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# BETTER WRITING, BETTER THINKING: USING LEGAL WRITING PEDAGOGY IN THE “CASEBOOK” CLASSROOM (WITHOUT GRADING PAPERS)

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The first revolution in American legal education occurred in the late nineteenth century, when Christopher Columbus Langdell took a giant step away from the apprenticeship method of teaching law and moved to the case study method.<sup>1</sup> Although Langdell was not the first to use the classroom to seek more efficient ways of training lawyers,<sup>2</sup> his “scientific” method became popular at universities, where law professors sought to distance themselves from the “trade-school” methods of apprentice-based legal education.<sup>3</sup>

The benefits of the apprenticeship method were limited, naturally, by the strengths of the particular lawyers who supervised each apprentice lawyer.<sup>4</sup> At least a theoretical advantage of this method, however, was that each apprenticeship could be tailored

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<sup>1</sup> *E.g.* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 *Loy. U. Chi. L.J.* 449, 452 (1996) (footnotes omitted).

<sup>2</sup> *E.g.* William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 *Baylor L. Rev.* 201, 206 (1996).

<sup>3</sup> *E.g.* Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 *Temp. L. Rev.* 117, 124–126 (1997).

<sup>4</sup> Amy M. Colton, Student Author, *Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education*, 27 *U. Mich. J.L. Reform* 963, 966 (1994).

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

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

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

<sup>6</sup> Philip C. Kissam, *The Ideology of the Case Method/Final Examination in Law School*, 70 U. Cin. L. Rev. 137, 137 (2001).

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

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

<sup>9</sup> Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 Hamline J. Pub. L. & Policy 1, 62 (2002) (describing the revolution in clinical education).

<sup>10</sup> Philip C. Kissam, *Lurching towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 Ohio St. L.J. 1965, 1966 (1999). The Legal Writing revolution has something important in common with both the technological revolution and the clinical revolution: all three promote increased student participation in the process of learning.

The Legal Writing revolution is a move forward to an apprenticeship method in law school teaching. I purposely do not say “a move back,” because this new apprenticeship method is not the haphazard apprenticeship of old, nor is it the enhanced, traditional apprenticeship that is reflected in most clinical programs.<sup>11</sup> As Professor Wegner’s remarks imply,<sup>12</sup> the apprenticeship offered in the legal writing course is a cognitive apprenticeship, an apprenticeship that allows faculty to train the mind of the apprentice as the master of old trained the hand. Many of the techniques that Legal Writing faculty use to guide this cognitive apprenticeship are relevant to the “casebook classroom,”<sup>13</sup> and all faculty should consider how they can be integrated there.

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

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

<sup>12</sup> Judith Wegner, *Better Writing, Better Thinking: Teaching Students to Think Like Lawyers*, 10 Leg. Writing 9 (2004).

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

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

<sup>15</sup> ABA Sec. of Leg. Educ. & Admis. to the B., *Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 172–176 (ABA 1992); see also Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course*, 3 Nev. L.J. 32, 33 (2002) (noting that integrating skills “greatly enhances the students’ understanding of substantive theories by

ABA Standards mandate that every law school require legal writing in some form,<sup>16</sup> and because virtually all Legal Writing programs incorporate significant individual teaching through conferences and personal critiques,<sup>17</sup> every law student is getting a taste of this revolutionary new method. The revolution will be complete, however, only when Legal Writing faculty and legal writing courses are fully integrated into the law school curriculum.<sup>18</sup> Only after this integration will the goal of integrating Legal Writing teaching methods into the rest of the curriculum be possible.

Integrating Legal Writing teaching methods does not mean that all faculty must begin assigning and individually critiquing writing assignments, although others have suggested that.<sup>19</sup> Instead, I recommend that the educational theories behind Legal Writing teaching methods should be adapted for use in casebook courses. As will be explained below, this integration will result in students doing more writing, but it *will not* result in casebook faculty doing the hours of individualized critique that are the hallmark — and one of the chief benefits of — the Legal Writing course.<sup>20</sup> Just as Legal Writing faculty have integrated Socratic

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placing them in a practical, hands-on context”).

<sup>16</sup>The preamble to the ABA standards provides that “an approved law school . . . must provide an educational program that ensures that its graduates . . . receive basic education through a curriculum that develops . . . skills of legal analysis, reasoning, and problem solving; oral and written communication [and] legal research.” ABA, *ABA Standards, Preamble*, <http://www.abanet.org/legaled/standards/preamble.html> (visited Aug. 2, 2003). In addition, Chapter Three, regulating “The Program of Legal Education,” restates the importance of “[a]ll students” receiving instruction in “oral and written communication” ABA Standard 302(a)(1), and mandates that “[a]ll students” receive “substantial legal writing instruction,” ABA Standard 302(a)(2).

<sup>17</sup>For example, 171 of the 172 schools responding to the 2003 Legal Writing Institute/Association of Legal Writing Directors Survey noted that they provide individual comments on student papers; ninety-six schools reported providing a feedback memo written specifically for each individual student, and 144 schools reported that they give students comments during individual conferences. ALWD & Legal Writing Institute, *2003 Survey Results*, question 24 (copy available online at <http://www.alwd.org>) [hereinafter *ALWD/LWI 2003 Survey*].

<sup>18</sup>*E.g.* Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ALWD 3, 3 (2002) (noting that a goal of the 2001 Conference of the Association of Legal Writing Directors is to “begin the process of erasing the often artificial lines that presently exist between ‘doctrinal’ and ‘skills’ courses, between education focused on the acquisition of knowledge and education focused on the practical application of that knowledge”).

<sup>19</sup>Kissam, *supra* n. 10, at 1968 (noting significance of “individualized supervision and feedback”); Noble-Allgire, *supra* n. 15, at 46 (noting the time-saving benefits of providing individualized feedback without grading); *but see* Carol McCrehan Parker, *Writing throughout the Curriculum: Why Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 576 (1997) (noting that “writing exercises need not always be graded or even collected by the teacher”).

<sup>20</sup>I recommend against individual critiques in the casebook classroom not because

pedagogy into the Legal Writing course,<sup>21</sup> casebook faculty can integrate aspects of Legal Writing pedagogy into their courses.

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

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

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these critiques are not valuable — the significant learning that occurs in Legal Writing courses shows that they are — but because frequent, individual critiques are not a realistic goal for faculty who have sixty, eighty, or one hundred students in a course.

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

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

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

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

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

### I. HOW LAW SCHOOL CULTURE PROMOTES AND INHIBITS CURRICULAR INNOVATION

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

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

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<sup>24</sup> *E.g.* Kissam, *supra* n. 10, at 1968.

<sup>25</sup> I have no idea what school the professor was from, but he was not from Vermont Law School, with which I was interviewing — and where he also wanted to teach. In fact, Vermont’s Dean, Jonathan Chase, took me by the shoulders after the encounter ended, saying, “I promise you, as long as it is within my power, that man will never teach at Vermont Law School!” I taught legal writing at Vermont Law School from 1983 to 1985.

<sup>26</sup> J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 43 (1994) (noting that one “traditional view” is that “Legal Writing is a talent; either you have it or you don’t,” and that a consequence of this view is the attitude that “[w]riting can’t be taught, so we shouldn’t try”).

<sup>27</sup> Law schools have a long history of trying to save money on Legal Writing programs. *E.g.* Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 Alb. L. Rev. 292, 294 (1980) (citing and decrying articles that focus on how to save money when teaching Legal Writing courses by noting that no similar articles focus on “cheap” methods for teaching contracts or civil procedure).

In fact, Legal Writing is part of the core curriculum at every American law school.<sup>28</sup> Institutional forces at many schools, however, perhaps reflecting the attitude that writing is impossible to teach, have relegated it to the status of “other.”<sup>29</sup> “Other” people teach it,<sup>30</sup> or it has an “other” grading system,<sup>31</sup> or it is awarded fewer credits than the “other” first-year courses,<sup>32</sup> or all of the above. This “otherness” is both strange and unfair,<sup>33</sup> for faculty who teach Legal Writing are *not* teaching an “other” subject matter.<sup>34</sup> On the contrary, there is a strong intersection between writing and thinking, and both faculty who teach legal writing courses and faculty who teach casebook courses are teaching students how to think like lawyers.<sup>35</sup> Even more unfortunately, this otherness is also counterproductive to the law school’s mission: when Legal Writing courses and the faculty who teach them are treated as outliers in the educational venture of the law school, all faculty lose a

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

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

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

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

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

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

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

<sup>35</sup> See e.g. Kearney & Beazley, *supra* n. 21; Laurel Currie Oates, *Beyond Communication: Writing As a Means of Learning*, 6 Leg. Writing 1, 1 (2000) (“When our [Legal Writing] students write memos and briefs, they are doing more than just telling us what they know. They are also learning how to think like lawyers.”).

valuable opportunity for sharing<sup>36</sup> teaching methods that could benefit both law students and the practice of law.

### A. Promoting Curricular Innovation

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

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

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

<sup>37</sup> Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick up the Pedagogical Baton*, 5 *Leg. Writing* 143, 149 (1999) (citing legal writing scholarship addressing pedagogy (footnotes omitted)); Kathryn M. Stanchi, *Exploring the Law of Law Teaching: A Feminist Process*, 34 *John Marshall L. Rev.* 193, 194 (2000) (“[L]egal writing teachers, in our scholarship and in our classrooms, are at the forefront of thinking about law pedagogy.” (footnote omitted)).

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

<sup>39</sup> *E.g.* Schwartz, *supra* n. 22, at 360 (“The criteria by which law schools hire new law teachers and measure law teachers' performances for tenure purposes discourage innovation.”).

<sup>40</sup> Although these reasons are of course interconnected, I will consider them separately.

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

### 1. *The Blank Slate*

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

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

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

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

<sup>43</sup> E.g. Arrigo, *supra* n. 3, at 131–132 (noting the creation of a few Legal Writing programs in the 1950s, and that many programs were still student-taught in the 1980s (citations omitted)).

theorists for teaching ideas.<sup>44</sup> Fortuitously, the dramatic increase in professional Legal Writing faculty occurred during and just after the great paradigm shift in writing and composition theory, from the “current-traditional theory” to “new rhetoric.”<sup>45</sup> Writing teachers were evolving from the more primitive “instrumentalists” — those who saw writing as merely a method for transcribing thought — into “cognitivistists” — those who saw writing as a way of making meaning, as a method of thinking.<sup>46</sup> Thus, when we consulted writing theorists for guidance, we found a world that was changing its pedagogy, and that gave us the courage to experiment with our pedagogy, too.

In contrast, law faculty have had to fight the powerful force of inertia: the property of an object at rest to remain at rest, or the tendency of a Property teacher who was taught by the case method/final exam system to begin teaching and continue teaching using the case method/final exam system.<sup>47</sup> We tend to teach the way we were taught, and casebook faculty were taught by teachers who gave exams, while Legal Writing faculty were taught by students, or not taught at all. Thus, we had no preconceived agenda to follow, and this lack of an agenda encouraged us to explore new horizons.

## 2. “Measurable” Teaching Goals

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

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

<sup>45</sup> Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *Sw. L.J.* 1089, 1093–1094 (1986) (analyzing the paradigm shift and its relevance to legal writing).

<sup>46</sup> See text accompanying footnotes 126–140.

<sup>47</sup> *E.g.* Kissam, *supra* n. 6, at 151 (noting that “ideological forces will implicitly or explicitly encourage a seasoned law professor to retain the [case method/final examination teaching] method (footnotes omitted); see also Schwartz, *supra* n. 22, at 364–365 (“Because . . . law professors receive very little instruction in designing instruction or in teaching, law professors are likely to use the methodologies by which they learned law.” (footnote omitted)).

in their careers harbored the notion that we really could teach all of our students to write, and we measured our progress toward that goal by looking for final drafts that were error-free. If our students' final drafts were not error free, or mostly error free, we tried to make changes in our teaching that would produce those error-free documents.<sup>48</sup>

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

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

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

<sup>49</sup> At least some casebook faculty have thought that this was our job as well. Many Legal Writing faculty can tell stories about casebook faculty who have upbraided them for the random mechanical writing errors of upper-level students. See e.g. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?* 40 Ariz. L. Rev. 105, 115 (1998) ("I think many of my [casebook faculty] colleagues believe that much class time in my legal writing course is devoted to comma usage and the diagramming of sentences; why else would they direct their comments about unfortunate grammar in upperclass students' papers to me?").

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papers, and changed my method of critique. I believe that my path to innovation has not been unique, and that many of my colleagues, trying to achieve this unreasonable teaching goal that had been thrust upon us (or that we thrust upon ourselves), looked to curricular innovation as a way of achieving teaching goals.

### ***3. The Connection between Course Goals and Course Methods***

In Legal Writing courses, a clear connection exists between the goal of learning how to write and the methodology of classroom sessions about writing methods coupled with frequent, personal critiques of student-written work products. Teachers can easily see the connection between their teaching methods and student performance due to the multiple samples taken over the course of the semester. In contrast, as Professor Eichhorn has noted, in the typical casebook classroom, the oral presentation is held in higher esteem than written work.<sup>50</sup> While it may be easy to see the direct connection between the goal of thinking like a lawyer and the course method of talking through legal analysis and orally challenging students to “revise” those thoughts, it is more difficult to connect course teaching methods to the typical method of measurement: a one-time written examination.

The Legal Writing curriculum is directly and obviously connected to the measurement system used in the course. In a typical Legal Writing course, the professor teaches for a week or two about how to write an office memo,<sup>51</sup> and then asks the students to turn in a draft of an office memo. Some professors break things up even more, and might have a session or two devoted to individual elements in legal documents, such as questions presented, case descriptions, rule explanations, or the like, and ask the students to produce that narrow element for review. These professors have instant feedback on the effectiveness of their teaching: they were teaching about how to write a memo, or a rule explanation, or

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

<sup>51</sup> Including myriad steps such as research, issue spotting, case authority description, etc.

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whatever, and here are the documents, right in front of them, with *each student's* attempts at the work.

In the typical casebook course,<sup>52</sup> the exam is used at the end of the semester to sort the students from the best to the worst.<sup>53</sup> The teacher cannot use the exam to adapt teaching methods for that class, because the class is over. Further, because most casebook professors do not teach students how to write the examination,<sup>54</sup> it is difficult for faculty to see a cause-and-effect between the process of their classroom teaching and the product of the final examination. Thus, the “disconnected” nature of the case method/final exam course structure<sup>55</sup> does not lead casebook faculty to experiment with changes that would help particular students achieve particular goals, or to be able to see and understand the effectiveness of particular teaching methods if they did so.

In Legal Writing courses, however, the measurement method is also used to assess each student's particular strengths and weaknesses so that teachers may help each student to improve. They have instant feedback on the teaching methods that they use, and they can use this feedback to “revise” their teaching methods as the semester progresses, and not only at the beginning of each new semester.<sup>56</sup> Therefore, by allowing Legal Writing faculty to see the impact of their teaching — and their teaching innovations — the very structure of the Legal Writing course promotes curricular reform.

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<sup>52</sup> I recognize that the “typical” or “average” course does not describe all courses, and that many casebook faculty are using innovative techniques to teach their students. As I have noted, however, institutional forces inhibit casebook course innovations; this Article is meant to help counter those forces.

<sup>53</sup> Kissam, *supra* n. 10, at 1979–1980 (noting that using one-time exams makes it easier to arrange students on a mandatory curve).

<sup>54</sup> *Id.* at 1980 (noting that students are graded on only a final examination and generally receive “no supervised practice or mid-term examinations”).

<sup>55</sup> *Id.* (noting “[t]he basic disjunction between case method analysis in the classroom and the rule-oriented process of identifying and quickly resolving novel, surprising situations on time-limited final examinations”).

<sup>56</sup> Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher As Reader and Writer*, 6 *Leg. Writing* 57, 58 (2000) (noting that Legal Writing teachers “should focus as much on planning, monitoring, and revising our own reading and writing as we do on communicating our interpretations of student work; and we should use our own reading and writing experiences to reflect on and respond to what our students are doing”).

#### 4. *Intrinsic Rewards*

Another reason that Legal Writing faculty have been innovators in pedagogy is that we have had rewards available to us that were not available to casebook faculty. While casebook faculty may never have been formally punished for innovation or for pedagogy-related scholarship, many have seen handwriting on the wall that told them not to rock the curricular boat, and to publish articles in which they analyzed cases, rather than articles in which they analyzed how to teach students how to analyze cases.<sup>57</sup> Although there has been a recent surge in articles on pedagogy by casebook faculty,<sup>58</sup> pedagogy has not been a traditional focus for casebook faculty scholarship. In fact, it has been a given that scholarship about pedagogy would hurt rather than help chances for tenure.<sup>59</sup>

Because, even now, most Legal Writing faculty are not on the tenure track,<sup>60</sup> both our pressure to publish and our rewards for that pressure have been more intrinsic than extrinsic. Furthermore, because of our course design of providing several individual critiques to our sometimes too-numerous students,<sup>61</sup> many Legal Writing faculty have literally hundreds of pages of critiquing to accomplish each semester.<sup>62</sup> Thus, we grew hungry not just for

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<sup>57</sup> “Time spent on developing pedagogy is fast becoming the professor’s pro bono work — something extra, done for love, and in the face of formidable institutional disincentives.” Barbara B. Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 Mich. L. Rev. 1977, 1993 (1993) (cited in Trail & Underwood, *supra* n. 2, at 213–214).

<sup>58</sup> *E.g.* Gerald F. Hess, *Monographs on Teaching and Learning for Legal Educators*, 35 Gonz. L. Rev. 63, 63 (2000) (noting methods of research for law faculty who want to improve their teaching).

<sup>59</sup> Kevin H. Smith, “X-File” *Law School Pedagogy: Keeping the Truth out There*, 30 Loy. U. Chi. L.J. 27, 42 n. 29 (1998) (noting that “legal scholarship which deals with law school pedagogy frequently is treated as second-class scholarship, not worthy of anyone’s interest or time, either to write or to read”).

<sup>60</sup> Each year, however, there are more legal writing faculty on the tenure track. The 2001 *ALWD/LWI Survey* found thirty-eight tenured or tenure-track directors and fifteen tenured or tenure-track non-directors teaching legal writing. In 2003 those numbers had increased to forty-eight and twenty-six, respectively. *ALWD/LWI 2003 Survey*, *supra* n. 17, questions 45, 65.

<sup>61</sup> The *ABA Sourcebook* recommends that full-time legal writing faculty teach no more than forty-five students per semester. Ralph Brill et al., *ABA Sourcebook on Legal Writing Programs* 74 (ABA 1997). This recommendation seems to be too high, given that each legal writing student uses up to eight hours of one-on-one teacher time each semester. Yet some programs assign as many as eighty-five students per semester. *ALWD/LWI 2003 Survey*, *supra* n. 17, at question 82.

<sup>62</sup> Professor Jan Levine initiated the practice of asking legal writing faculty to total the number of pages of student writing they read each semester. Jan M. Levine & Cheryl Beckett, *Status and Salary*, in *The Politics of Legal Writing: Proceedings of a Conference for Legal Research and Writing Program Directors* 15 (Jan Levine, Rebecca Cochran & Steve

sleep, but for knowledge about useful pedagogy. The reward for learning how to teach better was the joy of having a more successful semester, of seeing our students' writing improve, of having better papers to read on those long nights.<sup>63</sup> We published not to meet tenure requirements, but because we wanted to share our triumphs with others who we knew were in the same boat.

In this sense, the formation of the Legal Writing Institute (LWI) after a conference for Legal Writing teachers in 1984<sup>64</sup> had a synergistic impact on Legal Writing teaching and scholarship. LWI has held a national conference every other year since 1984, and many of its members attend regional conferences annually.<sup>65</sup> While tenure-track faculty may have found (and may still find) that people frown on scholarship and presentations about pedagogy, pedagogy was celebrated at LWI conferences. At the first meeting in 1984, 108 Legal Writing faculty shared their common dilemmas and solutions in presentations and workshops. LWI started a newsletter in 1985<sup>66</sup> and published the first volume of *Legal Writing: The Journal of the Legal Writing Institute* in 1991. When Legal Writing faculty published in our newsletter and journal (and eventually elsewhere), we were rewarded not just by seeing our ideas published or by getting cited, but by getting personal thank yous from colleagues who had tried our teaching methods. Many of the textbooks that line the shelves of Legal Writing faculty offices today got their starts at LWI conferences or in LWI publications. In 1995, Legal Writing faculty gained another professional voice, when the Association of Legal Writing Directors held its founding

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Johansen eds., ALWD 1995). The *2003 ALWD/LWI Survey* reports that an average number of pages per year is 3,163. *ALWD/LWI 2003 Survey*, *supra* n. 17, at question 82.

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

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

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

<sup>66</sup> *The Second Draft* is published twice annually; its current editors are Barbara Busharis (Florida State), Sandy Patrick (Lewis & Clark), and Joan Malmud (Oregon).

conference.<sup>67</sup> Interestingly, casebook faculty have lately stepped up the search for more effective teaching techniques.<sup>68</sup>

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

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

The fact that Legal Writing faculty, and their courses, have been considered separate, or “other,” may have spurred Legal Writing faculty toward curricular innovation, but it has hurt and continues to hurt useful cross-pollination between Legal Writing faculty and casebook faculty. Although I teach at a law school in which Legal Writing is not segregated, at many schools, there are four types of courses taught by three types of faculty. One group, the largest, which Kent Syverud would call “The Faculty,”<sup>69</sup> and which I have been calling “casebook faculty,” teaches only casebook courses and seminar courses. The second group, “Legal Writing faculty,” teaches only legal writing courses and advanced Legal Writing courses.<sup>70</sup> The third group, “clinical faculty,” teaches only clinical courses.<sup>71</sup>

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

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

<sup>69</sup> Syverud, *supra* n. 13, at 14.

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

<sup>71</sup> Of course, this segregation does not exist at all schools. At Ohio State, most faculty have taught Legal Writing, and some make it part of their regular teaching package, along with casebook courses. At Mercer University School of Law, the new home of the LWI, Legal Writing faculty are fully integrated members of the faculty, with teaching packages based on their interests and abilities and the school’s curricular needs, rather than on artificial distinctions.

There is nothing wrong with faculty having areas of expertise, but too many schools draw lines that push these groups farther away from each other and inhibit interaction.<sup>72</sup> At most schools, at least some Legal Writing faculty and clinical faculty are not members of the faculty, or do not have the status that casebook faculty have. They may have segregated offices and separate mailboxes, they may not be allowed to vote at — or even attend — faculty meetings,<sup>73</sup> they may have “lesser” titles, and they almost certainly have lesser salaries.<sup>74</sup> Professor Ilhyung Lee, after a year teaching Legal Writing, found that he was welcomed to “the Academy” only *after* accepting a job teaching casebook courses.<sup>75</sup>

The real and metaphorical symbols of segregation that separate Legal Writing faculty from casebook faculty affect more than the emotional and financial well-being<sup>76</sup> of the affected faculty: they directly inhibit the ability of different types of faculty to learn from each other. If casebook faculty are inhibited from getting to know Legal Writing faculty personally and professionally, they are more likely to misunderstand what goes on in Legal Writing courses, and certainly less likely to expect to find any benefit in learning about Legal Writing teaching methods. Further, while it is not impossible for those with higher status to be interested in teaching ideas from those with lower status, it does not happen

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

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

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

<sup>75</sup> Ilhyung Lee, *The Rookie Season*, 39 *Santa Clara L. Rev.* 473, 500–501 (1999) (“Whether [teaching legal writing] qualifies for membership in the academy ought not be a matter for continuing debate.”).

<sup>76</sup> As Professor Bayer has noted, “Writing professors are substantially injured by . . . disparate treatment — harmed financially through low salaries, hurt professionally by the lack of respect from colleagues, damaged communally through withholding of the franchise at faculty meetings, and denied the peace-of-mind resulting from job security.” Bayer, *supra* n. 33, at 385.

naturally.<sup>77</sup> Keeping Legal Writing faculty in low status, segregated positions makes it harder for the rest of the academy to take their scholarship seriously,<sup>78</sup> and thus inhibits the ability of all faculty to realize the benefits of sharing teaching methods. The integration of legal writing teaching methods — and Legal Writing faculty — should proceed with all deliberate speed.

## II. THEORETICAL FOUNDATIONS

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

Both Legal Writing courses and casebook courses are courses about how to think like a lawyer; the main difference is one of process. In most casebook courses, the teaching can be compared to the post-mortem.<sup>79</sup> Students read appellate decisions and dissect them as a group, under the teacher's guidance, discovering in the process the "thinking like a lawyer" that led to the various decisions of both attorneys and judges along the way. Ideally, the students learn both the doctrine of the particular subject matter as well as protocols for how to think like a lawyer in various situations.

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

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

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

<sup>79</sup> Eichhorn, *supra* n. 49, at 109–110 (noting that Langdell thought that "the law school classroom should resemble the laboratory in the medical school. . . . Thus, law students would dissect cases much in the same way that medical students would dissect a cadaver." (footnote omitted)).

ten critiques, and individual conferences.<sup>80</sup> Of course, this does not mean that the process of Legal Writing has three discrete steps; it is recursive, with the writer moving among thinking, researching, writing, and revising.<sup>81</sup>

In Legal Writing, the student thinks in order to write and writes in order to think,<sup>82</sup> and this thinking-writing connection provides rich teaching opportunities that can be exploited by all law faculty. Two pedagogical lenses are relevant here. First, as noted above, students who complete guided written analysis in the Legal Writing course are participants in a “cognitive apprenticeship.”<sup>83</sup> Allan Collins, John Seeley Brown, and Ann Holum have characterized the cognitive apprenticeship as “thinking made visible,”<sup>84</sup> and have described how this apprenticeship theory can be used to inform the teaching of reading, writing, and mathematics. Cognitive apprenticeship theory is particularly relevant to describe pedagogy used in the Legal Writing course, which in most law schools is the only required course in which students are guaranteed the individual faculty attention that mirrors the traditional apprenticeship. As I will explain, however, these techniques are not limited to use in Legal Writing or clinical courses.<sup>85</sup>

Second, the teaching of Legal Writing is also informed by composition and writing theory.<sup>86</sup> While this connection seems more obvious, it is only within the past twenty years that Legal Writing faculty have begun to articulate and embrace the theories underpinning their courses. Legal Writing faculty use their

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<sup>80</sup> *E.g.* Kearney & Beazley, *supra* n. 21; Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719 (1997).

<sup>81</sup> *E.g.* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155, 155–156 (1999) (discussing how new rhetoric provides an effective tool for analyzing legal writing’s recursive nature).

<sup>82</sup> *See also* Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 John Marshall L. Rev. 303, 307 (2000) (footnote omitted).

<sup>83</sup> Allan Collins, John Seely Brown & Ann Holum, *Cognitive Apprenticeship: Making Thinking Visible*, 15 Am. Educator 3, 5 (Winter 1991).

<sup>84</sup> *Id.* Professor Joe Kimble has also recognized the intersection between writing and thinking, noting that “writing is thinking. Thinking on paper. Thinking made visible.” Joe Kimble, *On Legal Writing Programs*, 2 Persp. 1, 2 (1994); *see also* Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Leg. Educ. 562, 579 (2000) (“If writing is thinking made visible . . . then it is thinking and analysis that are the core of legal writing courses.” (footnote omitted)).

<sup>85</sup> *See* discussion in Section IV (noting differences).

<sup>86</sup> *E.g.* Berger, *New Rhetoric*, *supra* n. 81, at 165–168; Phelps, *supra* n. 45, at 1098–1101; Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking about Legal Writing*, 85 Marq. L. Rev. 887, 906 (2002).

knowledge of writing process theory when designing appropriate teaching methods to help their numerous “cognitive apprentices” learn how to think like lawyers.

### A. *The Writing-Thinking Connection*

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

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

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

<sup>88</sup> Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 College Composition & Commun. 365, 381 (Dec. 1981).

<sup>89</sup> Kissam, *supra* n. 29, at 142.

Although some think of writing as inevitably distinct from thinking,<sup>90</sup> it is difficult to separate writing from thought. In fact, there is increasing recognition that a Legal Writing course is a particularly good place for students to learn the process of analytical thought at the heart of “thinking like a lawyer.” Professors Steinzor and Hornstein note that “writing in law school is the understanding of legal analysis in concrete form, in order to provide a vehicle for critique and improvement,” and that writing “cannot be separated from the analysis it substantiates.”<sup>91</sup> Thus, they note, “effective writing instruction means teaching students how to perform rigorous analysis.”<sup>92</sup> Similarly, in a piece stressing the importance of integrating “skills” and “doctrine” in legal education, Professor Noble-Allgire noted that the MacCrate Report recognized that both practical and analytical skills are “essential to competent lawyering and that ‘individual skills and values cannot be neatly compartmentalized.’”<sup>93</sup> The Honorable Kenneth Ripple has noted that “writing is for most legal ventures the primary engine that drives the reasoning process,” seeing it as a “necessary tool for thinking through the most difficult problems.”<sup>94</sup> Professor Carol Parker has noted that “the development of communicative skills is inseparable from the development of analytical skills.”<sup>95</sup>

The internal dialogues of law students in the process of writing represent a hidden teachable moment that should interest all law faculty. Both cognitive apprenticeship theory and writing process theory give law teachers methods that allow them to use the written word to see and enter into these internal dialogues, and to guide and improve their students’ thinking. In the casebook classroom, when teachers use Socratic method to discuss the analytical processes of judges and attorneys, much of the learning is vicari-

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<sup>90</sup> See e.g. Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 Wash. U. J.L. & Policy 195, 215 (2003) (noting that “the dominant pedagogic value in most law school environments is still the analytical thought process,” and “[t]he majority of law school instruction is spent on developing the analytic skills associated with ‘thinking like a lawyer,’” but also admitting that “[t]here are certainly courses in every law school that teach students *other* important skills . . . including courses in . . . legal writing.” (emphasis added)).

<sup>91</sup> Steinzor & Hornstein, *supra* n. 14, at 472.

<sup>92</sup> *Id.*

<sup>93</sup> Noble-Allgire, *supra* n. 15, at 36 (footnote omitted).

<sup>94</sup> The Hon. Kenneth F. Ripple, *Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special “Classroom,”* 74 Notre Dame L. Rev. 925, 926, 929 (1999).

<sup>95</sup> Parker, *supra* n. 19, at 562; see also Busharis & Rowe, *supra* n. 82, at 314 (“Legal writing cannot be isolated from other law school experiences; learning to write in the legal context is intimately related to learning to think and analyze in the legal context.”).

ous. Not all students participate in each conversation; the conceit of the large-classroom Socratic dialogue is that one student will participate directly while the rest of the class participates vicariously, following the conversation and mentally proposing answers, and then testing the validity of those answers by following the teacher-student discussions that go on around them.<sup>96</sup> In Legal Writing courses, in contrast, each student must write, and so each student directly participates both in the thinking and the teacher-student conversations about that thinking. This required participation is what makes Legal Writing courses so difficult and so rewarding, for both teachers and students.

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

### *B. Cognitive Apprenticeships*

In her remarks, Professor Wegner discussed the cognitive apprenticeship of the law student, and she, Brook Baker, and others have noted the concept's connection to legal education.<sup>97</sup> Most people are familiar with the notion of an apprenticeship as it relates to the trades; we know that Ben Franklin was apprenticed to one of his older brothers to learn the trade of printing, for example,<sup>98</sup>

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

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

<sup>98</sup> H.W. Brands, *The First American: The Life and Times of Benjamin Franklin* 20–21 (Doubleday 2000).

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

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

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

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<sup>99</sup> *Id.* at 34.

<sup>100</sup> Collins, Brown & Holum, *supra* n. 83, at 8.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 8–9. Although this description is meant to be focused on traditional apprenticeships rather than cognitive apprenticeships, many Legal Writing faculty will recognize themselves in the description. When we design writing projects and in-class exercises, we are “choosing tasks”; when we assign texts and design criteria sheets, we are “providing hints and scaffolding”; when we provide individual critiques of student papers and hold student conferences, we are “evaluating the activities of apprentices and diagnosing the kinds of problems they are having, challenging them and offering encouragement, giving feedback . . . [and] working on particular weaknesses”; finally, when we design the course and its assignments, and when we provide focused criteria for various projects, we are “structuring the ways to do things.”

<sup>103</sup> *Id.* at 42–45. Although almost all of these principles would provide a helpful paradigm for analyzing the teaching of Legal Writing, such an analysis is beyond the scope of this Article.

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book class, which is based on a vicarious learning model, at least four of the principles relevant to the cognitive apprenticeship highlight teaching methods in Legal Writing courses that could be transferable to casebook courses.

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

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

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

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<sup>104</sup> *Id.* at 42.

<sup>105</sup> Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 62–64 (Aspen L. & Bus. 2002).

<sup>106</sup> Collins, Brown & Holum, *supra* n. 83, at 43.

<sup>107</sup> *Id.* at 43.

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Finally, the principle of “**Articulation**” asks teachers to use teaching methods that require students to “articulate their knowledge, reasoning, or other problem-solving processes.”<sup>108</sup> Although in some ways, every Socratic dialogue requires articulation, requiring students to reveal their reasoning “processes” is what makes articulation such an important part of the cognitive apprenticeship in the Legal Writing course. Students in casebook courses certainly articulate their knowledge when they describe elements of cases under discussion, but not every Socratic dialogue requires them to articulate the *processes* that underlie their statements in that dialogue. In writing courses, in contrast, professors can require students to conduct “meta-writing,” which often turns out to be “meta-thinking” that reveals the students’ “reasoning or other problem-solving processes.”<sup>109</sup>

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

### C. Writing Process Theory

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

In the early years of legal writing programs, perhaps most law faculty had a simplistic view of writing that Kissam has called the “instrumental” view.<sup>110</sup> Instrumental legal writing exists merely to transcribe the pre-formed thoughts of the lawyer. A Legal Writing

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<sup>108</sup> *Id.* at 44.

<sup>109</sup> The prefix “meta” comes from a Greek word meaning “beside,” or “after,” and it is often used to describe a more comprehensive version of the noun. For example, “meta-discourse” is discourse within a document in which a writer describes, references, or characterizes the discourse in the document. See Joseph M. Williams, *Style: Ten Lessons in Clarity & Grace* 66–68 (7th ed., Longman Publishers 2003). Similarly, I think of “meta-writing” as “writing that describes or analyzes writing,” and “meta-thinking” as “thinking that describes or analyzes thinking.” For more information about possible meta-writing and meta-thinking exercises, see Section III(B).

<sup>110</sup> Kissam, *supra* n. 29, at 136.

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teacher would review the writing only to make sure that “the conventions and rules of grammar and vocabulary are applied correctly to thoughts that could be communicated orally but for considerations of efficiency and effectiveness.”<sup>111</sup> In other words, the writing is just the “instrument” the writer uses to transcribe the already-formed thoughts, and the only job of the writing teacher is to make sure that each sentence is transcribed in a grammatically correct fashion.

An instrumental view of writing is consistent with — although it does not fully describe — what some have called a “formalist” theory of teaching writing;<sup>112</sup> both would be at home in what some people have called a “product method” Legal Writing course. In a product method course, teachers and students talk about the rules of writing, and perhaps about organization, but teachers grade only a final product. They do not work directly with the students as they complete their writing, and they do not challenge the students to refine their thoughts or analysis, because they presume that all of the thinking takes place before writing begins, and the writer uses the written word merely to record or transcribe those thoughts. In other words, the brain completes its thinking, and then “dictates” the results to the hands, which record those thoughts in writing.<sup>113</sup> Writing teachers use the written product to measure how well the students have complied with the formal standards for correct writing. Any critique the students might receive will be used on the next, different product.<sup>114</sup>

Most Legal Writing courses are now structured around some form of the “process” method. In the process method, teachers intervene in their students’ writing before the final draft, so they can give students feedback on their research, writing, and thinking<sup>115</sup> and question premises upon which their analysis is based. Through this interaction, both student and teacher think more deeply and critically, both about the subject matter that is the focus of the writing and about the writing process itself. The process method recognizes that writing is more than the hands taking dictation from the brain. Even if that were a realistic description of how words get onto paper, it is getting those words onto paper or

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<sup>111</sup> *Id.*

<sup>112</sup> Pollman, *supra* n. 86, at 897; Rideout & Ramsfield, *supra* n. 26, at 49–50.

<sup>113</sup> Schwartz, *supra* n. 22, at 401 (noting that “the writing of legal analysis is the end product of all the thinking that precedes it”).

<sup>114</sup> Phelps, *supra* n. 45, at 1093.

<sup>115</sup> *Id.* at 1093–1094.

screen that makes the act of writing a process of thinking. But it is not a realistic description, for the brain interrupts itself, thinking and revising, during the time the hands take to record the original thoughts. Furthermore, once the writer can see his or her words, the writer can continue to engage with the text — even in the absence of a guiding teacher — and question its premises, its substantive message, and the communicative impact of that message.<sup>116</sup> As E.M. Forster has famously observed, “How can I know what I think until I see what I say?”<sup>117</sup>

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

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

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

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

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<sup>116</sup> Flower & Hayes, *supra* n. 88, at 385.

<sup>117</sup> E.M. Forster, *Aspects of the Novel* ch. 5 (Harcourt Trade Publishers 1947) (cited in Oates, *supra* n. 35, at 1 n. 2).

<sup>118</sup> Kissam, *supra* n. 29, at 151–170; Rideout & Ramsfield, *supra* n. 26, at 55–56.

<sup>119</sup> Kissam, *supra* n. 29, at 140–141 (citation omitted, emphasis added).

<sup>120</sup> Rideout & Ramsfield, *supra* n. 26, at 51–52 nn. 49–56.

<sup>121</sup> *Id.* at 51 n. 50.

<sup>122</sup> Linda S. Flower & John R. Hayes, *Problem-Solving Strategies and the Writing Process*, 39 *College English* 449, 459–460 (Dec. 1977).

or her eventual message.<sup>123</sup> In other words, writer-based prose is a way that writers use writing to think about and learn about the legal issues that they grapple with. In contrast, “reader-based prose” is the vehicle the writer uses to communicate information about those issues to the reader.<sup>124</sup> By studying the thinking underlying the writer’s decision-making during this process, cognitive scholars can help teachers identify heuristics to focus the multiple drafts that writers complete while they are creating a document.

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

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<sup>123</sup> *Id.* at 459.

<sup>124</sup> *E.g. id.* at 460; Linda Edwards, *Legal Writing: Process, Analysis, and Organization* 161–166 (3d ed., Aspen L. & Bus. 2002).

<sup>125</sup> Rideout & Ramsfield, *supra* n. 26, at 57.

<sup>126</sup> Indeed, social perspectivists may require students to follow rules that are not really rules. I am not the only writing teacher who tells her students not to split infinitives, and who does so not because splitting infinitives violates a grammar rule — it doesn’t — but because I know that many overly formal writers in the legal profession *think* that splitting infinitives is wrong. *See e.g.* Anne Enquist & Laurel Currie Oates, *Just Writing* 20 (Aspen L. & Bus. 2001); Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 356 (3d ed., West 2000). Thus, in the social context in which lawyers find themselves, splitting infinitives is “wrong” because it could affect their credibility with legal readers.

<sup>127</sup> *E.g.* Enquist & Oates, *supra* n. 126, at 71–96; Richard Wydick, *Plain English for*

the document level<sup>128</sup> — not just because they are rules, but because a legal reader will be more likely to understand a well-written and well-organized argument that includes the information and analysis that the reader expects.<sup>129</sup>

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

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

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*Lawyers* 9–56 (4th ed., Carolina Academic Press 1998).

<sup>128</sup> *E.g.* Richard Neumann, *Legal Reasoning and Legal Writing* 95–113 (4th ed., Aspen L. & Bus. 2001).

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

<sup>130</sup> Berger, *supra* n. 81, at 158.

<sup>131</sup> *Id.* (citing Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need to Know about Writing*, 3 *Pre/Text* 213, 214–217 (1982)).

<sup>132</sup> Parker, *supra* n. 19, at 565 (noting that “no single theory is sufficient” (footnote omitted)).

<sup>133</sup> *E.g.* Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 *Mont. L. Rev.* 373, 376 (1991) (noting that

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Both inner-directed and outer-directed writing theories can inform faculty who explore teaching opportunities that make their students' thinking visible. And because teaching methods relevant to both of these theories can help to teach students how to think like lawyers, they are relevant to both the legal writing classroom and to the casebook classroom.

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

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

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

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"[c]omposition theory offers teachers and students of writing the theories, strategies, and practices that empower us to begin to identify and satisfy the demands we face as professional writers").

<sup>134</sup> Berger, *supra* n. 56, at 79 (noting that the writing teacher should change her role as a reviewer depending on the student's writing).

*A. The Thinking of the Reader*

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

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

Some of these expectations are codified in court rules about document requirements; for example, United States Supreme Court Rule 24 describes the requirements for briefs on the merits. Some of these expectations have been articulated by legal writing scholars; James F. Stratman,<sup>135</sup> Laurel Currie Oates,<sup>136</sup> and others<sup>137</sup> have studied legal readers' cognitive processes as they read and write. These studies provide valuable insights for both legal writers and teachers of Legal Writing, and they reveal how the reader's needs and expectations inevitably affect the writer's thinking as he or she writes, thus connecting the epistemic branch of cognitivism with the social perspective.

Legal Writing faculty have used many different methods to translate these expectations into heuristic strategies and to make these abstract readers and their needs become more concrete in the mind of the legal writer. Some teachers have used pictures to conjure up concrete images of either readers or their needs,<sup>138</sup>

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<sup>135</sup> See e.g. James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 Leg. Writing 35, 36 (1991).

<sup>136</sup> Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs*, 83 Iowa L. Rev. 139 (1997).

<sup>137</sup> E.g. Dorothy H. Deegan, *Exploring Individual Differences among Novices Reading in a Specific Domain: The Case of Law*, 30 Reading Res. Q. 154 (1995) (cited in Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155, 170 n. 97 (1999)); Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407 (1987).

<sup>138</sup> E.g. Beazley, *Teacher's Manual to Practical Guide to Appellate Advocacy* 52-54 (Aspen L. & Bus. 2002) (noting how to use photographs to make students think about their audience); Sheila Simon, *Top 10 Ways to Use Humor in Teaching Legal Writing*, 11 Persp.

while others have required their students to create and sign “reader-writer covenants,” in which they articulate the needs of a person reading a particular document.<sup>139</sup>

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

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

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

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

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

<sup>141</sup> Berger, *supra* n. 81, at 176; *see also* Beazley, *supra* n. 105, at 50 (addressing the question, “Will my writing be boring if I use the same paradigm in each section?”).

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process. For example, at an early stage of the writing process, teachers can provide heuristic strategies for planning, research, or large-scale organization, while at later stages of the writing process teachers can design criteria sheets to help the writer revise his or her document for the reader.<sup>142</sup>

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

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

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

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<sup>142</sup> *E.g.* Beazley, *supra* n. 138, 24–33 (models of four different criteria sheets for four stages of the writing process).

<sup>143</sup> Edwards, *supra* n. 124, at 165.

<sup>144</sup> *E.g.* Berger, *supra* n. 56, at 79–80 (noting that in later drafts, the teacher-responder must respond to the writing "as an average reader in the field").

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teacher, the writer re-engages with the thinking process necessary to make meaning with the written word. Through the repeated, recursive process of writing, being critiqued, and revising, student writers develop strategies that refine the writer's ability to think and analyze not only the issues raised in the current document, but future ones as well.

A method that is relevant to both the expectation context and the reaction context is "modeling" legal writing documents. As noted above, in the cognitive apprenticeship, "modeling" allows teachers to perform the task and to "externaliz[e] . . . usually internal process[es] and activities . . . by which experts apply their basic conceptual and procedural knowledge."<sup>145</sup> Legal Writing teachers "model" legal writing by providing students with annotated samples of legal writing. These annotations can occur in at least two ways. In the "live sample" method, a teacher shows students a sample paper, often on an overhead projector of some type, and conducts a critique in front of the class.<sup>146</sup> Joe Kimble, of Thomas M. Cooley Law School, has pioneered a method of individual live critique, known as the "live grading conference." Some teachers use this method as a vicarious rather than individual teaching tool, looking at one document with the whole class.<sup>147</sup> The teacher can show the students places where the document met and did not meet reader needs and expectations, and this allows students to hear the thoughts of a reader reacting to the writer's composition and analytical decisions. The teacher may even ask the students to participate in this critique themselves; serving as legal readers often gives students useful insights into the writing process.<sup>148</sup>

A second modeling method is the pre-annotated sample. Many modern Legal Writing textbooks provide annotated samples within the text, with perhaps the first widely-used example appearing in 1989 in *Writing and Analysis in the Law*,<sup>149</sup> by Professors Shapo, Walters, and Fajans. Instead of showing a five- or ten-page exam-

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<sup>145</sup> Collins, Brown & Holum, *supra* n. 83, at 43.

<sup>146</sup> Soonpaa, *supra* n. 44, at 96; *see also* Jo Anne Durako et al., *supra* n. 80, at § II(B)(1).

<sup>147</sup> Teachers who use a live sample method can give students their own copies of the paper and allow them to annotate the document themselves based on class discussion or their own insights.

<sup>148</sup> Berger, *supra* n. 81, at 179–180 (describing use of and benefits of peer writing groups); Susan J. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of the Law*, 40 Duq. L. Rev. 489, 507 (2002) (lamenting the lack of opportunity to act as a reader in most Legal Writing courses).

<sup>149</sup> Helene Shapo, Marilyn Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 115–127 (1st ed., Found. Press 1989) (showing annotated samples of legal writing).

ple and telling students that it was an example of good legal writing, Shapo, Walter, and Fajans took the then-revolutionary step of using the margins to describe exactly what legal writers were trying to do in specific paragraphs, and even specific sentences within those paragraphs.<sup>150</sup> This is a perfect example of the use of “modeling” in the cognitive apprenticeship to “externaliz[e] . . . usually internal process[es] and activities.” Since 1989, many others have followed their lead and provided annotated samples of legal writing to help their students to see how a legal writer uses certain heuristic strategies to create an argument.<sup>151</sup> Some textbooks contrast annotated bad examples with good examples so that students can note the differences between ineffective and effective writing.<sup>152</sup>

Annotated examples advance the teacher’s mission in two ways. First and most obviously, they give students a “model” to follow, externalizing inner thoughts about what the writer is trying to accomplish in particular paragraphs and allowing students to see directly how certain heuristic strategies have played out in a written document.<sup>153</sup> Second, they define and illustrate vocabulary about the doctrine of Legal Writing. Teachers and students can then use that vocabulary to communicate more precisely about their thinking and their writing.<sup>154</sup> Professor Pollman has noted that the use and development of Legal Writing vocabulary is one way that Legal Writing faculty develop and communicate the doctrine of Legal Writing to their students.<sup>155</sup>

Thus, teachers can use the thinking of the reader to advance student understanding of both inner-directed and outer-directed writing strategies. Criteria sheets and annotated samples give writers a model to use to guide their thinking as they create early drafts and evaluate later drafts. The personalized critique, while still revealing the reader’s thoughts, helps students to focus their attention on inner-directed strategies of thinking and analysis, as

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<sup>150</sup> I have told my students that if *Writing and Analysis in the Law* were a sex book, it would be banned for being too explicit.

<sup>151</sup> *E.g.* Edwards, *supra* n. 124, at 101–103; Neumann, *supra* n. 128, at 102–103. Of course, teachers also have annotated documents on their own. *E.g.* Durako et al., *supra* n. 80, at 725.

<sup>152</sup> *E.g.* Beazley, *supra* n. 105, at 140.

<sup>153</sup> Professor Oates has discussed the importance of providing sufficient depth when using sample documents. Laurel Currie Oates, *I Know That I Taught Them How to Do That*, 7 *Leg. Writing* 1, 8 (2001).

<sup>154</sup> Pollman, *supra* n. 86, at 892 (footnotes omitted).

<sup>155</sup> *Id.* at 891.

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

### *B. The Thinking of the Writer*

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

In some ways, Legal Writing faculty have a more difficult situation. While the casebook teacher engaged in a Socratic dialogue can offer critique and suggest "revision" while the student is still engaged in thinking, the Legal Writing teacher usually reviews the cold record of the document itself, alone and apart from the student whose thinking is at issue. This separation can also be a benefit, however. By asking the student to complete writing and meta-writing, thinking and meta-thinking, in private, the teacher can give all types of students — both those comfortable talking in class and those who are uncomfortable in the glare of the headlights<sup>157</sup> — time to think and to reflect upon their thinking.

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

Some Legal Writing faculty require their students to record in writing their meta-thoughts *while* writing. Ellen Mosen James has required her students to perform "reflective writings"<sup>158</sup> in which

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

<sup>157</sup> Parker, *supra* n. 19, at 576 (noting the value of giving students an opportunity to perform outside the "hotseat" of the classroom).

<sup>158</sup> Ellen Mosen James, *Evaluating Writing in the Context of Experiential Learning*, Second Draft (Jan. 1987).

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the students reflect on the steps they have taken as lawyer-writers. Inspired by the concept of reflective writings, I have asked students more directly to record the thoughts and anxieties that occurred while writing. In these “private memos,” students can record analytical conflicts as well as conflicts based on formal requirements or reader needs.<sup>159</sup> The private memo asks students to think about their thinking as they use language to make meaning. When they have trouble deciding how to accomplish a particular writing task — or a particular thinking task required to complete a writing task — they can record their conflict and seek specific advice from an expert reader and writer. In the alternative, they can test their self-evaluation of the document and seek the teacher’s approval. For example, a student might drop a footnote and write, “I used a Court of Appeals case. Not very persuasive, huh?”<sup>160</sup> One student wrote the following at the end of a section: “Nice conclusory statement. How about some rule application?” Each of these “private memo” notes shows the writer struggling with the text and recognizing ways in which the writer believed that the writing did not meet the reader’s needs and expectations. By recording his or her thoughts, the writer sets up an opportunity to discuss these conflicts in a later conference.

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

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

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<sup>159</sup> Kearney & Beazley, *supra* n. 21, at 891–892.

<sup>160</sup> This student was writing a brief to the United States Supreme Court, in which a United States Court of Appeals opinion would not be optimal authority.

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dent's thinking at the moment of decision. In conference, both student and teacher could review the options, talk about the student's thinking and decision-making process, and help the student to identify strategies to use in the future when making writing and thinking decisions.<sup>161</sup>

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

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

Instead of merely asking each student to make marginal notes or footnotes that identify where each element of the heuristic ap-

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<sup>161</sup> I thank Steve Ferrell, who served as an adjunct in Ohio State's legal writing program, for sharing this story with me.

<sup>162</sup> Steven J. Johansen, *What Were You Thinking? Using Annotated Portfolios to Improve Student Assessment*, 4 *Leg. Writing* 123, 138–139 (1998).

<sup>163</sup> *Id.* at 136–137.

<sup>164</sup> Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 *Leg. Writing* 175, 182 (1997).

<sup>165</sup> A "unit of discourse" is a section of the document within which the writer will attempt to argue or prove a specific point.

<sup>166</sup> *E.g.* Neumann, *supra* n. 128, at 98–99 (explaining reader expectations).

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pears, the self-graded draft also requires students to use highlighters of different colors to physically mark the words or phrases that comprise the element, or common markers of the element. For example, because the legal writer must talk about the client's facts when applying the law to the facts, the writer is asked to highlight his or her facts in one color. The writer is also asked to highlight the key terms, or "phrase-that-pays," in another color, and is advised to look for the application of law to facts in the paragraph(s) in which the writer finds these two colors juxtaposed.<sup>167</sup> Students are also encouraged to use private memos to record questions and concerns that occurred to them during the self-grading process.<sup>168</sup> Asking students to isolate certain analytical elements gives the students an opportunity to analyze the elements' effectiveness; it also gives teachers an opportunity to evaluate the students' understanding.

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

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<sup>167</sup> *E.g.* Beazley, *supra* n. 105, at 95. Having the correct color combination is not what indicates complete analysis. Instead, the writer uses the colors to find the relevant parts of the analysis so that he or she can evaluate them more effectively.

<sup>168</sup> *Id.* at 92.

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Similarly, when students use marginal and highlighting annotations to identify the elements of an analytical paradigm, the teacher can easily see and evaluate the students' understanding of the paradigm elements and how they can be used most effectively in the particular section of the document.

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

#### IV. USING WRITING PROCESS METHODOLOGY IN THE CASEBOOK CLASSROOM

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

Section A addresses some of the reasons that casebook faculty might choose to talk more explicitly about the elements of legal analysis when teaching. Section B suggests that faculty can incorporate Legal Writing pedagogy into their courses by affirmatively labeling steps in their legal analysis. Section C suggests a variety of ways that faculty can use legal writing pedagogy to help stu-

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<sup>169</sup> Kissam, *supra* n. 10, at 1968; Parker, *supra* n. 19, at 578.

<sup>170</sup> For example, Professor Parker recommends that professors use a "three-minute thesis" technique that requires students to spend three minutes of class time responding to a question, thus requiring all students to consider the question thoughtfully. Parker, *supra* n. 19, at 578 (footnote omitted).

<sup>171</sup> Professor Kissam has suggested ways of providing feedback while saving the professor time, noting the value of teaching assistant feedback or peer feedback, Kissam, *supra* n. 10, at 2009, and of providing vicarious feedback to practice exam questions by describing "model answers" in class, *id.* at 2010.

dents learn how to write more effective law school examinations, recognizing that the examination is just one example of how to use writing in the casebook classroom.

*A. The Case for Being Explicit in Law School Teaching*

When asked why they do not teach legal analysis methodology more explicitly — particularly in regard to exam-taking — many casebook faculty give one of three answers: 1) they are not grading students on their writing, so there is no need to teach them how to write an exam; 2) it will wreck the curve to teach too explicitly;<sup>172</sup> or 3) lawyers have to spend a lot of time teaching themselves how to do things with little direction; it is appropriate to rank law students on how well they teach themselves to take an exam.<sup>173</sup> While there is a kernel of truth behind these statements, the benefits of explicit teaching far outweigh the burdens for each justification.

**All faculty who grade exams are grading students on their writing.** In some foreign law schools, students' final grades are determined based on oral final examinations.<sup>174</sup> Faculty who give oral finals can state with certainty that they are not grading students on their writing. Any faculty member who gives a written exam, however, is, in some way — and probably in a significant way — grading students on their writing. Many casebook faculty sincerely believe that they have no standards about the writing; they have standards only about the *thinking*, and they believe that the writing will take care of itself. The problem is that students may be doing a fine job of thinking, but the professor is grading them only on the information that is recorded in writing. Writing theory helps to clarify this problem. Many professors are instrumentalists, who think that writing is merely the clothing of thought. They spend their semester on inner-directed concerns that help students learn how to think, but they pay no attention to the outer-directed concerns that show students the categories of

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

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

<sup>174</sup> E.g. Richard J. Wilson, *Three Law School Clinics in Chile, 1970–2000: Innovation, Resistance and Conformity in the Global South*, 8 Clin. L. Rev. 515, 535 (2002) (noting system of oral examinations throughout legal education and as a condition for licensure).

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

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

**Teaching more explicitly will not “wreck the curve.”**

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

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

<sup>176</sup> And all of this is quite outside any standards they may have about rules of grammar or mechanics.

<sup>177</sup> *But see* Fines, *supra* n. 5, at 891.

<sup>178</sup> During most semesters, I can get all of my students to understand the elements of legal discourse and how they operate. I cannot, however, get all of them to implement these

wrecking the curve might want to make their exams more complex, or longer, to assure that some students will stand out at each end of the spectrum. I confess, however, that I do not see universal basic competence as a crisis.

**Law faculties should go beyond supervising self-teaching.** Professor Schwartz has characterized the case method/final examination classroom as a “self-teaching” model, noting that “for the most part, law professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class.”<sup>179</sup> Professor Rogelio Lasso notes that

not all students develop the same level of self-teaching competence. Some students are capable self-teachers and likely to perform well on law school exams. Most law professors managed to learn by this sink-or-swim model. However, this model does not work well for most, completely fails some, and is frustrating to all students.<sup>180</sup>

It is true that lawyers will have to practice on their own, and some may use this reality as a reason for continuing the self-teaching method.<sup>181</sup> It seems a waste of talent and opportunity, however, for law professors not to be more explicit when all of the students are gathered in the law school classroom with the expectation that they will be taught how to conduct legal analysis. Furthermore, while this methodology might have made sense in the days when law schools routinely flunked out one-third or more of their student bodies, it makes less sense to use this method in law schools that hope to graduate all of their students, to see those students pass the bar examination, and to see those students who practice law have successful practices. Professor Schwartz notes

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elements with equal effectiveness; I have always had students display a range of abilities. I hope for all of my students to achieve basic competence in legal analysis. My B's are reserved for those whose performance is beyond competence, and my A's for those whose performance is well beyond competence. I presume that this same use of curved grades could exist in casebook courses.

<sup>179</sup> Schwartz, *supra* n. 22, at 351–352.

<sup>180</sup> Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 Santa Clara L. Rev. 1, 28 (2002) (footnote omitted).

<sup>181</sup> See *e.g. id.* Faculty who believe that lawyers need to self-teach may wish to develop standards for self-teaching, and give students guided practice in accomplishing self-teaching. See *e.g.* Collins, Brown & Holum, *supra* n. 83, at 10 (noting that the “exploration” aspect of the cognitive apprenticeship “involves pushing students into a mode of problem solving on their own”).

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that the self-teaching model is “particularly problematic for all but the very best law students. . . . On the other hand, students who enter law school with lesser skills and less developed learning strategies depend on their instruction to succeed in law school, on the bar exam, and in practice.”<sup>182</sup>

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

### *B. No Writing Required: Labeling Analytical Steps*

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

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

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<sup>182</sup> Schwartz, *supra* n. 22, at 354.

<sup>183</sup> *E.g.* Pollman, *supra* n. 86, at 908 (citing Legal Writing textbooks that use “explication, rather than . . . demonstration or the Socratic method, to articulate exactly what lawyers mean when they talk about ‘legal analysis’”).

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Because the tradition in law schools has been to illustrate thinking without talking about components of legal thought,<sup>184</sup> many students leave the casebook classroom uncertain of exactly what steps they are supposed to take to accomplish this “thinking like a lawyer” that they are supposed to be learning how to do.<sup>185</sup> Some students may have intuitively picked up on the method by observation, but for other students, like my college cast member, observation may not be enough. Professor Schwartz has noted that, while law professors will critique students’ oral attempts at legal analysis in class, they “fail to state explicitly what students need to know, or to explain how to spot legal issues or to perform legal analysis.”<sup>186</sup> Traditional law school pedagogy does not give the casebook faculty a ready vocabulary to communicate failings, and traditional casebooks, which contain only cases and discussion questions, do not lay out and label common steps in the analytical process.

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

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

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

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

<sup>186</sup> *Id.* at 351.

ing(s),” “Facts,” “Policy,” “Dicta,” and finally, “Reasoning.” Most would agree that the reasoning is the most important part of the opinion and therefore the most important part of the brief.<sup>187</sup> And yet, this most important element is labeled with one broad label instead of being broken into the pieces that would represent what the court did in that case and what lawyers must do when they use cases to construct written legal arguments and write briefs to courts.<sup>188</sup> At least some guidelines for writing case briefs advise students that the “reasoning” section should include discussion of relevant rules and how those rules are applied to facts.<sup>189</sup> This advice mirrors parts of the common paradigm that some use to describe the use of syllogistic legal reasoning within the basic units of legal discourse: Issue, Rule, Application, Conclusion.<sup>190</sup> Most Legal Writing texts, however, recognize that this paradigm does not go far enough. They note that the connection between the major premise, or “rule” and the minor premise, or “application,” is not always self-evident, and that the lawyer usually needs to provide rule explanation<sup>191</sup> (also known as “rule proof,”<sup>192</sup> or an “analogous cases” section<sup>193</sup>) to see — and to show someone else — the connection between the rule and the facts.

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

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<sup>187</sup> See e.g. Ray & Ramsfield, *supra* n. 126, at 65.

<sup>188</sup> The best possible compliment for a lawyer is when an appellate court adapts a large portion (or even a small portion) of his or her brief for the court’s opinion. We do not make it easy for our students to learn to do this when we refuse to break a court’s reasoning into labeled elements.

<sup>189</sup> *Id.* at 65.

<sup>190</sup> E.g. Beazley, *supra* n. 105, at 47–48.

<sup>191</sup> E.g. *id.* at 54–57; Edwards, *supra* n. 124, at 92–97.

<sup>192</sup> Neumann, *supra* n. 128, at 95–109.

<sup>193</sup> Laurel Currie Oates, Anne Enquist & Kelly Kunsch, *The Legal Writing Handbook* 109 (3d ed., Aspen L. & Bus. 2002).

<sup>194</sup> Edwards, *supra* n. 124, at 40–43.

<sup>195</sup> Beazley, *supra* n. 105, at 54–55. Many authors refer to these words as “key terms.” E.g. Oates, Enquist & Kunsch, *supra* n. 193, at 592–593.

Writing courses, but they can also be helpful in casebook courses. For example, many first-year students are misled by a court's statement, early in its opinion, that "the rule in this area of law has always been thus," and they eagerly record the information in their case briefs without noticing that in the next few pages, the court explains why the old rule must change into a new and better rule. When faculty ask students to distinguish between the "inherited rule" and the "processed rule," they not only use meaningful vocabulary to distinguish between two types of rules that commonly appear in cases — especially cases that find their way into law school casebooks — they also give students a heuristic strategy to use when reading cases. Similarly, faculty who want to focus students' attention on the nub of the controversy can ask students to identify the "phrase-that-pays"; simply having this vocabulary term helps students to realize that many legal controversies turn on the meaning of a word or phrase from a statute or other legal rule.

Thus, when a professor asks a student to identify the rule in the case and the student replies by talking about the "old" rule, the professor could say, "that's a good job of identifying the 'inherited rule.' That's the rule the court found when it started looking for what rule to apply in this situation. What I want to know is the 'processed rule' — the rule the court ended up with." Of course, some professors might want students to identify the inherited rule and spend time talking about how the court moved from the inherited rule to the processed rule, asking them to identify the ways in which the court changed the inherited rule to create the processed rule. Often, the struggle in a case is whether the court should apply a rule more broadly, to include new categories of persons or situations, or more narrowly, to exclude them.<sup>196</sup> Did the court create an exception to the inherited rule? Perhaps the inherited rule is the same as the processed rule, and the court simply used analogical reasoning, counter-analogical reasoning, or policy-based reasoning to make the connection between the rule and the facts more obvious.<sup>197</sup>

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

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

<sup>197</sup> Edwards, *supra* n. 124, at 4–8.

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Neumann's Legal Writing textbook identifies three parts of a rule: (1) the set of elements, or test; (2) the result that occurs when the necessary elements are present; and (3) the "causal term," that shows whether the rule is "mandatory," "prohibitory," or "discretionary."<sup>198</sup> Linda Edwards's text uses familiar labels to focus on categories of elements that may exist, noting, for example, that some sets of elements are "conjunctive," others are "disjunctive," and that some courts use a "balancing test" to consider the elements.<sup>199</sup>

There are many ways that labels can help students to understand common, but often troublesome, aspects of opinions. In some cases, the court will go through a quick discussion of several legally significant but uncontroversial rules that lead up to the issue at the heart of the controversy. Legal Writing students often ignore these rules when conducting legal analysis in their haste to get to what they see as "the important part." What they fail to recognize is that any judge analyzing the issue would need to know the context in which the "important" issue arose, and the rules whose application is "given" may nonetheless be a necessary part of the analysis. Using the label "rule cluster"<sup>200</sup> to describe a paragraph that contains one or more "given" issues can help students to recognize that before focusing on the most controversial point, they must be sure to understand the legal context — and to include that context in written legal analysis.

Of course, terms that are used in Legal Writing texts or courses are not the only permissible vocabulary words. Law faculty are so creative that I would expect a proliferation of new vocabulary words to result from many faculty trying to label the parts of legal analysis. That has certainly happened in the field of Legal Writing, as Legal Writing faculty have struggled with labels over the past fifteen years or so in particular.<sup>201</sup> It does not even matter if two faculty members within the same school use different vocabulary to refer to the same analytical step, although it might be preferable for faculty to converse enough about their teaching to dis-

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<sup>198</sup> Neumann, *supra* n. 128, at 15–18.

<sup>199</sup> Edwards, *supra* n. 124, at 19–23. Edwards also identifies a "factors" test, which guides, rather than mandates, court behavior; she also analyzes rules with exceptions and rules that have no elements, factors, or subparts. *Id.*; see also Neumann, *supra* n. 128, at 17–18 (analyzing the various types of elements that rules contain).

<sup>200</sup> Beazley, *supra* n. 105, at 51.

<sup>201</sup> Pollman, *supra* n. 86, at 889 (noting the rise of new jargon as use of various new Legal Writing textbooks became more common).

cover each other's vocabulary and agree to common terms when appropriate.<sup>202</sup> Right now, some students have *no words* to use to articulate the steps they go through when reasoning. Certainly it is better to have too many words than to have no words.

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

*C. No Individual Critiquing Required: Teaching Exam Method Is Teaching Legal Method*

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

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

<sup>203</sup> Kissam, *supra* n. 10, at 1980.

<sup>204</sup> J.K. Rowling, *Harry Potter and the Order of the Phoenix* 244 (Scholastic Press 2003).

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form the spells under carefully controlled examination conditions.”<sup>205</sup>

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

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

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

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<sup>205</sup> *Id.*

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

<sup>207</sup> See also Lasso, *supra* n. 180, at 34–35 (noting how the use of web-based threaded discussion lists can help teachers reach students with different learning styles).

### **1. Articulating Generic Exam Standards**

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

Many faculty draft model answers of exams, in which they articulate the specific issues and analyses they expect the students to include. Exam standards — or an exam criteria sheet — would need to be more abstract, and faculty would need to identify the categories of information that they expect to see in student exams. The good news, however, is that faculty need not start from scratch. Two authors — Charles Calleros,<sup>208</sup> who has taught both Contracts and Legal Writing, and Linda Edwards,<sup>209</sup> who has taught both Property and Legal Writing — have included information about exam methodology in their textbooks.

By articulating examination standards, faculty will be giving their students “heuristic strategies”: i.e., “generally effective” techniques for accomplishing certain common tasks.<sup>210</sup> The standards make the reader’s thinking visible, showing the exam-writer the expectations that the reader has for the document, and also giving students a way to organize their thoughts when attacking examination questions. With a criteria sheet or an exam guideline, faculty can also make vivid the connections between classroom sessions and the final examination, and between the final examination and legal practice. For example, a professor who always asked students to consider the general rule and then the exceptions during the semester could design a criteria sheet that consisted of a list of questions, such as “What is the general rule that governs issues of this type? Are there any exceptions to this rule? (List them.) Which exceptions apply in this case?”

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<sup>208</sup> Charles Calleros, *Legal Method and Writing* 149–166 (4th ed., Aspen L. & Bus. 2002).

<sup>209</sup> Linda Edwards, *Legal Writing: Process, Analysis, and Organization — Teacher’s Manual* 121–123 (Aspen L. & Bus. 2002).

<sup>210</sup> See Collins, Brown & Holum, *supra* n. 83, at 42.

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

## **2. *Providing Annotated Sample Exams***

In Collins, Brown, and Holum's vision of the cognitive apprenticeship, "modeling" asks the expert to perform the task and to "externaliz[e] . . . usually internal processes and activities . . . by which experts apply their basic conceptual and procedural knowledge."<sup>211</sup> Casebook faculty can implement this concept by giving students a practice exam and then annotating a model answer, using the analytical vocabulary mentioned above, a criteria sheet, or both, as a source of vocabulary for identifying what the writer of the model exam was doing in each section of the exam.<sup>212</sup> By making the writer's thinking visible, they model an exam-writer's thinking behavior, and give students concrete ideas to use when they write exams and when they confront similar analytical issues in the practice of law.

## **3. *Ask Students to Include "Private Memos" with Practice Exams***

In my nomadic career,<sup>213</sup> I have chatted with many faculty members after they have read their first set of student exams. Almost always, dismayed by too many incoherent exam answers, they say something about their students along the lines of, "What were they thinking?"<sup>214</sup> Private memos can give faculty a way to discover and address this problem at a meaningful time: early in

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<sup>211</sup> *Id.* at 43.

<sup>212</sup> This technique was inspired in part by Dean Kent Syverud's description of his use of a similar technique during our panel discussion on January 2, 2003.

<sup>213</sup> Because many schools used to term-limit their Legal Writing faculty, I taught at two schools where writing faculty were forced to leave after two years before landing at Ohio State. I was thus "the new person" three times at three different schools, and inevitably made pals of first-year faculty members.

<sup>214</sup> Indeed, annotative methods that show student thinking were developed precisely because legal writing faculty feel this same frustration when we read our student papers. See e.g. Steven J. Johansen, "What Were You Thinking?" *Using Annotated Portfolios to Improve Student Assessment*, 4 *Leg. Writing* 123, 137 (1998).

the semester, when there is still a chance to guide the students' thinking process.

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

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

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

<sup>216</sup> Collins, Brown & Holum, *supra* n. 83, at 44.

#### 4. *Self-Graded Exams*

Another method that teachers can use to encourage students to articulate their thinking is to develop a “self-grading” instrument for students’ practice exams.<sup>217</sup> As noted above, Legal Writing faculty ask students to use self-grading instruments to physically mark certain intellectual locations within each unit of discourse within their document. For example, within each section in which they analyze an issue or sub-issue, students must highlight in pink the “phrase-that-pays” or key terms of the rule governing that issue. They must highlight the client’s facts in blue. In addition to the highlighting, students must mark specific analytical elements such as the “rule” (or “focus”), “explanation of rule,” and “application of law to facts” in the margin.<sup>218</sup>

After the teacher develops generic exam standards, it could be very enlightening to design a self-grading instrument that requires students to identify where they think they are articulating rules, noting exceptions, applying law to facts, or identifying counter-arguments. Because many of the same markers of effective legal analysis appear in office memoranda, appellate briefs, and examinations, it would be relatively easy to adapt existing self-grading instruments to a professor’s particular exam requirements.<sup>219</sup> Furthermore, telling students in advance that they will be asked to “self-grade” their analysis of each issue separately might encourage them to use an issue-based organization for their exam answers. Completing the self-grading of the exam allows students to “articulate” their knowledge and processes, and reviewing the self-graded exams allows the professor to “coach” the students more effectively.

It might be tempting to design a self-grading exercise that is specific to the particular exam — for example, one that asks students to identify where they discussed the *res ipsa* issue or specific exceptions to the search warrant requirement. This type of exercise would certainly have benefits, but the transferability of these benefits would be limited unless the exercise *also* included generic

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<sup>217</sup> Beazley, *supra* n. 164, at 182–185 (describing methods for developing self-grading exercises).

<sup>218</sup> As noted above, the colors often, but not always, help students and teachers to identify needed analytical elements.

<sup>219</sup> See *e.g.* Beazley, *supra* n. 164, at 194–200 (providing self-grading guidelines for an office memorandum); Beazley, *supra* n. 138, at 130–133 (providing self-grading guidelines for an appellate brief).

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categories such as “rule,” “application,” “exceptions,” etc. It could certainly be beneficial to identify and discuss the numerous issues that the exam contained, for students who have trouble spotting issues would benefit from knowing which issues they missed. It might be even more important, however, to identify and articulate heuristic strategies for issue-spotting to share with the students.<sup>220</sup> An important value of developing criteria for exams is that the criteria give students thinking strategies that they can use not just on a particular examination, but when they act as legal thinkers throughout their lives in the law.

Reviewing self-graded exams can let the professor see how students comprehend both the substantive law and the fundamental elements of legal reasoning. Seeing just what students mark as “rules,” as “exceptions,” as “application,” or as “counter-arguments” might well dictate the focus of class discussion by allowing the teacher to spend less time on concepts that appear to be generally understood, and more time on concepts that significant numbers of students do not understand.<sup>221</sup> Teachers might also use the “live conference” method described below to focus the students’ attention on troublesome concepts and try to clear up common confusions and misunderstandings as evidenced by the students’ “meta-thinking.”

### 5. *The Vicarious “Live Grading Conference”*

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

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

<sup>221</sup> This guideline is focused on those aspects of casebook courses that are meant to teach skills, rather than those that are meant to impart legal doctrine. See e.g. John E. Sexton, *Out of the Box: Thinking about the Training of Lawyers in the Next Millennium*, 33 U. Tol. L. Rev. 189, 195 (2001) (recommending that schools must abandon the “coverage” paradigm and apparently recommending a doctrine of skills, noting that there are “skills and styles of thinking that must be learned”). I will not wade into the “skills versus coverage” debate, but I will note that writing exercises can also be helpful to assess the depth of student understanding of particular legal doctrines.

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teachers use a vicarious-learning version of this method by using an overhead projector or document camera to review student work (anonymously) in front of the whole class. This technique could also be used with practice exams. Instead of critiquing each exam individually, the professor could scan through the practice exams, looking for examples of good answers and examples of common mistakes. The professor might display either the annotated model answer, the student answers, or both, for class discussion. The professor can both annotate the papers live (“here is where the student laid out the counter-argument”) and react to them live (“I don’t understand what rule the student is applying because he or she only referred to ‘a tort’ and did not name the specific tort.”). The professor might decide to engage the class even more by distributing excerpts or samples at the beginning of class (or even the day before, perhaps via e-mail) and asking the students to participate as readers. By articulating the reader’s thoughts when reading “good” exam answers and “bad” exam answers, the professor can communicate the reader’s thoughts and expectations to the students and help them to see written legal analysis through the reader’s eyes.

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

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

[and] reminders . . . aimed at bringing their performance closer to expert performance.”<sup>222</sup>

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

#### *D. Practical Concerns*

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

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

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<sup>222</sup> Collins, Brown & Holum, *supra* n. 83, at 43.

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am, perhaps getting even more mileage out of the demonstration by having the students participate in the self-grading of a model answer on a simple, unfamiliar problem. On a later day, students could turn in their self-graded papers for review.<sup>223</sup> At this point, the professor can review the self-graded exams only,<sup>224</sup> noting the private memos for common questions and concerns, and reviewing the exams and self-grading annotations for common misunderstandings as well as to identify sample papers that would provide good fodder for class discussion. The professor might block and copy excerpts from the e-mailed answers to use in the class discussion (being careful to delete private memos).

On a later designated day, the professor could again use class time to go over model answers, good student answers, and/or classic mistake answers and to engage students in discussion. In this way, the only class time that would be needed would be one class session to demonstrate the self-grading method, and one class session for discussing the exams themselves.<sup>225</sup>

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

## V. CONCLUSION

A Legal Writing revolution is a reasonable step in the progress of legal education. Negative attitudes have for too long interfered with the spread of effective pedagogy germinated in Legal Writing courses. Just as Legal Writing faculty have benefitted from using casebook pedagogy, it is time for casebook faculty to

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<sup>223</sup> The professor might ask for these assignments in hard copy form due to formatting concerns caused by highlighting requirements. The students could be instructed to keep all "old" private memo questions, but to add new ones if they wish.

<sup>224</sup> I recommend this technique as a time-saving measure. Although the professor could certainly read the exams as soon as they came in, he or she could save time by waiting until the self-graded exams were turned in, at which point the professor could look at both the private memo annotations and the self-grading annotations.

<sup>225</sup> Of course, if professors found that giving practice exams was a helpful method, they might want to repeat the procedure. Doing so would take only one class session, because they would not need to re-demonstrate the self-grading technique.

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consider the benefits of using Legal Writing pedagogy. Integration of Legal Writing faculty into the legal academy is one clear way to advance this goal.

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

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

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

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<sup>226</sup> Berger, *supra* n. 56, at 81; Edwards, *supra* n. 124, at 165.