Survey Results]. It omitted many questions about the curriculum, but continued to ask about salary, workload, and status of directors. The 1999 survey actually included more questions about non-directors’ status and workload. The author of the 1999 survey wrote that she “consulted with the boards of directors of the two sponsoring organizations, the Legal Writing Institute and the Association of Legal Writing Directors, to determine the direction and scope of the 1999 Survey. We plan a broader survey for 2000.” Durako, supra n. 1, at 95 n. 2.
17. This Article uses “submitter” for the person completing the survey for a particular school, although the term is often interchangeable with “respondent.” Part I of the survey is the “Submitter Profile,” gathering information about the person who is completing the survey and about the director of the legal writing program (if any); the survey highlights section uses the term “respondents” to refer to the schools. See 2009 Survey Results, supra n. 1, at i–xi, 1–2.
Since 2003, the survey’s 100 questions have been supplemented by “hot topic” questions. Some hot topics highlight issues of growing concern. Other hot topics are intended to appear just one year to provide statistics on current trends. Hot topic questions have addressed academic freedom of legal writing faculty, implementation of American Bar Association (ABA) standards for accrediting law schools, staffing models, sabbaticals, curriculum, and the impact of the economic downturn.

The snapshots provided by past surveys have shown the impressive development of legal writing with more credits and semesters, lower student-teacher ratios, and more experienced faculty, to name just a few areas of progress. Each survey has been a benchmark to which schools could compare their own curricula and a persuasive instrument for change. It is time, though, for the survey to be updated.

III. LOOKING AHEAD: THE 3-D MOVIE

In too many respects, the current survey resembles faded snapshots from the 1990s. It is time to update the venerable survey to address changing realities and to take advantage of increased online capacity to capture and sort information. Fortunately, the web-based format of the survey should make it easier...
to modify the survey, update the questions, and analyze the results more effectively—transforming the faded collection of snapshots into a dynamic 3-D movie.

A. Reorganize for the New Reality

The organization of the survey suggests a model that exists at fewer law schools each year and that many legal writing faculty hope will disappear—the director-centric program. When the survey began in 1990, its questions focused on directors and provided information to help them face daunting challenges in teaching too many students with too few resources. Back then, the non-directors teaching legal writing were often students, adjuncts, and short-time instructors. Today, the vast majority of legal writing professors nationwide are not directors, but full-time.

26. The ability of the web-based survey to slice and dice information is evident from the survey’s current treatment of responses to the questions on salary. In 2009, the survey devoted nine pages to showing directors’ salaries by region; setting (urban, suburban, rural); institution type (public, private); size of the first-year class, years since the director received a J.D.; years the director has been teaching; years of directing at the current school; staffing model; and director type (tenure track, contract, administrator, etc.) 2009 Survey Results, supra n. 1, at 34–42. The survey devoted another six pages to similar analysis of non-directors’ salaries. Id. at 60–65.

27. In 1999, four submitters taught in directorless programs. 1999 Survey Results, supra n. 16, at 1. In 2009, 25 submitters taught in schools without a legal writing director. 2009 Survey Results, supra n. 1, at 1 (question 1).

28. The Author has facilitated two discussions on directorless programs, and both have generated great interest. The first took place in July 2003 at the ALWD biennial conference, held at Windsor Law at the University of Windsor (Ontario, Canada). It was entitled Leading without Directing (co-facilitator with Linda H. Edwards). The following year, in July 2004, the Author facilitated a discussion entitled Directorless Programs at the national LWI conference, held at Seattle University School of Law. A large lecture hall was filled with interested conference participants.

29. The structure of the 1990 survey seemed to assume that students would do much of the teaching. For each program model, questions were included about use of student assistants. See 1990 Survey Results, supra n. 8, at questions 57 (reporting twenty-four of thirty-nine schools with tenure-track writing faculty used student assistants), 67 (reporting thirty-four of seventy-five schools with full-time, non tenure-track faculty used student assistants), 77 (reporting that thirteen of thirty schools using adjunct teachers also used student assistants). Two additional sections asked about programs taught primarily by law students (questions 83–92) and graduate students (questions 93–101). Id. at questions 83–101.

30. In 1990, 35 of the 126 schools responding used adjunct teachers. See id. at questions 73–75.

31. In the 1990 survey, thirty-three schools reported that LRW teachers remained on the faculty up to two years; forty-nine schools reported that LRW teachers stayed between three and five years; eleven schools reported that LRW teachers remained between six and ten years; and just five schools reported LRW teachers remained more than ten years. Id. at question 41.
faculty who consider legal writing a long-term career choice.\textsuperscript{32} Some schools no longer have directors.\textsuperscript{33} Only at the small percentage of schools where directors lead adjunct-taught or student-taught legal writing programs does the old focus on directors make sense.

To recognize this new reality, the survey needs two changes. First, the survey should avoid bifurcating data on legal writing directors and other full-time legal writing faculty. There are currently two sets of questions about workload, scholarship requirements, participation in faculty governance, salary, and so on. One set addresses how these issues affect legal writing directors; another set addresses how the same issues affect full-time legal writing faculty who are not directors.\textsuperscript{34} This division between full-time colleagues should be phased out as legal writing faculty erase lines among themselves as well between legal writing faculty and casebook colleagues.\textsuperscript{35} When valid reasons exist for continuing the distinction on particular issues, the survey could ask for information about everyone,\textsuperscript{36} then break out information by

\begin{itemize}
  \item \textsuperscript{32} Professor Terrill Pollman has suggested the term “autonomous” to describe legal writing faculty at schools without a director; like their colleagues who teach other subjects, autonomous legal writing faculty create their courses and pursue their scholarship with full academic freedom. The differences between these professors and their director colleagues are far fewer than existed twenty years ago.
  
  \item \textsuperscript{33} 2009 Survey Results, supra n. 1, at question 1 (reporting that twenty-five schools did not have a director).
  
  \item \textsuperscript{34} Compare pt. VII (providing questions for directors), with pt. VIII (providing questions for full-time faculty who are not directors).
  
  \item \textsuperscript{35} Symposium, Erasing Lines: Integrating the Law School Curriculum, 1 J. ALWD 1 (2002) (proceedings from a conference that addressed artificial distinctions between faculty who teach legal writing and those who teach legal doctrine). Professor Mary Beth Beazley differentiates between legal writing faculty and other faculty by using the term “casebook faculty” rather than “doctrinal faculty,” “substantive faculty,” “traditional faculty,” or “stand-up faculty.” Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (without Grading Papers), 10 Leg. Writing 23, 25 n. 13 (2004). The term “casebook faculty” recognizes that most non-legal writing courses use casebooks, but it avoids the pejorative “non-substantive” label that is sometimes applied to legal writing faculty. Id.
  
  \item \textsuperscript{36} The survey should continue to collect data about the director’s workload where it differs from that of non-director colleagues. The 2009 survey showed that directors spend on average 28 percent of their time on director duties. 2009 Survey Results, supra n. 1, at 45 (question 53). It might be helpful for law school administrators and faculties to know what directors do in that time, and the survey could easily add a question to compile that information. Possibilities include hiring, mentoring, and evaluating LRW faculty; hiring and training student assistants; managing the program’s budget; organizing program-wide activities like oral argument practice rounds or moot court; preparing and circulating LRW brochures; maintaining the program’s web site; planning special events like visits from state courts; leading meetings of LRW faculty; and, of course, responding to surveys. Such
status. Second, to the extent director-focused questions remain because the director has unique personnel or administrative roles or is held to different standards for promotion, the survey should be reorganized so questions about the majority of legal writing faculty come before questions about directors. This simple reorganization—switching Parts VII and VIII—would go a long way toward making the survey feel less director-centric. Likewise, the survey highlights (i.e., the executive summary) that accompanies the survey results should address directors as a footnote to legal writing faculty as a whole.

Another small organizational change could enhance the public relations image of the survey by shifting it from being teacher-focused to being student-focused. Student concerns capture the attention of all law schools, even those schools that do not value legal writing faculty. Questions that emphasize the student’s experience—for example, questions about student-teacher ratio, class size, assignments, and grading methods—should come before questions about the faculty’s status or salary. Simple reordering is all that is required.

B. Update Language for the Post-Program Model

The fundamental language of the survey might need to be changed, as law schools move away from programs for teaching legal writing courses.\textsuperscript{37} The survey still asks about the “first-year program” or the “required program,” even though more schools are offering legal writing as a series of courses—a legal writing curriculum—not tied to a program. This trend is likely to continue, as shown by the decrease in uniformity among sections of legal writing\textsuperscript{38} and by the increase in status and job security of those teaching legal writing.\textsuperscript{39} As LRW as a subject area becomes more integrated into the law school curriculum and exists less in a list could help a school decide whether to move to a directorless program and, if so, how to allocate the administrative work of the director.

\textsuperscript{37} For example, legal writing courses at Georgetown Law Center and Mercer University School of Law are not part of structured programs.

\textsuperscript{38} See infra pt. III(C)(2)(b).

\textsuperscript{39} See infra pt. III(H). Just as the business law courses at each school are not grouped together as a “program,” LRW courses will not need to function as a “program” once those teaching in them are full members of law faculties. Administrative work can be divided collaboratively, professors can rotate the role of coordinator, or the school can hire an administrative assistant.
segregated programs, the survey will need to update its language to match reality.

C. Enhance Accreditation Data

When the American Bar Association accredits or reaccredits law schools, it considers the opportunities for faculty members to participate in faculty governance and whether faculty members enjoy academic freedom. Currently, ABA Standard 405(d) requires law schools to “afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . , and (2) safeguard academic freedom.”\(^{40}\) The legal writing survey’s questions are useful in gauging how schools are doing as to participation of legal writing faculty in faculty governance and academic freedom regarding faculty research and course design, but the survey could do more.

1. Data on Faculty Governance

Questions about participation in faculty governance address the basic rights to attend faculty meetings, vote on faculty matters, and participate on faculty committees. These rights are important for a school’s ABA accreditation,\(^{41}\) and the survey does a


\(^{41}\) Standard 405(a) requires schools to “establish and maintain conditions adequate to attract and retain a competent faculty.” 2009–2010 ABA Standards, supra n. 40, at 35. Standard 405(c) states that a school must “afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.” Id. Interpretation 405-8 explains further that a law school must ensure full-time clinical faculty members “participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members.” Id. at 37 (emphasis added). Standard 405(d) requires that legal writing teachers have “such security of position and other rights and privileges of faculty membership” as needed to ensure a well qualified legal writing faculty and safeguard their academic freedom. Id. at 36 (emphasis added).
good job of gathering basic data. The survey could, however, gather additional information about faculty governance. As a positive example, which committees do LRW faculty chair, showing not only participation but also leadership on faculty matters? As a negative example, are there committees on which LRW faculty are excluded from serving on? When faculty members are not allowed to serve on any committees, does the school give any reasons?

2. Data on Academic Freedom

Academic freedom is implicated both in the scholarship of LRW faculty and in the design of the LRW curriculum. The survey asks questions relevant to both of these issues, but more specific questions could produce more valuable data.

a. Academic Freedom in Scholarship

The survey currently asks whether LRW faculty must produce scholarship. After clarifying whether scholarship is required, expected, or encouraged, the survey asks whether that scholarship must be “of the same quality and quantity” as the scholarship required of tenure-line faculty. Quantity seems objective, as one simply counts the number of publications or the number of pages. Quality is, however, quite subjective. The survey does not define “quality,” leaving the interpretation open to the individual faculty member submitting responses (or to the prevailing norm at that individual’s school). Thus, two submitters could answer “yes” for different reasons. One may interpret scholarship as including articles addressing legal writing issues,


while another could believe that scholarship includes only articles that address issues of doctrinal law. The difference impacts academic freedom, as one can hardly imagine a professor teaching criminal law being told that his articles on criminal law issues are not scholarship.

A related question concerns where legal writing faculty scholarship is published. LWI and ALWD each publish a scholarly journal that is peer edited. Is placement of an article in one of these journals considered better than, the same as, or inferior to placement in a student-edited law review?

Yet another question should address how schools value the many books by legal writing faculty on writing, research, analysis, advocacy, professionalism, and other skills. Do these publications receive the same recognition as casebooks on doctrinal law issues?

To show more precisely the scholarly expectations of legal writing faculty, the survey should include more questions and offer more answer choices. Can LRW faculty scholarship focus only on legal writing issues, only on doctrinal legal issues, or on either? Do LRW faculty receive equal credit for articles placed in legal writing journals and in student-edited journals? Are books on legal writing and related skills valued the same as doctrinal law casebooks?

b. Academic Freedom in Curricular Design

Academic freedom in course design is difficult to capture in a survey, especially given the history of legal writing programs. Twenty years ago, many legal writing programs were tightly organized in lock-step fashion. This uniformity helped assure

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44. LWI’s peer-edited journal is Legal Writing: Journal of the Legal Writing Institute; ALWD’s peer-edited journal is Journal of the Association of Legal Writing Directors. These scholarly journals are distinct from publications that provide shorter articles focused on teaching experiences and ideas. This latter category includes publications like The Second Draft, the LWI newsletter. Certainly, articles written in The Second Draft share valuable insights and engage the writer in the national community of legal writing faculty, but the articles are qualitatively different from those appearing in scholarly journals.

45. See Pollman & Edwards, supra n. 42, at 55 (noting that the publications of nearly 300 legal writing professors listed in a bibliography included over 150 books).

46. Supra pt. III(B) (discussing programs).

47. Early surveys did not ask about uniformity, perhaps because uniformity was assumed. The survey first included this question in 2002. See ALWD & Leg. Writing Inst., 2002 Survey Results, at question 26 (2002) (available at http://www.alwd.org/surveys.html;
comparable experiences for first-year students being taught primarily by student teachers or short-term instructors. As student teachers and caps on instructor contracts have all but disappeared, so too has the need for lock-step uniformity.

Current questions regarding the freedom of legal writing faculty to design the curriculum address the following topics: selection of citation text; selection of other textbooks; number of major assignments; due dates and length of assignments; syllabus coverage; grading; number of minor assignments; class lectures; and exercises. The survey response choices are “uniform,” “generally consistent,” and “varies among sections.” Nationwide, uniformity continues in the selection of a citation text and the number of major assignments. The least uniformity has always existed in the content of class lectures and exercises. In most instances, the shift has been from lock-step uniformity to general consistency. In one instance, the selection of the course textbooks (other than citation texts), the shift has been from uniformity to variety. The trends from uniformity to consistency to variety are positive, and the survey should continue tracking these trends.

What the survey is missing is a question on who is determining any continued uniformity and why. Compare these five scenarios, each of which results in uniformity but for very different reasons: At one school, colleagues independently choose their citation texts and they happen to all choose the same one, resulting in uniformity. At a second school, colleagues decide collaborative-ly to use the same citation text, both because they generally pre-

select 2002 ALWD/LWI Survey Report) [hereinafter 2002 Survey Results].
48. 2009 Survey Results, supra n. 1, at 4 (showing, in the responses to question 10, that in 2009 only 11 schools used upper-level students to provide a substantial portion of the teaching or the feedback on individual papers).
49. Id. at 54 (reporting in question 66 that just 7 schools had “capped” programs in 2009).
50. Id. at 14 (question 26).
51. Id.
52. Id. In 2009, 138 schools (83 percent) were uniform in selection of a citation text and 121 schools (73 percent) were uniform in the number of major assignments. Id. In 2008, 150 schools (86 percent) were uniform in selection of a citation text and 131 schools (75 percent) were uniform in the number of major assignments. 2008 Survey Results, supra n. 3, at 15–16 (question 26). The percentages may be higher in each year, as not all schools responding to the survey answered these questions. Id.
53. In the 2009 survey, about half of the schools reported uniformity in due dates and lengths of most assignments, selection of the required textbook, and syllabus coverage. Just over one-third of schools were uniform in grading and in the number of minor assignments. 2009 Survey Results, supra n. 1, at 14 (question 26).
fer the same one and because uniformity makes sharing teaching materials easier. At a third school, the director requires that the writing faculty agree to use the same citation text for ease of administration. At a fourth school, the director decides which citation text all legal writing faculty will use, based on her assessment of which text students are most likely to use in practice in that state. At a fifth school, a committee of professors who do not teach legal writing decide which citation text will be used in legal writing courses; these professors select a text—for courses they do not teach—based on their desire for research assistants ready to polish the professors’ scholarly articles for publication in journals that use a particular style of citation.

Having a director, a committee, or an associate dean decide which text legal writing faculty use, or requiring them to agree to use only one text, violates academic freedom. The same holds true for the overall syllabus, the substance of assignments, the due dates, the lengths of assignments, and so on. Asking in the survey why uniformity exists could cause a director answering the question to pause and consider whether imposed uniformity is warranted. Data showing who makes these decisions nationwide could convince committees or deans to respect their own LRW colleagues to make decisions regarding their LRW classes. If the answers show that LRW faculty are not allowed to make basic choices within the scope of academic freedom, the ABA might reconsider whether the assurances of academic freedom in Standard 405(c) are sufficient.

54. The ABA includes a sample description of academic freedom in an appendix to the standards: “The teacher is entitled to full freedom in research and in the publication of the results. . . . The teacher is entitled to freedom in the classroom in discussing his subject . . . .” ABA Standards, Appendix 1: Statement on Academic Freedom and Tenure (following the text of the “1940 Statement of Principles on Academic Freedom and Tenure” of the American Association of University Professors). Most law faculty likely interpret this description of academic freedom in the classroom broadly to mean the teacher is entitled to select the text, organize a syllabus, design assignments, etc. Others might interpret it literally to mean that the teacher is entitled to freedom only in the classroom discussion, leaving the actual course design to administrators or colleagues. Some, of course, might adopt a broad understanding for their own courses and the narrow interpretation for legal writing courses. But if a school would not require all its contracts professors to use the same casebook, why should it require all legal writing teachers to use the same citation manual?
D. Clarify Student-Teacher Ratios

Student-teacher ratios are much lower than they used to be, but the survey data leave readers uncertain what the current ratios are. In the old days, when we all rode dinosaurs to work and taught students using rock tablets, a single professor was sometimes responsible for more than 150 students.\(^55\) As late as 1999, the average student-teacher ratio was still quite high at 53 to 1, but beginning in 2000, the ratios eased down.\(^56\) For the last two years, the national average for full-time\(^57\) legal writing faculty who are not directors has been around 42 to 1 in the fall and 41 to 1 in the spring.\(^58\)

But what exactly do those ratios include? Anecdotal evidence suggests that these ratios might include the teaching LRW faculty are doing in non-LRW classes,\(^59\) even though the survey question specifically asks about the workload “in the required program.” In other words, the survey responses could represent (a) the overall workload that includes students taught in non-LRW classes, or (b) just the workload in the LRW program. If the former, then legal writing courses have even lower ratios than the survey indicates. If the latter, then LRW faculty are likely more overworked than the survey currently suggests because legal writing professors are increasingly teaching courses outside the required curriculum.\(^60\) Moreover, because almost all legal writing faculty teach their other courses during the academic year,\(^61\) the

\(^{55}\) 1990 Survey Results, supra n. 8, at question 16.

\(^{56}\) In 1999, the student-teacher ratio was 53 to 1; in 2000, it was 46 to 1. 2000 Survey Results 35, question 82 (2000) (available at http://www.alwd.org/surveys/2000.html). By 2006, it was 44 to 1 in the fall, and a bit lower in the spring. 2006 Survey Results, supra n. 3, at 56 (question 82a).

\(^{57}\) Since 2006, adjuncts have consistently taught around seventeen students in each section of the course, though the class sizes range considerably. Id. at 61 (question 89); 2007 Survey Results, supra n. 3, at 67 (question 89a); 2008 Survey Results, supra n. 3, at 67 (question 89a); 2009 Survey Results, supra n. 1, at 72 (question 89a).

\(^{58}\) 2008 Survey Results, supra n. 3, at 62 (question 82a); 2009 Survey Results, supra n. 1, at 68 (question 82a).

\(^{59}\) In the spring of 2009, the Author posted a question to a listserv of legal writing faculty asking about ratios in legal writing courses and other courses. The answers strongly suggested that writing faculty may not be reading the survey question carefully and may be providing ratios for their total student load.

\(^{60}\) According to question 85, legal writing faculty at around two-thirds of law schools teach “other courses.” 2009 Survey Results, supra n. 1, at 69 (question 85).

\(^{61}\) In 2009, of the 120 schools that said legal writing faculty teach other courses, 108 schools reported that legal writing faculty taught those courses during the academic year. Id.
ratios affect both the quality of teaching available to students and the potential for burnout among faculty.

To clarify questions about student-teacher ratios, the survey needs at least three questions. One question should continue to ask about ratios in the required LRW curriculum, another question should ask about ratios in other courses that legal writing faculty teach (whether in LRW electives or in casebook courses), and a final question should ask about total student-teacher ratios for legal writing faculty. The survey should continue to gather information for each semester separately, as legal writing faculty do not necessarily teach the same number of courses or students each semester.

Similar uncertainty exists about the student-teacher ratio for directors. The average ratio over the past few years has varied between 36 and 39 students in the fall and spring semesters. Again, the question asks for the “number of students taught at least weekly in the required program,” but the range of answers is almost incredible: the minimum is 10 students and the maximum is 200. Moreover, the averages do not include directors who do not teach students in the required legal writing course. To further complicate the picture, directors claim to spend 29 percent of their time teaching students in the required curriculum and 18 percent of their time teaching students outside the required curriculum. If the 36 to 39 students taught do not include the directors’ workload outside the required program, how many students do directors teach in total? Again, the survey should ask specifically and separately about teaching within the required program, in other courses, and in total.

62. To avoid inflating statistics, information about large casebook courses should be segregated from LRW classes, which by necessity are smaller.

63. Id. at 47 (reporting, in the responses to question 54a, an average of around 38 students in fall and 37 in the spring); 2008 Survey Results, supra n. 3, at 42 (reporting, in the question 54a, an average of 39 in the fall and 38 in the spring); 2007 Survey Results, supra n. 3, at 43 (reporting, in question 54a, 36 in the fall and 37 in the spring).

64. Id. Presumably, the answer “200” is from one of the few schools where all first-year students take LRW together. The Author’s informal survey from the spring of 2009, see supra n. 59, suggests faculty might be including non-LRW courses in the total.

65. 2009 Survey Results, supra n. 1, at 46 (question 53).
E. Provide Totals for Semesters and Credits Awarded

Legal writing is required for more semesters and awarded more credit in the curriculum now than it was when the surveys were started, but again the summary nature of the information makes it difficult to use. \(^{66}\)

In 2009, it appeared that all schools required at least two semesters for the required LRW curriculum, a significant number of schools required additional credits of legal writing in the second year, and a few schools even required third-year legal writing courses. \(^{67}\) The presentation of the survey question makes it hard to tell the nationwide average for number of semesters or exactly what the average number of credits for the required curriculum is. The question asks, “How many credit hours are awarded each semester of the required program?” The resulting answer shows the total number of schools awarding one, two, three, or four credits in each semester. But that summary hides the average total number of credits awarded nationwide. The survey could easily add two questions: first, how many semesters of legal writing are required and, second, precisely how many total credits are awarded for the required LRW sequence.

F. Include Outcome Measures

The survey has always asked helpful questions about what the required LRW program covers in its credits and semesters, \(^{68}\) but as academia moves to outcome measures, perhaps the survey should refocus questions to ask about the skills students are expected to master. \(^{69}\) LRW programs are probably more outcome-
focused than other parts of the law school curriculum could
demonstrate, but the survey questions emphasize assignments
rather than learning outcomes, and they cover only some of the
learning outcomes expected in LRW courses. The survey’s cur-
rent questions cover research assignments, writing assignments,
and speaking skills. An outcome measures list could include not
only research, writing, and speaking skills, but also analytical
skills. In fact, the list could run the gamut from basic research
and fundamental writing skills to case synthesis, organization
of a legal argument, and ability to resolve cutting-edge legal is-

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G. Expand Information on Upper-Level Courses

According to the survey, many schools now offer upper-level
writing and research courses, including courses in general writ-
ing, drafting in a variety of settings, advocacy, scholarly writing,
judicial writing, and advanced research. The number of schools
offering these courses suggests that faculties now realize the re-
quired LRW curriculum cannot cover all writing and research
skills and that mastery of essential skills requires repeated prac-
tice in a variety of contexts.

While the number of schools offering upper-level courses is
impressive, the list of courses included in the survey seems dated.
The survey lists courses that have been offered in some schools
for years, but law schools are offering new courses in legal writ-
ing, just as law schools are offering new courses in other growing disciplines. The survey as written may not capture the “Writing across the Curriculum” courses that incorporate writing, research, and other skills in doctrinal law classes. It may not include the pro bono project that includes a classroom component. It may inadvertently omit the business practice lab or the hybrid course that resulted when an LRW professor started teaching a casebook class like Trusts and Estates, or when the doctrinal law professor realized that incorporating skills into her course could energize students and deepen their analytical abilities.\textsuperscript{72}

The survey could also provide opportunities for schools to mention new courses that are being considered. If a course is being proposed to the curriculum committee this year, it might be offered as soon as next year. A text box on the survey could let faculty name the courses under consideration; when a critical mass existed for a particular course, it could be added to the survey. Thus, schools could use the survey to learn not only what other schools are doing, but what they will be doing.

H. Make Titles and Status Tell the Whole Truth

The titles and status of full-time legal writing faculty vary widely, even within the same school.\textsuperscript{73} The survey accommodates the variety within schools by having submitters mark all responses that apply to colleagues at their schools. The result is that the survey shows total numbers but does not account for overlap. The survey is less helpful because of the resulting ambiguity.

1. Faculty Titles

Faculty titles can be confusing, as they denote both nomenclature and rank (i.e., what a faculty member is called and what status a faculty member has). LRW faculty at some schools have only the courtesy title of “professor.” While students may call them “Professor Jones,” their actual rank—denoting their status and job security—may be “lecturer,” “instructor,” or some other

\textsuperscript{72} A related question could ask whether schools that have added upper-level courses decided to have existing LRW faculty teach them, hired additional LRW faculty, or used adjuncts.

\textsuperscript{73} For example, during the 2009–2010 academic year, the University of Oregon had five full-time LRW faculty: one has tenure, one is a senior instructor, two are instructors, and one is a visiting professor.
lesser position. The survey could provide more helpful information for understanding faculty titles and status.

Imagine a colleague trying to persuade his faculty to grant legal writing faculty some form of the title “professor,” either as a courtesy title or to signify enhanced rank. That colleague reviews the 2009 survey and finds that 39 schools used the title “professor,” 47 schools used “professor of legal writing,” and 16 used “clinical professor.” Does an argument exist that “up to 102” schools (39 + 47 + 16) grant the use of the title “professor” in some form?

Perhaps the survey could provide a notation of how much overlap exists, or at least how many schools answered the question. Otherwise, someone using the survey has to connect dots with other questions and still ends up with information that may be imprecise. Without knowing how many schools answered the question on titles, one has to go back to an earlier question to learn how many schools used full-time legal writing faculty. In 2009, the easy answer was 73. But the more complete answer takes more digging because 58 schools selected the “hybrid” model. Of those 58 schools, 47 used full-time legal writing faculty.

So the total number of schools using full-time faculty was likely 120. The question on titles has a total of 177 answers, meaning that up to 57 schools used more than one title. Alternatively, a handful of schools could have used multiple titles. Knowing which alternative was accurate could help legal writing professors use the survey results more persuasively.

2. Faculty Status

The same uncertainty is true for status. In the 2009 survey, 15 schools reported a staffing model that predominantly used ten-

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74. 2009 Survey Results, supra n. 1, at 55 (question 68). According to the survey question, titles with the word “professor” include the possibility of a progression from assistant professor to associate professor to full professor.
75. Id. at 4 (question 10).
76. Question 10 asks about the staffing model for the first-year writing program at each school. Id. Answers include tenure-track models as well as models based on full-time contract teachers, part-time faculty, adjuncts, graduate students, and upper-level law students. Id. An answer is available for schools with a “complex hybrid of the above models or some other model.” Id. Those schools also answer question 11, in which they mark all of the elements of their hybrid model. Id. at 4–5 (questions 10, 11).
77. Id. at 5 (question 11).
ure-line professors for teaching legal writing.\textsuperscript{78} Up to 37 additional schools reported a staffing model that included tenure-line professors in a hybrid model. Because this question also instructs, “Please mark all that apply,” the number of schools using tenure-line faculty in legal writing could be as high as 52, over one-quarter of American law schools. The number could also be much lower. The survey should be able to suggest which answer is more accurate, at least by noting the level of duplication. The same problem—and possible solution—exists for questions on 405(c) status,\textsuperscript{79} three-year contracts, and short-term contracts.

In determining status, the survey faces a challenge in the amorphous definition of ABA Standard 405(c). In Standard 405(c), the ABA requires schools to provide clinicians “a form of security of position reasonably similar to tenure.”\textsuperscript{80} In an interpretation, the ABA explains that “security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts.”\textsuperscript{81} A long-term contract is defined as “at least a five-year contract that is presumptively renewable” or some “other arrangement sufficient to ensure academic freedom.”\textsuperscript{82} Legal writing faculty who receive the rights and privileges assured to clinicians have “405(c) status.”\textsuperscript{83}

The survey should ask whether those legal writing faculty claiming 405(c) status have five-year contracts and whether those contracts are presumptively renewable. In addition, the survey should ask for any exceptions or circumstances that could make the contracts not presumptively renewable. The survey should

\textsuperscript{78} Id. at 4 (question 10).

\textsuperscript{79} An obvious survey update is to put answers about 405(c) status closer together or even combine them, just as the answers regarding tenure are closer together or combined. Currently, in question 65, the answer “405(c) status” appears second, while the answer “405(c) track” appears at the end of the list. See id. at 54.

\textsuperscript{80} Standard 405(c) states,

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

\textsuperscript{2009–2010 ABA Standards, supra n. 40, at 35.}

\textsuperscript{81} Id. at 36 (providing Interpretation 405-6) (emphasis added).

\textsuperscript{82} Id. (emphasis added).

\textsuperscript{83} Supra sec. III(C).
also ask specifically what “other arrangements” schools have put in place to satisfy the requirement of academic freedom. The goal of these follow-up questions would be to determine whether “gentleman’s agreements” are truly gentlemanly. At one school, three-year, presumptively renewable contracts may truly meet the 405(c) standard, supported by the fact that the legal writing faculty have all been in place for at least ten and up to twenty-five years and have enjoyed full academic freedom during that time. The history at that school could demonstrate that the employment situation is not based solely on the goodwill of particular colleagues who could move on at any time, but on the collective understanding of the importance of academic freedom for all faculty. In contrast, another school may claim 405(c) status for its legal writing faculty even though their five-year contracts can be terminated for any reason—or no reason—as long as faculty are informed of termination by the end of the contract’s fourth year.

I. Monitor Backsliding

Most of the trends indicated by the survey are positive. But each year, rumors circulate about schools that have taken the proverbial two steps backward in legal writing. Sometimes the backward steps seem a sleight of hand. For instance, a tenured faculty member may be relieved of her director duties, with the school subsequently hiring or appointing a new director with only contract status. Sometimes the backward steps seem temporary but move toward permanence. Consider the legal writing professors covering a bulge class (resulting from unusually high admissions) for just one year: If the administration decides to continue the larger enrollment without hiring more legal writing faculty, the school has a higher student-teacher ratio, which is a backward move. Occasionally, the backward steps are blatant; last year, legal writing professors at one school were told they would have to begin following a uniform syllabus that was designed by a committee of doctrinal law professors.

While the survey cannot undo the damage, it can monitor changes in the legal writing curriculum and legal writing faculty. So that negative trends do not get lost in the volume of answers to individual questions, the survey could do two things. First, it could add specific questions in areas where backsliding is most
likely. Instead of simply asking the status of the person submitting this year’s survey, for example, an additional question could ask the status of the person who submitted the previous year’s survey. Second, the survey could include a catch-all text box in which responders could list important programmatic changes. Did class sizes increase? Were legal writing faculty unable to teach upper-level courses? Was a director position downgraded from tenure to contract? Were LRW faculty not allowed to participate in the search for a dean? Were LRW faculty told which text to use? Did LRW faculty publish articles in their field that were not valued as scholarship by internal review committees? Has the program moved from full-time teachers to adjuncts or fellows? Did the school provide any reasons for the backsliding? Again, this type of information could help LRW professors and national leaders recognize negative trends and respond appropriately both at individual schools and through legal writing organizations. This information could also persuade the ABA Council, which sets standards for accreditation of law schools, to consider the efficacy of Standard 405(c).

J. Include Aspirations

The survey should add a question on aspirations for the coming year, to show where programs are heading. Providing aspirational data could allow more schools to move forward faster, rather than after years of survey data indicate movement. The question might simply ask which of the following a school is actively trying to improve in the coming year: student-teacher ratio, credits and semesters, upper-level courses, job security, voting rights, participation in faculty governance, academic freedom, staffing model, or other areas. A text box could allow submitters to provide details.

84. A member of the survey committee would need to read through these responses and compile answers, but the information could be well worth the extra time.

85. This change would take us “back to the future,” as the 1990 survey contained questions asking about the most significant changes LRW faculty hoped to achieve in the next five and ten years, whether they expected to achieve those goals, and the reasons. See Ramsfield, First Images, supra n. 1, at 172.
IV. CONCLUSION

The changes suggested here comprise a major overhaul of the annual survey. The transition may take more than one year, especially as old questions are correlated to new ones to provide continuity of information on individual topics. Some changes—for example, those addressing simple organization or those adding subparts to existing questions—could be implemented almost immediately.

The survey has proven to be an invaluable tool in the professionalization of our discipline. Updating it now will ensure that it continues to be invaluable for years to come.
APPENDIX

The current survey contains the following eleven parts:

I. **Submitter profile:** The five questions in this part ask about both the person completing the survey (the person’s position in the LRW program, gender, and race) and about the director, if any (the number of years since the director earned a J.D., years the director has been teaching full time, and years the director has been directing the LRW program at that school).

II. **Law school information:** These questions elicit information about the law school’s geographic region, setting (urban, suburban, rural), and institution type (public or private), and the size of the first-year class.

III. **Staffing model:** Two questions try to pin down the staffing of the required legal writing curriculum at the school. In the first question, submitters are asked to name the predominant staffing model for legal writing. One of the answers is “a complex hybrid” model. In the second question, schools with hybrid models identify all of the components of their model, including full-time teachers, part-time teachers, graduate fellows, adjuncts, and students.

IV. **Curriculum:** In one of the lengthier parts of the survey, the questions in Part IV cover credits; grading; assignments (research, writing, and speaking); use of class time; coordination with other courses; use of drafts and rewrites; methods for commenting on papers; uniformity among sections of LRW at each school; and the role of writing specialists.

V. **Upper-level writing courses:** These questions address both required and elective LRW courses after the first year (including research courses). The questions cover the demand for the courses, who teaches the courses, and the amount of written feedback students receive in the courses.

VI. **Technology:** This part covers the fundamental technological needs of LRW faculty; the existence of an LRW web page for each school; and teaching technology (e-mail, smart classrooms, online editing, etc.).

86. Quite a few schools have a complex hybrid model that includes a combination of tenured, contract, and adjunct teachers, making exact determinations of the prevalent staffing models difficult.
VII. Directors: Another lengthy portion of the survey, this part addresses the director’s status; salary and benefits; duties (as a percentage of the director’s time); workload (including number of students, number of in-class hours, number of assignments, number of pages graded, hours of student conferences, etc.); participation in faculty governance; scholarship requirements; hiring process; and eligibility for sabbaticals and other types of leave.

VIII. Full-time legal writing faculty members (excluding directors): This part covers the same general areas as the questions about directors, though in different order: status; gender and race; hiring; salary; eligibility for research grants, developmental funding, and research assistants; scholarship requirements; workload; and participation in faculty governance.

IX. LRW adjunct faculty: Seven questions in this part ask whether schools hire adjuncts to teach required LRW courses and, if so, their salaries, their workload, their prior experience, and the assignments the adjuncts use.

X. Teaching assistants: These seven questions address use of student teaching assistants (TAs), the number of students assigned to each TA, the TA workload, and compensation.

XI. Survey use: The single question in this part asks whether the school has used data from the survey to improve the LRW program in various ways.
LRW PROGRAM DESIGN: A MANIFESTO FOR THE FUTURE

Eric B. Easton

All of us have, at one time or another, had occasion to consider, or reconsider, our program model. The trigger may have been a new dean; the prospect of a sabbatical inspection; a budget crisis or financial windfall; a faculty champion or saboteur; something we learned at a Legal Writing Institute (LWI) or Association of Legal Writing Directors conference; or merely the cycle of bureaucratic reorganization. Those reconsiderations have led to a great diversity of Legal Research and Writing (LRW) program models: two-, three-, four-, and all-semester programs; adjunct-, contract-, and tenure-track staffing; and directors, co-directors, and no directors. Reconsiderations have also lead to discussions

* © 2010, Eric B. Easton. All rights reserved. Professor of Law and Co-Director Legal Skills Program, University of Baltimore School of Law.

1. According to the most recent Association of Legal Writing Directors (ALWD) and Legal Writing Institute (LWI) survey, Virtually all writing programs (163 out of 166) extend over the first two semesters of the first year, averaging 2.40 credit hours in the fall and 2.26 hours in the spring (comparable to the 2008 averages). 45 programs have classes in the fall of the second year, averaging 2.02 credits. 16 programs have classes in the spring of the second year, averaging 2.19 credits. 6 programs have classes the fall of the third year, averaging 2.33 credits. 4 programs have classes in the spring of the third year, averaging 2.00 credits.

2. "For the 2008–2009 academic year, as in past years, most programs continued to use full-time non-tenure-track teachers (73 programs or 43.9% of those responding to this question) or a hybrid staffing model (58 respondents or 34.9%). 17 programs reported using solely adjuncts (10.2%); 11 programs used solely tenured or tenure-track teachers hired specifically to teach LRW . . . ; and another 11 programs used such teachers in hybrid programs." Id. at i.

3. In 2009, 134 programs reported having a director, that is, “a person with direct responsibility for the design, implementation, and supervision” of the writing program. Id. at 31 (question 44). The trend towards directorless program is accelerating, with 32 schools reporting no program director in 2009, compared to only 27 schools in 2008, when 15 more schools responded. Id. Thirty-one programs reported having an associate or assistant director, down from thirty-nine in 2008. Id. (question 46).
about how to use writing specialists, teaching assistants, teaching librarians, and post-graduate fellows in LRW programs.

Our curricula reflect fresh thinking as well, with the introduction of more and varied practice skills: interviewing, counseling and negotiation; drafting and client communications; and especially professional responsibility. Some of us have ventured even further away from the traditional model to integrate our programs with first-year or upper-level courses, to champion or

4. In 2009, fifty law schools employed a full-time or part-time writing specialist, compared to forty-three in 2008. Id. at 15; see also C. B. Bordwell, A Writing Specialist in the Law School, 17 J. Leg. Educ. 462 (1964–1965); Susan Dailey, Writing Specialist as Pariah: Reflections on My First Year, 9 Second Draft (Bull. Leg. Writing Inst.) 8 (May 1995); Chris Rideout, Creatures from the Black Lagoon—They’re Nice, or What Writing Specialists Can Offer Legal Writing Programs, 13 Second Draft (Bull. Leg. Writing Inst.) 16 (May 1999); Lynn B. Squires, A Writing Specialist in the Legal Research and Writing Curriculum, 44 Alb. L. Rev. 412 (1980).

5. In 2009, 104 programs used teaching assistants in the required program, with the vast majority providing 25 percent or less of the instruction. 2009 Survey Results, supra n. 1, at 73.

6. Librarians taught or participated in teaching legal research at 102 law schools in 2009. Id. at 8.

7. Established fellowship programs include the Harry A. Bigelow Teaching Fellowship at the University of Chicago, the Harvard Law School First-Year Legal Research and Writing Program Cimenko Fellowships, the Lawyering Program at New York University, Law Fellows at Stanford University, and the Abraham L. Freedman Teaching Fellowship at Temple University Beasley School of Law. Newly announced programs have appeared at Thomas Jefferson School of Law and Stetson University College of Law. E-mail from Linda M. Keller to LWI Discussion List, Legal Writing Positions at Thomas Jefferson School of Law (July 31, 2009, 7:30 p.m.) (copy on file with Author); e-mail from Kirsten K. Davis to LWI Discussion List, Stetson University College of Law Announces Jacob Fellows Program Opportunities (Oct. 13, 2009, 9:00 a.m.) (copy on file with Author).


9. See Sourcebook, supra n. 8, at 178–183; see also Reed Dickerson, Teaching Legal Writing in the Law Schools (with a Special Nod to Legal Drafting), 16 Idaho L. Rev. 85 (1979); Joseph Kimble, Teaching Legal Drafting, 3 Scribes J. Leg. Writing 148 (1992).


12. For example, the University of Baltimore’s Introduction to Lawyering Skills course integrates basic legal analysis, research, and writing instruction with doctrinal instruction in Contracts, Civil Procedure, Criminal Law, or Torts. See U. of Balt. Sch. of L., Legal...
at least support writing-across-the-curriculum, and to acknowledge the phenomenon of globalization by exporting our teaching or importing our students. We have been guided in these innovations by a variety of studies, among them the MacCrate Report in 1992, the Sourcebook in 1997 and 2006, Carnegie Report and Best Practices.


Several of DePaul University Law School's Legal Analysis, Research & Communication courses are specialized by subject matter. First-year, full-time day division students have the option of applying for a seat in one of four special sections focusing on child and family law, health law, intellectual property law (including traditional intellectual property, information technology and cultural property/art law) and public interest law. Students in these specialized sections complete the same course requirements as students in the general legal writing sections, but many of their assignments are drawn from the particular area of law. Admission to these special sections is very competitive; applicants may apply to only one section at the time they apply for JD admission. Applicants are notified of their acceptance into the special LARC sections after receiving their letters of admission to the College of Law.

Seattle University's legal writing faculty has been teaching in Africa since 2003. See e.g. Seattle U. Sch. of L., Legal Writing in Africa, http://www.law.seattleu.edu/Academics/Legal_Writing_Program/Teaching_in_Africa.xml (accessed May 3, 2010).

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15. See generally, Sourcebook, supra n. 8 at 199–212 (discussing English-as-a-Second-Language students).

in 2007, and outstanding new studies that seem to appear every day. And we have freely shared our ideas and experiences among ourselves, at national, international, and regional conferences; and in journals and law reviews, listservs, and blogs.

My purpose today is to step back from the detail and take a long look at where we are headed. My central thesis is simply this—the time for reconceptualizing and reinventing LRW programs is ending; the time to destroy them is coming. And we must take the lead in that enterprise. I know that sounds subversive. I hope, when I have finished, you find it realistic enough to be merely provocative.

Since Langdell’s day, legal education has straddled the divide between the academy and the profession. And since Langdell’s day, the academy has had the upper hand. The introduction of

22. See e.g. Thomas D. Barton, Preventive Law and Problem Solving: Lawyering for the Future (Vandeplas Publig. 2009); Michael Hunter Schwartz et al., Teaching Law by Design: Engaging Students from Syllabus to Final Exam (Carolina Academic Press 2009); David I. C. Thompson, Law School 2.0: Legal Education for a Digital Age (LexisNexis 2009).
24. Including, of course, Legal Writing: The Journal of the Legal Writing Institute and the Journal of ALWD.
25. Such as lrwprof@listserv.iupui.edu and dircon@lists.washlaw.edu.
27. I leave this sentence intact, despite my embarrassment at listening to speaker after speaker at the Mercer Symposium offer similar prescriptions, see especially Carol McCrehan Parker, Signature Pedagogy of Legal Writing, 16 Leg. Writing 477 (2010).
29. Sullivan et al., supra n. 20, at 4 (discussing how “as American law schools have developed, their academic genes have become dominant”). Additionally, Thompson explains,

Most law schools draw their academic legitimacy from being parts of larger universities. The academic model therefore will always tend to hold sway. And the academic model simply does not have the same values as the values championed by the critics of legal education. What universities prize is scholarship. Scholarship requires by its very nature some distance from the day-to-day grind of law practice.

Thompson, supra n. 22, at 57.
clinics and professional skills courses is a comparatively recent development; many were taught by adjunct practitioners, or, more recently still, by undervalued clinicians and legal writing teachers. Over the past twenty-five years, which we are celebrating today, we have professionalized our programs, our curricula, and, by adopting and adapting academic scholarship as a value, our own status.

As a consequence, we may have become complacent. Some of us are deans and associate deans, some of us are acknowledged

30. Recent, that is, since the demise of apprenticeship-based legal education in favor of academic-based law schools. See generally Amy M. Colton, Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education, 27 U. Mich. J.L. Reform 963 (1994) (tracing the history of American legal education from the earliest apprenticeship-based models to the present); Leonard D. Pertnoy, Skills is Not a Dirty Word, 59 Mo. L. Rev. 169 (1994) (same). Colton points out that “[a]lthough clinics slowly began finding their way into law school curricula by the 1950s, they were often greeted with a skeptical eye. It was not until the late 1960s that a new and much stronger clinical movement began.” Colton, supra n. 30, at 977–978.

31. The statistics on faculty status in skills courses included in the MacCrate Report show that part-time or non-permanent faculty taught 59 percent of 9,230 skills courses surveyed. Full-time permanent faculty taught a majority of courses only in first-year “Introduction to Lawyering” courses (56 percent); advanced research, writing, or drafting (52 percent); interviewing and/or counseling (74 percent); negotiation and/or alternative dispute resolution (67 percent); non-litigation, substantive lawyering courses (55 percent); and clinics and other (65 percent). MacCrate Report, supra n. 17, at 246–247. Part-time and non-permanent faculty taught the majority of first-year research, writing, or drafting (64 percent); trial practice/trial advocacy (75 percent); pretrial litigation practice (64 percent); appellate advocacy, including moot court (67 percent); certain combinations, including INC (interviewing, counseling, and negotiation) and trial and appellate practice (53 percent); and externships and internships (68 percent). Id.

32. Colton writes about the “disdain” with which academics have tended to look upon skills training courses, relegation of clinical studies to the “second tier” of legal education, Colton, supra n. 30, at 976–978, and the preference of law schools for “real” professors who can “teach substantive courses, publish journal articles, give the school prestige, and therefore, be a profitable return on the school’s investment.” Id. at 978.


34. Any surrogate that might be used for professionalization is bound to be controversial. To Sue Liemer and Jan Levine, professionalization equates to the combination of program design and faculty status. See Liemer & Levine, supra n. 33, at 119 (stating that “the professionalization of legal-writing teaching is continuing steadily”). For a thorough analysis of the credentials of legal writing teachers today, see Susan P. Liemer & Hollee S. Temple, Did Your Legal Writing Professor Go to Harvard? The Credentials of Legal Writing Faculty at Hiring Time, 46 U. Louis. L. Rev. 383 (2008).

35. To name just a few, Dean Ellen Suni at University of Missouri-Kansas City; Dean
faculty stars. Many more of us are tenured, full professors or well on the way. And, with clinicians and other supportive faculty, at least a few of us have the numbers to win faculty votes in our institutions. Yet we continue to work in an academic world that takes its priorities from more than a century ago, in the face of documented demands to the contrary by the principal consumers of our labor.

Again and again, we are told that our students are not ready for practice when they graduate from law school. Is that not the message of the new apprenticeships? Again and again, their

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Darby Dickerson at Stetson University College of Law; Dean Michelle Simon of Pace Law School; Dean Daisy Hurst Floyd of Mercer University’s Walter F. George School of Law; Associate Dean Susan Richey of Franklin Pierce Law Center; former Associate Dean Nancy Soonpaa of Texas Tech University School of Law; and former Associate Dean Susan Brody of John Marshall Law School—all of whom began their careers as legal writing teachers.

36. Again, to name just a few, consider Burton Award winners Ralph Brill of Chicago-Kent College of Law (2006); Laurel Oates of Seattle University School of Law (2007); Mary Beth Beazley of Ohio State University’s Michael E. Moritz College of Law (2008); and Richard K. Neumann of Hofstra Law School (2009). Every day, the legal writing listservs report major faculty awards won by our colleagues.

37. Liemer and Levine point out the growth in tenured and tenure-eligible program directors increased dramatically between 2000 and 2003, from “44 to 69 [or 24%], or from 24% to 36%[ which is] a 50% increase over three years.” Liemer & Levine, supra, n. 33, at 121. Subsequent ALWD-LWI surveys show a steady decline in that number, presumably attributable to a decline in the number of programs with directors. E.g. 2009 Survey Results, supra n. 1, at 31.

38. “While practicing lawyers undoubtedly appreciate the value of the law school experience to their own careers, surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation.” MacCrate Report, supra, n. 17, at 5. “In legal education . . . the primary emphasis on learning to think like a lawyer is so heavy that school wide concern for learning to perform like one is not the norm.” Sullivan et al., supra, n. 20, at 22.

39. To be sure, the new apprenticeship movement can be partly attributed to the downturn in the economy and concomitant desire to reduce charges to clients and salaries for associates. See e.g. Steven T. Taylor, Starting Salaries Stalled or Slashed, While a New Trend Emerges: Apprenticeships, 28 Of Counsel 1 (2009). Nevertheless, deferring the hiring of new associates or the date they report to work was always a viable alternative. Those firms that developed apprenticeship programs certainly saw the need for enhanced skills training. “Why is Ford & Harrison doing something different? To close the gap between what law schools teach and what clients demand.” Ford & Harrison, Year One Associate Development Program, http://www.fordharrison.com/Files/Year%20One%20Flyer.pdf (accessed May 3, 2010). “All of the First Years will attend the core curriculum coursework for the first six weeks of the program. . . . There will be instruction and interactive presentations, as well as exercises in writing, ethics, negotiation, presentation skills, problem-solving, teamwork and collaboration.” Drinker Biddle, News Release, Listening to Our Clients, Adding the Value They Want: Drinker Biddle Launches Much-Heralded Training Program for First Year Lawyers, http://www.drinkerbiddle.com/files/News/9a2d0264-3922-4812-8d5d-03a3c388nb0a/NewsAttachment/c1f40422-1778-428a-a835-0c595107a07d/First_Year_Associates.pdf (Sept. 29, 2009) (news release);
deficiencies are identified and solutions suggested. Does anyone read the MacCrate Report, Carnegie Report, or Best Practices? Again and again, the advice is ignored. Why? Because the academic tail still wags the professional dog. It is time to reverse the emphasis in law school, and it will be up to us to lead the way. It is time to take charge of legal education, and program design is our Archimedean fulcrum.

I am not advocating that we abandon our struggle for status within status quo; scholarship remains the “coin of the realm,” and I do not suggest we return to the day when we were neither expected nor encouraged to write. Certainly our students have benefited, albeit indirectly and to some extent incidentally, from much of our research. Nor am I asking anyone to jeopardize job security or career advancement; on the contrary, the more deans and tenured professors we produce, the easier our revolution will be.

I am charging those of us with clout, whether pervasive or situational, to take program design restructuring and other opportunities to advance three specific goals:

1. Take over the first-year doctrinal curriculum as the opportunities arise.

Teachers must teach the core curriculum. At many schools, “teachers” means us, the clinicians, and other conscientious facul-

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see also What to Expect in the Decade Ahead, Natl. L.J. S10 (Nov. 9, 2009) (“For Baker & McKenzie Chairman John Conroy Jr., successful firms a decade from now will . . . train associates in apprentice-like programs. . . . Law firms and law schools are going to have to get a ‘cold shower’ and retool training of would-be lawyers, putting more focus on practical project management, client development and budgeting skills, Conroy said.”).


42. I hasten to exclude most of my own oeuvre, which was launched well before I knew enough, or had the courage, to push the envelope.

43. I add the word “doctrinal” here to distinguish torts, contracts, property, etc., from the theoretical and perspective courses finding their way into the first-year curriculum. I am encouraged by and fully support this trend, which ranges from the new Harvard curriculum, see Harvard Law School, HLS Faculty Unanimously Approves First-Year Curricular Reform, http:// www.law.harvard.edu/news/2006/10/06_curriculum.php, to the University of Baltimore’s decision to add electives in Law & Economics, American Legal History, Critical Legal Studies, Jurisprudence, or Comparative Law to the first-year curriculum, see University of Baltimore School of Law, Law in Context Requirement, http:// law.ubalt.edu/template.cfm?page=1282.
ty members. Many fine legal scholars are also outstanding teachers; others are not. Teaching in the first-year curriculum must not be a chore expected of all faculty, regardless of their teaching skills. Let us replace those who would prefer and excel in an upper-level seminar course. The introduction of outcome assessments will help us along the way.

It will not be as hard as you might think. Some of your doctrinal faculty colleagues would much rather teach their upper-level specialty courses anyway. And chances are you have already taught first-year doctrine in connection with memo and brief assignments.

There are a variety of ways to do this. You may be able to structure your program so that each LRW teacher can teach one doctrinal course every semester or every other semester. You may be able to integrate your LRW course with one or more doctrinal courses, following the late, lamented Pace model, as we

44. Many of the best scholars at my own law school are also among the best teachers. Michael Hunter Schwartz has launched a major project for Harvard University Press to identify the best law teachers in the country and report on what makes them so; nominees so far include all categories of law teachers. See Washburn U. Sch. of L., What the Best Law Teachers Do, http://washburnlaw.edu/bestlawteachers/ (accessed May 3, 2010).

45. Kent Syverud has described the “Brahmins” of legal education as rarely changing what they teach or how they teach it. “[T]hey like teaching really good students (like the ones on the law review), but they abhor grading and, except in seminars, rarely evaluate and correct written work.” Kent D. Syverud, The Caste System and Best Practices in Legal Education, 1 J. ALWD 12, 14 (2002).

46. See Susan Hanley Duncan, The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know to Be Ready for Them, 16 Leg. Writing 619, 644 (2010). The kind of formative assessment that a learning-centered model requires is common in the skills classroom, and rare in the doctrinal classroom, putting us far ahead of that curve already. See Gregory S. Munro, Outcomes Assessment for Law Schools 16 (Inst. for L. Teaching 2000) (“This formative dimension of assessment is limited in most American law schools to the clinical and legal writing programs.”).

47. Do not for a minute think you cannot teach doctrine—though some faculty colleagues may have their doubts. I have now taught contracts and torts in both stand-alone courses and courses integrated with LRW; if I can do it, you can do it.

That we are not always highly regarded by our doctrinal colleagues is nothing new, but was brought home recently when Professor Charles E. Rounds, Jr., called in-house clinics and legal writing programs “politicized bureaucracies [that] behave like labor unions. They are great at self-promotion and forging national networks. They are labor-intensive and thus frightfully expensive. At best, these programs are pedagogically inefficient; at worst they are pedagogically cancerous.” Charles E. Rounds, Jr., John Williams Pope Ctr. for Higher Educ. Policy, Bad Sociology, Not Law, http://www.popecenter.org/commentaries/article.html?id=2281 (Jan. 4, 2010).

48. The Pace model is discussed in Simon, supra n. 12, but was abandoned there in 2009. An insider told me that the program worked very well for almost twenty years, and its demise was more political and ideological than substantive or pedagogical. While the faculty supported it, as time went on, they recognized that it cost a lot of resources. Newer
have done at Baltimore. You may even be able to bring some doctrinal teachers into the conspiracy, at least temporarily.

That model has worked well for us in Baltimore, and we are gradually turning our faculty and administration into believers. We still have our problems—classes are too large, continuation classes pose coordination problems, the faculty is not quite stable from year to year—but we seem to have solid support behind the changes we want to make.

Of course, this is not the integrated program some of us may remember from law school. My writing “class” was an appendage of a property class. The property professor (whom I quite like and respect) gave us a dog-bite scenario and told us to go write a memo. And we got handouts from the law librarians to help us. Mine came back marked “good,” and I was actually quite pleased.

49. In early 2005, the dean at that time asked Amy Sloan and me, as co-directors, to come up with a proposal for moving Baltimore’s legal writing program from an adjunct-taught model, which it had been for twenty-five years or so, to full-time, professor-taught model. Our original plan was to phase in a course that integrated legal writing and torts in a seven-credit course, Introduction to Lawyering Skills/Torts, with a section size of about twenty-five students. We would hire two experienced, tenure-track legal writing professors each year until we had enough to deliver instruction to all of our 370 first-year day and evening students. The faculty approved our proposal, and we taught in that form during the fall of 2006 and 2007, while our second and third semesters continued to be taught by adjuncts. We were also able to hire two terrific teachers in each of those years, although one has since left us. The arrival of a new dean, however, coincided with a growing chorus of complaints from the students who could not be accommodated in the new curricular model. The new dean was agnostic toward our program, but he insisted that we roll it out in the fall of 2008 to all first-year students. We altered the plan to comply. In addition to torts, we added sections of ILS/Contracts and ILS/Civil Procedure, to maximize our flexibility. We increased average class size from twenty-three to thirty-seven, and we persuaded a few doctrinal professors (including the former dean who inspired the course) to teach in the program. Our ability to hire experienced legal writing teachers was formally ended, but the needs of the program were taken into account in hiring new tenure-track junior faculty. It is working well, and the students are generally very pleased, but we are taking steps to stabilize the faculty and reduce class size.

50. One of our senior doctrinal professors at Baltimore even attended an LWI summer conference and has gone on to write an article about his experiences. See generally John A. Lynch, Jr., Teaching Legal Writing after a 30-Year Respite: No Country for Old Men? 38 Cap. U. L. Rev. 1 (2009).

51. See Sourcebook, supra n. 8, at 104 (“Generally, traditional doctrinal tenure-track or tenured professors do not want to teach legal writing and know little about developments in the field of legal writing. Therefore, even when they are assigned to teach legal writing, they may have neither the commitment nor expertise to do so and fail to put the necessary time or energy into the legal writing course.”).
It did not have any other marks on it, so I figured, “Well, I’m done with that.” But I digress.

2. However you manage to seize control of the first-year doctrinal curriculum, refocus the curriculum to reduce reliance on reading cases and increase the time spent on preventive law—such as drafting contracts; on problem solving—such as drafting settlement agreements; and on litigation process—such as drafting pleadings, discovery documents, and motions.

We know from experience that our students never forget the doctrine they learn from researching and writing memoranda and briefs, especially when they work collaboratively in a moot court.

52. See generally Barton, supra n. 22. It may be self-evident that contract drafting is a pre-eminent form of preventive law. As Charles Fox writes,

The time to anticipate and resolve potential issues is before the parties have bound themselves to the transaction, when deal momentum and mutual interest in completion greases the skids. Among the lawyer’s most important functions are to help orchestrate this process, to identify issues, to propose solutions, to help identify workable compromises and to put it all into words that clearly express the parties’ intent. Charles M. Fox, Working with Contracts: What Law School Doesn’t Teach You 34 (Practising L. Inst. 2002). Integrating drafting into a traditional contracts course is difficult, see e.g., Eric Goldman, Integrating Contract Drafting Skills and Doctrine, 12 Leg. Writing 209 (2006), but much easier in a six-credit course like Baltimore’s ILS/Contracts, see supra n. 49.

53. Problem solving is the MacCrate Report’s very first “Fundamental Lawyering Skill,” and the report devotes ten pages to it. MacCrate Report, supra n. 17, at 141–151. Maxeiner points out that, by the late 1970s, the “problem method” had insinuated itself into many first-year casebooks. Maxeiner, supra n. 28, at 44; see also Gregory L. Ogden, The Problem Method in Legal Education, 34 J. Leg. Educ. 654 (1984); Susan Kurtz et al., Problem-Based Learning: An Alternative to Legal Education, 13 Dalhousie L.J. 797 (1990); Myron Moskovitz, Beyond the Case Method: It’s Time to Teach with Problems, 42 J. Leg. Educ. 241 (1992); Myron Moskovitz, From Case Method to Problem Method: The Evolution of a Teacher, 48 St. Louis U. L.J. 1205 (2004); Steven J. Shapiro, Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method, 34 Creighton L. Rev. 245 (2000). The settlement agreement, of course, is only one manifestation of a “solution” that lends itself to a writing exercise as part of a doctrinal course.

54. Many of us have added such documents to our stand-alone writing courses. The 2009 Survey shows forty-six programs include “drafting documents” in their curriculum. 2009 Survey Results, supra n. 1, at 10. My first assignment in an integrated ILS/Torts class has been to draft a simple battery complaint.

55. This experience is supported by observations reflected in both Best Practices and the Carnegie Report:

Principle: The program of instruction integrates the teaching of theory, doctrine, and practice.

* * *

One of the impediments to merging instruction in theory and practice has been the perception that context-based learning is useful for teaching “practical skills” but not substantive law or theoretical reasoning associated with “thinking like a lawyer.” In fact, the opposite is true. . . .

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context. How better to teach doctrine than to borrow from the doctors’ motto, “see one, do one, teach one”? It is the other doctrine that flies out of their heads the minute the bar exam is over. We need to incorporate more of that, even at the expense of coverage, and we have to get over the “whole-book” attitude.

But we need the teaching materials to do that. With all due respect to the authors of our current array of fine LRW books, we now need contracts books, torts books, criminal law books, property books, and civil procedure books for integrated courses. Give those hoary cases new life by creating and integrating, not only discussion problems, but also writing assignments such as memos, client letters, pleadings, motions, briefs, and transactional documents.

Law schools cannot prepare students for practice unless they teach doctrine, theory, and practice as part of a unified, coordinated program of instruction. Stuckey et al., supra n. 21, at 97–99.

[S]tudents suggested that writing should be “more integrated into courses on doctrine” in order to speed up students’ learning of legal reasoning. Sullivan et al., supra n. 20, at 104.

We believe legal education requires not simply more additions, but a truly integrative approach in order to provide students with broad-based yet coherent beginning for their legal careers. Id. at 59.

56. See Barbara Bennett Woodhouse, Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life, 91 Mich. L. Rev. 1977, 1989 (1993) (explaining that despite law students’ penchant for forgetting doctrinal learning from one semester to the next, “they tend to remember with crystal clarity the doctrines they mastered for their first-year moot court arguments”). Byron Cooper, who quoted the Woodhouse article, adds that “[n]ot only do they remember what they learned for their moot court problems, but most of their knowledge of the law used for those problems was acquired with little expenditure of class time.” Byron D. Cooper, The Integration of Theory, Doctrine, and Practice in Legal Education, 1 J. ALWD 50, 57 (2002).


58. Michael R. Smith, Alternative Substantive Approaches to Advanced Legal Writing Courses, 54 J. Leg. Educ. 119 (2004) (“[N]o textbooks are available at present for the integrative approach. While there are some helpful articles, many teachers may feel the need for a truly comprehensive textbook.”).

59. There is certainly precedent for adapting course books to suit contemporary instructional needs. Maxeiner cites a 1908 article on point, “If the object of the three years course is to equip the graduate for the actual work of his profession, why not substitute for books of pre-selected opinions, books of concrete facts or skeleton cases raising the important and crucial issues of the different topics of the law.” Maxeiner, supra n. 28, at 45 (quoting Henry Winthrop Ballantine, Adapting the Case-Book to the Needs of Professional Training, 2 Am. L. School Rev. 135, 137 (1908)).
Writing-across-the-curriculum may be a viable substitute for integration in some institutions, but the “declining culture” will be resistant. It requires more time and effort than many of our colleagues are willing or able to expend on the teaching, and it may be more difficult to inculcate professional values where professors only grudgingly accept the requirement. But that does not mean that we shouldn’t keep the pressure on to incorporate writing-across-the-curriculum wherever we can.

3. Insinuate yourself, your colleagues, and your program into the upper-division, using whatever entrée you can find or create; advanced writing courses, writing centers for scholarly writing and job-oriented writing samples; bar preparation and pre-bar preparation courses; and pre-clinic, externship, or clerkship boot camps.

60. Lysaght points out that doctrinal faculty may have developed an “intellectual distance” from practice; some are “openly hostile” to skills education. Lysaght, supra n. 14, at 196.

61. Id. at 195 (“[T]he time it takes to evaluate a writing assignment, which is considerably more than the typical essay exam, can act as a restraint for many casebook faculty with healthy scholarship agendas.”).


63. In 2009, 106 law schools reported offering advanced legal writing courses covering general writing skills, drafting of all kinds of legal documents, advanced advocacy, scholarly writing, or judicial opinion writing. 2009 Survey Results, supra n. 1, at 21–24.

64. In 2009, thirty-three law schools reported having a formal writing center. Id. at 20. All reported at least one part-time professional on staff; most (twenty-four) were also staffed by teaching assistants. Id. That leaves a lot of room for development: sixty-eight schools were served by a university writing center, while fifty-seven schools reported none at all. Id.; see Susan R. Dailey, Linking Technology to Pedagogy in an Online Writing Center, 10 Leg. Writing 181 (2004); Terrill Pollman, A Writer’s Board and a Student-Run Writing Clinic: Making the Writing Community Visible at Law Schools, 3 Leg. Writing 277 (1997).


66. “Legal writing faculty are sometimes consulted about the design of [a bar preparation] course or are asked to teach it because of their specialized knowledge related to the Multi-State Performance Test, which tests legal writing directly.” Sourcebook, supra n. 8, at 197 (citing Maureen Strub Kordesh, Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test, 30 U. Mem. L. Rev. 299 (2000)).

67. See Larry Cunningham, The Use of “Boot Camps” and Orientation Periods in Externships and Clinics: Lessons Learned from a Criminal Prosecution Clinic, 74 Miss. L. J. 983 (2005). Thirty-one law schools offered judicial opinion writing courses in 2009, with an average enrollment of more than sixteen students, many of whom presumably had clerk-
Those of us who also teach upper-level specialties, and write conventional navel-gazing law review articles, can assuage our guilt by introducing the skills and values of the “emergent culture” into those courses.\footnote{See Sourcebook, supra n. 8, at 193.}

Find common ground with clinicians and externship supervisors,\footnote{See e.g., Angela J. Campbell, Teaching Advanced Legal Writing in a Law School Clinic, 24 Seton Hall L. Rev. 653 (1993); Rowe & Liemer, supra n. 62, at 221.} consistent with confidentiality, and get involved in career services programs.\footnote{See Sourcebook, supra n. 8, at 198; Louis Sirico, Getting Respect, 3 Leg. Writing 293, 295 (1997) (“Assist in student placement efforts. Run workshops on such topics as composing résumés, drafting cover letters, and excelling in interviews.”).} Stake out permanent seats on appointments, curriculum, and other key committees.\footnote{Rowe and Liemer call it “Act like a Duck.” Rowe & Liemer, supra n. 62, at 224–225.} Above all, make sure that promotion and tenure policy committees recognize our scholarship and our peer-reviewed journals.

Bring practitioners into the planning and implementation of your integrated courses; they have a stake in the success of your efforts, and they can help you overcome some of the likely resistance to it.\footnote{Id. at 226 (“The local bench and bar can help provide real impetus for change in the law school curriculum. To tap into this source, you have to be part of the legal community outside of the law school.”); see also Sirico, supra n. 70, at 296.} Get involved in bar exam administration, lobby for changes that emphasize practice skills and, in so doing, exert external pressure for change on the law school.\footnote{With two Multistate Performance Test questions, the proposed Uniform Bar Examination may be a cause worth lobbying in some jurisdictions. For more views on the UBE, see Essays on a Uniform Bar Examination, B. Exmr. (Feb. 2009).}

By now, you may be thinking that I probably have too much time on my hands if I can expect you to do all or any of this while you are grading a hundred-plus memos during a semester. We work harder than anyone else, and we will keep working hard. But we must add change to our workload.

This kind of systemic change, however, requires more than just hard work from us. We have to have smaller classes. We have to have more faculty members. The hundred-student doctrinal class should have been jettisoned a long time ago, and that has to be part of the change too. If the profession wants practice-ready graduates, they have to help us with the resources to do it.
This may not be the year for your school to change. It is not easy to ask for more resources in this economy. But sooner or later, change is going to come. Ultimately, your program will cease to be a program and will become the dominant culture of the law school. And, ultimately, preparing our students for practice will become the dominant culture of legal education. I'm seeing signs all around the country that law schools are taking seriously their mission to ready their students for practice.

As my grandmother might have said, “Come the revolution . . .”

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74. Consider, for example, Suffolk University Law School’s Legal Education and Practice Partnership (LEAPP), http://www.law.suffolk.edu/academic/lps/leapp, or Franklin Pierce Law Center’s Daniel Webster Scholar Honors Program, http://www.piercelaw.edu/wbsterscholar, and others.