PERSPECTIVES

Teaching Legal Research and Writing

Incorporating Diversity and Social Justice Issues in Legal Writing Programs

BY BROOK K. BAKER

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Legal education, including legal writing, can be criticized for presenting a monocultural, monochromatic, and overly doctrinal view of the world.[1] We often select our legal research and writing problems for their doctrinal content, analytical structures, and adversarial balance. Given broad coverage concerns including legal bibliography; hybrid research; analytical paradigms and rule proofs; predictive and persuasive discourse conventions; and skills of counseling, negotiation, and oral advocacy, legal writing teachers necessarily concentrate on bare minimums rather than curricular enhancements. In making these hard choices, we tend to select our client problems without significant regard to the demographic diversity of our students, the diversity of their future clients, and the social justice concerns that might otherwise animate our discipline.

Although many legal writing professionals are committed in their personal and professional lives to redressing legacies of past injustice and to reforming present inequities, we often struggle over whether and how to bring these "outside" commitments into the classroom. If the importance of addressing class advantage, racism, sexism, disability discrimination, and homophobia were obvious and if it were easy to do so, each of us would be doing it already. Accordingly, we should consider both the predicate question "Why incorporate diversity/social justice issues?" and the more pragmatic question "How do we do it?"

Why Should We Address Diversity and Social Justice in Our Classrooms?

This question does not have a single answer for all legal writing classes or for every teacher.

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[1] Brook K. Baker, *Language Acculturation Processes and Resistance to In"doctrin(e)"ation in the Legal Skills Curriculum and Beyond*, 33 J. Marshall L. Rev. _ (forthcoming 2000); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 33 J. Marshall L. Rev. _ (forthcoming 2000).

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My answers are personal, as well as contextual. Having grown up in Northern Kentucky in the long shadow of Jim Crow and the bright light of the civil rights movement, having fought in the anti-war movement while my twin brother was in ROTC, and having married a first-wave feminist after being mothered by a stay-at-home mom, I frankly cannot imagine not addressing these issues—my life and my times are full of them. I also teach at a law school that attracts a diverse student body and that defines itself in terms of public interest. Thus, even if my own personal experiences and values did not compel me to address these issues, institutional forces and student demands might. But other legal writing teachers have different paths to the present, and their experiences of privilege and oppression are different from mine. Despite there being no universal answers to the "why" question, there are at least three pretty good answers.

The diversity of our students. Law school is a far more diverse place than it was 25 or even 10 years ago. The number of female applicants now, for the first time, equals the number of males, and the proportion of students of color is still relatively small but increasing. Fewer gay and lesbian students are closeted. Similarly, more students with disabilities are attending law school and come with just claims for accommodation. Even though legal education employs instructional methods designed to indoctrinate this diverse group of students into a dominant legal culture, the educational needs and life ambitions of our students cannot be satisfied by a legal writing curriculum that neglects their multiple experiences and perspectives. Indeed, a curricular pedagogy that marginalizes patterned experiences of discrimination and the diverse perspectives of our students predictably alienates and frustrates them, many of whom already experience additional burdens of stereotype threat and cultural disjunction in our classrooms.[2] If we want our diverse student body to learn better, to succeed in law school, and to pluralize and reform the legal community, then we will have to do a better job addressing their intra-psychic needs and the concerns of their constituent communities.

The diversity of our country and its growing international connections. The United States is becoming increasingly diverse demographically and the majority of the population will be nonwhite within 50 years. Moreover, the U.S. economy and its people are increasingly connected to others throughout the world through globalization, immigration, and travel. Finally, the legal interests of these diverse communities lie at the center of a just political economy. Issues of wealth redistribution; housing, school, and job opportunity; and political participation are significantly structured by the legal regime. As legal practitioners, students will need to be comfortable dealing with clients different from themselves and competent addressing legal concerns outside their immediate experience. Thus, if we want our students to be successful interacting with a more diverse group of clients and more responsive to diverse legal needs, we will need to expose them to legal and cultural pluralism earlier and more consistently in their legal training.

Problems in an unjust world. Most of us would agree that social justice remains an elusive and unachieved goal. Economic data clearly shows that the rich are getting richer and the poor poorer. The badges and incidents of slavery persist among African-Americans who still earn and own less, who live in more confined communities, who are profiled by the police and jailed disproportionately, and who suffer worse health and worse health care. Women too still earn less, care for others more, and are victimized more often by violence inside and outside the home. Gays and lesbians, though economically mainstreamed, still cannot marry, still face barriers to parenting, and still can be brutalized on the street. Despite the Americans with Disabilities Act, persons with disabilities are often excluded from the economic mainstream and from public buildings.

[2] *See, e.g.*, Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Cal. L. Rev. 1511 (1991); Janice L. Austin, Patricia A. Cain, Anton Mack, J. Kelly Strader & James Vaseleck, *Results from a Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School*, 48 J. Legal Educ. 157 (1998); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. Legal Educ. 137 (1988); Charles Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 La Raza L.J. 140 (1995); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. Legal Educ. 402, 404 (1998); Margaret Montoya, *Voicing Differences*, 4 Clin. L. Rev. 147 (1997); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7, 37, 41–51 (1998).

Internationally, issues of injustice are even more acute. Poverty in the developing world is worse, not better, than it was 30 years ago. For example, out of 34.3 million people with HIV, nearly 24.5 million reside in sub-Saharan Africa.[3] If we want law students to be prepared to deal with issues of social justice on a local, national, and global stage, we have to put issues of human and economic rights somewhere on the stage, if not center stage, in our teaching.

How Can We Address Diversity and Social Justice Issues in Our Classrooms?

This trio of answers, though far from complete, is compelling enough, I hope, to encourage us to consider how to incorporate issues of diversity and social justice into legal writing programs. In making these suggestions, I will include some experiments that I and others have tried, and others I wish we had.

Creating virtual realities and compelling contexts. When drafting our legal writing problems, we often focus on legally relevant material at the expense of contextual detail that animates moral reasoning in the real world. Although lawyers necessarily go through a process of selection in constructing legal narratives and legal theories, to do so prematurely robs students of the opportunities to explore the social background as well as the legal foreground of a dispute or transaction. In particular, since moral reasoning and legal problem solving around issues of discrimination and social justice are likely to be more situational than abstract, we should concentrate on creating "thick" legal problems—ones that are embedded in a historical time and place and constrained by dominant interests and institutional arrangements.

Example: In our Legal Practice Program, we use a 221-page case file, including a 142-page discovery record. The case involves a failed HUD project, a renovated low-income housing co-op, a struggling single mom with a troubled teenage son, a volunteer security force that neglects its duties, an elderly tenant who is robbed and injured, and a manufacturer that failed to deliver nonduplicable keys despite warranting to do so. Even though students primarily work on the third-party crime issue, contextual complexity heightens the intensity of their moral and legal inquiry.

Creating and interacting with clients with realistic identities. Real clients have identities. They are white or black or Latino/a or Asian-American; they are U.S. born or Kenyan or Jamaican; they are male or female or transgendered or transsexual; they are gay or straight or bisexual; they are young or middle-aged or older; they are able-bodied or impaired, Catholic or agnostic, and on and on. In fact, individual clients are always many of these things—their identities are constituted by their unique personal histories and by the communities they have called home. Thus, if we want our students to seriously address issues of diversity in the legal problems we assign, even at the margins, we must create a diverse world. Although the default path might be to create either sanitized clients or clients who fulfill a stereotype, we should do everything in our power to particularize the characters we cast in our legal writing problems for several reasons. First, when we create "generic" brand clients, our students tend either to ignore issues of identity altogether or to project prevailing cultural stereotypes. Second, when we create paper clients with whom students do not have to interact, students learn incorrectly that legal writing is an instrumentalist, self-directed skill instead of a representation skill, one that is responsive to the needs, goals, and perspectives of a real, but "messy" client. Third, one of the most important skills of lawyering is learning how to connect, empathize, and struggle with "imperfect" clients who come from unique and perhaps alien social locations.

Example: In our Legal Practice problem, students observe and participate in at least one client interview and counseling session. Mr. Agar, the plaintiff tenant, is a 72-year-old, white widower who has a drinking problem. He is afraid of losing his apartment, afraid that he'll be permanently disabled, and ambivalent about suing his neighbors. He lied in a deposition and wants to keep his alcohol treatment records private. He is alternately cantankerous and depressed. Ms. Melendez, the president of the defendant housing

> "[I]f we want our students to seriously address issues of diversity in the legal problems we assign, even at the margins, we must create a diverse world."

[3] UNAIDS, Report on the Global HIV/AIDS Epidemic 6 (July 2000).

> "By interacting with 'real' clients, students and instructors can also explore complicated issues of lawyer domination and client control."

co-op, is middle-aged, Latina, and concerned about her job. She hires troubled youths, she tries to involve tenants in the management at the development, and she struggles to enforce safety policies. She has to decide whether to try to evict the Lewis family, whether to put Mr. Agar's unit on the market, and whether to settle his lawsuit. Kenny Lewis, the teenage assailant, lives with his mom and two younger sisters and is suspected of involvement in a youth gang. His father has abandoned the family and his mom works full time. Does he have a race? Of course he does, and although many students initially assume he is black, we make sure to clarify that he is white and then discuss "youth gang" as a code word, and the danger of appealing to bias. In counseling these clients, instructors and students ask them what they want, how they want to be portrayed during the case, and how they want to portray their party-opponents. By interacting with "real" clients, students and instructors can also explore complicated issues of lawyer domination and client control.

Putting issues of equality and social justice center stage. In addition to populating complex virtual realities with multidimensional clients, legal writing teachers can put issues of legal diversity, social justice, and client empowerment [4] at the center of their legal problems. According to this principle, instructors would assign problems that require students to address human rights issues, e.g., political asylum; discrimination issues, e.g., high-stakes testing; and economic justice issues, e.g., community reinvestment. Admittedly, when creating legal writing problems, instructors often have to choose first-year material. Moreover, instructors should worry about creating "hot" topics that can trigger traumatic memories for certain students and that are so imbalanced that students on the "bad guy" side feel set up. Nonetheless, it should be possible to select cases in which individual claims for justice connect with group harms, where the law needs to be reformed because of the way it privileges power, or where novel legal theories must be cobbled together to address a newly defined need. Although legal writing teachers tend to focus on domestic law problems, we could also consider problems that address justice issues between the global North and the global South.

Examples: When in South Africa this past summer, I authored a legal analysis and writing problem that focused on the unaffordability of HIV/AIDS medications in South Africa and on the constitutionality of a dual or tiered pricing scheme by international pharmaceutical companies that had a disparate racial effect. On previous trips, out of my experiences in South African law clinics, I authored multicultural and human rights problems dealing with a lesbian custody dispute and with misappropriation of cows paid as part of the lobola, or bride's price, in a customary law marriage. Previously at Northeastern, we have used a statutory analysis, plea-bargaining simulation involving "skinhead" racial violence. Similarly, Charles Calleros has written extensively about using writing problems that involve Native-American legal and cultural issues and issues of discrimination against gays and lesbians.[5] Clinical literature is full of simulations and real-life examples of social justice and diversity issues that arise in live-client law school clinics and of teaching methods that try to deal with them appropriately.[6]

Dealing with "ancillary" diversity and social justice issues. Even if it is not possible or desirable to build an entire legal writing curriculum or research problem around an equity or social justice issue, it certainly is possible to have students address these as ancillary issues both in writing and in class discussion. Although there is some risk of giving an implicit message that these issues are "peripheral" by treating them as ancillary, there is an even greater risk of disaffecting students by ignoring such issues altogether.

[4] Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 New Eng. L. Rev. 809, 857–906 (2000).

[5] Calleros, *supra* note 2, at 150–56.

[6] *E.g.*, Beverly Balos, *Learning to Teach Gender, Race, Class and Heterosexism: Challenge in the Classroom and Clinic*, 3 Hastings Women's L.J. 161 (1992); Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 Mich. L. Rev. 901 (1997); Mary Jo Eyster, *Integrating Non-Sexist/Racist Perspectives into Traditional Course and Clinical Settings*, 14 S. Ill. U. L.J. 471 (1990); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 Clin. L. Rev. 65, 96–97 (1997); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 Stan. L. Rev. 1807 (1990).

Examples: In our Legal Practice case, we talk about discrimination against the elderly and against those with substance abuse problems. Students must research and write both about state psychotherapist/patient privilege rules and about federal statutes providing confidentiality for substance abuse treatment records. In class, we talk about the desirability of hiring troubled youth, about whether it is appropriate to evict entire families based on the misconduct of one household member, and about the financial issues and benign integration prohibitions that complicate housing choices for low-income people. Although these discussions occasionally are treated as distractions, many students relish the opportunity to talk about some of the values and experiences that brought them to law school in the first place.

Reading law critically. Although some legal writing specialists may have been too passive toward law as given, many have argued that we must teach students to read law critically.[7] By opening legal text to scrutiny, the social origins of law are revealed, as are its assumptions about the world and preferred power relationships.[8] By criticizing legal text, students can learn to talk back to power by exploring and exploding master stories of race, class, and gender—all the systems of oppression that make our world less just.[9] By criticizing legal text, students can also discover their interpretive responsibilities—their power to transform law in the pursuit of social justice.

Examples: When we first ask students to write a "case brief," we ask them to write a "Context and Commentary" section. This section asks students to express their experience of the world and to use that experience to interrogate and criticize the court's reasoning and outcome. Similarly, because many of the cases that students read when researching our simulation involve crimes of sexual violence against women, we ask students to reflect upon and criticize the courts' collective unwillingness to address this reality more directly. To augment this focus, we have created a parallel mini-simulation that involves a related domestic-violence case. In both cases, we ask the students to consider whether the law should address issues of violence against women more directly and whether the tort system's third-party crime rules are effective legal/social policies for redressing these forms of harm.

Pluralizing participation in the legal writing classroom. Some legal writing professionals, especially Charles Calleros and Kathryn Stanchi, have urged that the legal writing classroom be pluralized and that legal writing instructors should undertake "to ensure that the lived experiences, perspectives, and voices of outsider students be included both in the classroom and in legal discourse."[10] As discussed above, when we add multicultural issues to the classroom, we implicitly encourage minority students to participate knowingly about their communities and traditions.[11] By so participating, students are less alienated, more engaged, and more likely to express themselves authentically.[12] However, one of the complexities of using difference in the classroom is getting mainstream students to appreciate perspectives and experiences radically different from their own.[13] A second problem is how to prevent putting minority students on the spot and treating them as stand-ins for their entire

"[M]any students relish the opportunity to talk about some of the values and experiences that brought them to law school in the first place."

[7] *See, e.g.*, Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 Wm. Mitchell L. Rev. 491 (1997) [hereinafter *Transforming the Traditional Repertoire*]; Beth Britt, Bernadette Longo & Kristin R. Woolever, *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. Bus. & Tech. Comm. 213 (1996); Calleros, *supra* note 2; Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 Mercer L. Rev. 709 (1998); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 597 (1997); Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 4 J. Legal Writing Inst. 79 (1998); Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 New Eng. L. Rev. 865 (1995); Stanchi, *supra* note 2.

[8] Britt et al., *supra* note 7, at 213, 225–26.

[9] Fajans & Falk, *supra* note 7, at 165; *see* Sossin, *supra* note 7, at 901.

[10] Baker, *supra* note 1, at _; Calleros, *supra* note 2, at 150–56; Stanchi, *supra* note 2. The discussion in this subsection draws substantially on Baker, *supra* note 1, at _.

[11] Calleros, *supra* note 2, at 151–53; Brook K. Baker, *Dilemmas of Cross-Cultural (and Inner-Cultural) Lawyering and Teaching: Six Months in South African Classrooms and Clinics*, 5–19 (draft on file with the author 1998).

[12] Stanchi, *supra* note 2, at 51–57; Parker, *supra* note 7.

[13] Carolyn Grose, *A Field Trip to Benetton ... and Beyond: Some Thoughts on "Outsider Narrative" in a Law School Clinic*, 4 Clin. L. Rev. 109 (1997).

"[A]s instructors we must be aware of our own cultural baggage, our inherited insights and blind spots."

group.[14] A third difficulty is how to avoid a classroom dynamic that builds stereotypes and essentialist views about individuals and groups rather than combating them.[15] Fourth, in order to be successful in pluralizing the classroom, we may have to counteract some conventional classroom dynamics that limit participation by "outsider" students. For example, observers of classroom participation find that white men with more unquestioned social power speak more frequently and more confidently in most law school classes;[16] Mertz describes these "tribal" voices[17] as the "kinds of voices [that] can speak in the language of the law."[18]

Examples: Despite the difficulties of ensuring pluralistic participation, there are techniques that expand dialogue. One particularly effective strategy is to have students break into small discussion groups so that everyone gets to participate. Another is to ask students to write some thoughts down on paper before they speak, thereby encouraging participation by those who are careful and slow as well as quick and glib. A third strategy is to ask students to share cultural introductions after some initial trust has been established. A fourth is to ask whether people have experience with a particular diversity issue while avoiding looking at target group members only—after all, for example, white people know a lot about racism too!

Improving instructor/student cross-cultural transactions. It would be comforting if the only mistakes and difficulties in cross-cultural exchanges were between students, but as instructors we must be aware of our own cultural baggage, our inherited insights and blind spots, and be willing to navigate the interpersonal dilemmas created by systems of oppression that affect us and our students. For example, students may be resistant to our efforts to socialize them to discourse conventions and to a rule of law that has disadvantaged them and their communities.[19] Students may experience the imperative "to write like a lawyer" as an implied disavowal of their own contrasting conventions of expression.[20] Students may also fear that legal writing instructors will evaluate them subjectively and unfairly, especially because so many outsider students have experienced stereotyped responses and reduced educational opportunity in the past.[21] In other words, there are cultural barriers and barriers of unfamiliarity, distrust, and suspicion that can complicate our efforts to create productive pedagogical alliances with students from diverse backgrounds and that require us to become more culturally competent. We have to find out more about students' varied backgrounds and perspectives without thereby placing them in an "essentialist" box. Not only must we acknowledge rough spots when they occur, but we must also be willing to say "sorry" when we learn that we have affronted a student. Moreover, we have to train students to accept constructive feedback, not as a form of domination, but as an act of collaboration by a more knowledgeable mentor.

Examples: At legal writing conferences, multiple presenters have addressed interpersonal problems that arise in teaching students in general, and diverse student populations in particular. At Northeastern, we hire a multicultural trainer for a full Saturday to work with each rotation of teaching assistants and course instructors. We also give teaching assistants several diversity articles to read to help prepare them for their work.[22] Finally, we regularly ask questions in TA training sessions

[14] Calleros, *supra* note 2, at 160; Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L.J. 1, 6–7 (1989) (describing an expectation of minority "testifying" that poses barriers to participation in the classroom).

[15] *See* Elizabeth Mertz with Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. Legal Educ. 1, 80–86 (1998); Calleros, *supra* note 2, at 156–58 (discussing the problem of stereotyping).

[16] *See* Mertz et al., *supra* note 15 (reporting data on class participation in eight semester-long contracts classes and noting contextual complexity and patterns of reduced participation by women and minorities).

[17] *Cf.* Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1102 (1986).

[18] Mertz, *supra* note 1, at _.

[19] Baker, *supra* note 1, at _.

[20] *See* Jill J. Ramsfield, *Is "Logic" Culturally Biased: A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. Legal Educ. 157 (1997) (discussing cross-cultural perspectives on logic and persuasion).

[21] Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, The Atlantic Monthly 44 (August 1999).

[22] Valerie Batts, *Modern Racism: New Melody for the Same Old Tunes*, Episcopal Divinity School Occasional Papers (1998); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, Working Paper No. 189, Wellesley College Center for Research on Women (1988); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. Legal Educ. 147 (1988); Steele, *supra* note 21.

and in our individual supervision meetings about difficulties teaching assistants might be having and whether they need assistance brainstorming constructive responses.

Conclusion

I am confident that many legal writing colleagues routinely address issues of equity and social justice in their legal writing programs and in their classrooms. Despite this confidence, I believe that we are not yet doing enough to share our experiences with each other. Over the long run, we will need to explore stories of brilliant success and traumatic failure so that we can expand our repertoire of pedagogical innovations that address these areas of vital concern.

Waiving a Red Flag: Teaching Counterintuitiveness in Citator Use

BY KENT C. OLSON

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Not so very long ago, teaching the use of citators meant a lesson in hieroglyphic interpretation—explaining the meaning of strange ciphers and little raised numerals, and providing assurance that helpful tables of abbreviations were available in each of the several volumes and pamphlets that would need to be consulted. Now the process has been so simplified that teaching it requires convincing students to go beyond what they see at first glance.

Let us dispense first, quickly, with printed *Shepard's® Citations*. Print resources still have a vital place in legal research. A treatise or an encyclopedia can clarify issues and provide a conceptual framework for a legal problem. Even a digest can lead to analogies that might never have occurred to someone who uses only keyword searching. *Shepard's Citations* does none of these. It has no commentary, and context is meaningless. It is simply a more cumbersome and less timely version of information available electronically.

The only advantage of printed *Shepard's Citations* is that it is available to library users without access to online databases.[1] But this is no excuse for leading with this antiquated format. Word-processing instructors don't have their students start on manual typewriters so that they know how to operate a carriage return.[2] The electronic Shepard's and KeyCite® are more efficient, eliminating the abbreviations and the need to check several separate sources, and more powerful, allowing researchers to customize results and to go directly to citing cases.

Electronic citators are making the leap from the obscure to the intuitive, allowing students to incorporate their use as a more natural part of the research process. Law students today expect user-oriented computer applications, and anything that takes too long to understand will probably see little use by most students. The database suppliers recognize this. An online executive recently explained new research approaches to an *ABA Journal* reporter by saying, "There is no learning curve to use it. Everything is point and click."[3]

It makes sense for instructors to emphasize ways that citators are becoming more intuitive while still allowing for sophisticated retrieval. By incorporating the Focus feature of LEXIS®, Shepard's has added a user-oriented flexibility new to citators. No matter how powerful the KeyCite options for limiting retrieval, they require clicking on tabs and checking boxes. Shepard's has little boxes too, but it hides these on a "custom restrictions" screen. Anyone who has installed software knows that the safest course is to stick to "typical" and not to mess with anything "customized." "Custom" is just another word for "little used." Students should certainly be exposed to these features, but many of them will probably not return on their own.[4]

There is one area, however, in which both LEXIS and Westlaw® have taken intuitiveness to a potentially dangerous level. As part of their basic case display, both services have included graphic signals warning about a case's precedential status.

[1] This article focuses on case law citators. Some statutory sources, such as session laws and obsolete code provisions, can still be Shepardized® only in print.

[2] At least typewriters, unlike printed citators, have nostalgic partisans. *See*, e.g., Robin Chotzinoff, *Type Casting*, Westword, Nov. 4, 1999, available at <http://www.westword.com/issues/1999-11-04/chotz.html> ("I can't help it. I love typewriters. Damn it, I miss them."); Colin McEnroe, *A Black Ribbon Round My Pinkie, Tears on My Paper*, Hartford Courant, July 7, 1995, at E1 ("Clatter clatter clatter. Ding! I miss that ding. It always made me feel as though I might have actually done something.").

[3] Hope Viner Sanborn, *Up to the Plate: New Services Are Looking to Grab Small Firms and Solo Practitioners*, ABA J., July 2000, at 46, 48 (comments of Gregory Brown, QuickLaw vice president of marketing).

[4] Shepard's Focus advantage may be short-lived. For more than a year, West Group representatives have announced plans to incorporate the Westlaw Locate feature into KeyCite. Compare Daryl Teshima, *Users Win in the Battle between KeyCite and New Shepard's*, L.A. Law., Sept. 1999, at 84, 86 (Locate "will be incorporated shortly") with Tobe Liebert, *New Shepard's v. KeyCite: How Do We Compare?*, LLRX.com (June 1, 1999), at <http://www.llrx.com/features/keycite.htm> (Locate "will eventually be incorporated"). The latest word from West Group KeyCite Development is that the Locate feature for KeyCite "will be released in the first half of 2001." E-mail from James Roy, West Group E-Mail Support (Sept. 28, 2000).

Westlaw uses red and yellow flags, while LEXIS uses a red stop sign and a yellow diamond. These signals are wonderful tools for reminding researchers that citator analysis is needed, but they are such powerful visual cues that they can drown out the more complex analysis that is often required. The intuitive conclusion drawn from a red flag or a stop sign runs counter to the need to think while using a citator, to read the cases cited, and to determine their effect on the precedent of the cited case. As Michael Lynch has observed, legal research "is not merely a search for information; it is primarily a struggle for understanding. The need to think deeply about the information discovered is what makes legal research the task of a professional lawyer."[5]

The two distinct types of signals—red and yellow—present different problems. Red signals are less broadly used than yellow, and they are almost always correct in indicating that a case does indeed have precedential problems. But they should signify the beginning, not the end, of the investigation. Shepard's tells us only that a red stop sign means "strong negative history or treatment of your case (for example, overruled by or reversed),"[6] but the Westlaw explanation is more carefully worded: "A red flag warns that a case is no longer good law for at least one of the points it contains."[7] It follows, obviously, that a red-flagged case may still be good law for some other point it contains. But how many students simply see red and look no further? Even an experienced librarian can be drawn into oversimplifications and explain that a red signal "indicates that the case is not safe to use as a precedent."[8]

To encourage my students to look beyond these graphic signals, I give them a fact scenario in which one party relies on a case that has been overruled in part but that is still good law for the purpose for which it is cited:

> You are clerking for the Wisconsin Court of Appeals. Appellants have challenged a jury verdict, but appellees cite *Fehring v. Republic Insurance Co.*, 347 N.W.2d 595 (Wis.1984), for the rule that the verdict must be sustained if there is any credible evidence to support it. You have been asked to check the status of *Fehring* to determine whether appellants can rely on it as precedent. Explain briefly how you reached your conclusion, and cite a recent case (decided within the past five years) to support your answer.[9]

The Wisconsin Supreme Court overruled one minor aspect of *Fehring* in *DeChant v. Monarch Life Insurance Co.*,[10] but there is a long line of Wisconsin cases showing that *Fehring* remains good law on the standard of review issue. Most students find these cases, but a few are stopped short by the red signals.

The erroneous students can take heart that they are not alone, because the *Fehring* case was the subject of what must be the first published instance of a judge chastising a lawyer for overreliance on citator signals. In *Lewis v. Paul Revere Life Insurance Co.*,[11] U.S. District Judge Lynn S. Adelman added a footnote to discuss this aspect of the defendant's brief:

> I must address Paul Revere's briefing. Lewis cites *Fehring*, 118 Wis. 2d at 313, 347 N.W.2d 595, for the type of investigation that an insurer must provide to avoid bad faith liability. Paul Revere contends that *Fehring* was overruled by *DeChant*, 200 Wis.2d 559, 547 N.W.2d 592, and therefore "*Fehring* is of no value and must be disregarded by this Court." (R. 125 at 4.) A cursory glance at *DeChant* reveals that it does not discuss the only issue for which Lewis cited *Fehring*, namely, how bad faith may be established. And reading *DeChant* shows that it overrules *Fehring* only to the

"The need to think deeply about the information discovered is what makes legal research the task of a professional lawyer."

[5] Michael J. Lynch, *An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools*, 89 Law Libr. J. 415, 415 (1997). *See also id.* at 425–27 (discussing "the primacy of thinking"); Julius J. Marke, *Teaching the Process*, N.Y.L.J., Mar. 16, 1993, at 4 ("At each step of the research process, mechanical as it may be, decisions must be made as to the relevancy of information retrieved. Thus, to Shepardize a case without understanding what is at issue, could lead the researcher astray.")

[6] Understanding lexis.com: An Introductory Guide to Web-Based Legal Research 46 (2000).

[7] Quick Reference to Using KeyCite in westlaw.com® 1 (2000).

[8] Elizabeth M. McKenzie, *Comparing KeyCite with Shepard's Online*, Legal Reference Services Q. No. 3, 1999, at 85.

[9] A similar problem can be created in another jurisdiction by doing an online case search for the phrase "overruled on other grounds," and then examining (1) one of the cases found to see on what point it continues to rely on a "red" case, and (2) the overruling case cited to determine the scope of its announced overruling.

[10] 547 N.W.2d 592 (Wis. 1996).

[11] 80 F. Supp. 2d 978 (E.D. Wis. 2000).

"Sometimes a thousand words are worth a lot more than a picture."

extent that *Fehring* held that attorney's fees may be recovered in a bad faith action. See *DeChant*, 200 Wis.2d at 577, 547 N.W.2d 592. On the issue of the elements of bad faith, *Fehring* thus remains good law.

In a similar fashion, in its response to Abrams's motion for summary judgment, Paul Revere claims that a second case was overruled and of no value to this court. Paul Revere there asserts that *Jones v. Reliance Insurance Co*., 607 F.2d 1 (D.C. Cir. 1979)—cited by Abrams for the construction of the words "disease" and "disorder" in insurance contracts—was "overruled" by *Harbor Insurance Co. v. Schnabel Foundation Co.*, 946 F.2d 930, 936–37 (D.C. Cir. 1991), and that *Jones* therefore "is of no value to the Court." (R. 88 at 10.) But the issue on which *Harbor Insurance* overturned *Jones* had nothing to do with how to construe "disease" or "disorder," but rather the standard of review for certain denials of directed verdict motions. Such unwarranted claims about the precedential value of cases cited by opposing parties are discouraged.[12]

While it is not known why Paul Revere's lawyer concluded that two perfectly valid cases were "of no value to the Court," the most likely cause is that they appeared on the screen with bright red flags or stop signs.[13]

Yellow signals, which are much more common than red, indicate simply that a case may have "negative history." This is a concept that the services interpret very broadly. When *Fehring* is run through KeyCite or Shepard's, for example, *Lewis v. Paul Revere Life Insurance Co*. is listed as a negative history case, despite its express repudiation of reports of *Fehring*'s demise.

To demonstrate the overbreadth of yellow signals, I offer a cautionary tale. On the first day of the Supreme Court's new term, October 2, 2000, I checked the status of its decisions from the October 1999 term. All were still good law, of course, but you wouldn't readily reach that conclusion from their KeyCite or Shepard's treatment. Of 78 cases, more than half had yellow symbols and negative history references in both services. Within just a few months each system had given these cases at least 115 negative history references, more than 98 percent of which were cases in which lower court judges distinguished or declined to extend the Supreme Court's holding.[14]

For example, on May 15, 2000, the Supreme Court in *United States v. Morrison*[15] struck down a provision of the Violence Against Women Act as exceeding congressional power under the Commerce Clause. Within a month, lawyers had unsuccessfully argued that courts must also strike down regulations governing the taking of red wolves on private land[16] and the content of volatile organic compounds (VOCs) in consumer and commercial products.[17] By the first Monday in October, the KeyCite and Shepard's displays for *Morrison* each listed 10 distinguishing cases. These lower court decisions consider the scope of *Morrison*'s holding, but they don't affect its status as precedent.

Unless students learn that red and yellow visual cues mean "think" and "analyze" rather than "stop" or "go very fast," we are likely to see more Paul Reveres making unwarranted claims about the precedential value of cases. Sometimes a thousand words are worth a lot more than a picture.

[12] *Id.* at 990 n. 10.

[13] To its credit, Shepard's is trying to teach students not to rely on an "overruled" indication without investigating further. It has produced an entertaining new video noir, The Shepard's Case (2000), which shows how Jake Laxlawyer's lack of diligence loses a case and leaves his career in shambles. The videotape, however, doesn't mention the red stop signs LEXIS uses.

[14] Thirty-four cases had no negative references. Of the remaining 44 cases, five had negative treatment only in Shepard's, seven had negative treatment only in KeyCite, and 32 had negative treatment in both citators. (It should be noted that Shepard's also gave yellow symbols indicating "possible negative treatment" to nine of the 34 cases that did not in fact have any negative citing cases.) On Shepard's, 114 of 115 negative references were "distinguishing" cases. An unreported district court decision, Tracy v. Board of Regents, 2000 U.S. Dist. LEXIS 11320 (S.D. Ga. June 16, 2000), criticized Texas v. Lesage, 528 U.S. 18 (1999), as unclear. In KeyCite, 115 of 117 negative references were either distinguishing or declining to extend a holding. The others were State v. Fire, 998 P.2d 362 (Wash. Ct. App. 2000) (not following United States v. Martinez-Salazar, 120 S. Ct. 774 (2000) on state law grounds); and United States v. Hoskie, 2000 WL 1052022 (D. Conn. July 26, 2000) (recognizing a disagreement between Illinois v. Wardlow, 120 S. Ct. 673 (2000) and other Supreme Court cases).

[15] 120 S. Ct. 1740 (2000).

[16] Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

[17] Allied Local & Reg'l Mfrs. Caucus v. E.P.A., 215 F.3d 61 (D.C. Cir. 2000).

REPEATERS IN LRW PROGRAMS

BY GRACE WIGAL

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Brutal Choices in Curricular Design ... *is a regular feature of* Perspectives, *designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other "brutal choices" that should be considered in future issues. Please submit material to* Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035.

The Legal Research and Writing (LRW) faculty members are meeting on a warm, sunny day in May. The tone of the meeting has been upbeat so far—everyone in attendance is relieved that the school year is over. But faculty members ultimately must turn to the agonizing task of deciding what to do about the students who did not pass LRW. Sound familiar?

I direct the LRW Program at the West Virginia University College of Law, and I always dread the last task of the year—reviewing the files of students who did not pass. Although our first-year writing program usually has no more than five students who fall into the nonpassing category, the number occasionally climbs as high as seven or eight (of approximately 145 students in the first-year class).[1] Not surprisingly, my level of angst at this last LRW faculty meeting usually is directly proportional to the number of students on the "fail" list.

I've often heard other directors say that no student should fail the LRW program they have implemented, and I feel the same way. Students in our program have numerous opportunities to rewrite assignments. Furthermore, they have a variety of avenues to get individual help: (1) they are permitted to get peer feedback on early assignments; (2) the LRW faculty members maintain an open-door policy and meet regularly with individual students; (3) student teaching assistants are available to read drafts and assist struggling students; and (4) a writing specialist conducts grammar/mechanics workshops and also works individually with students on drafts of papers.

With all these opportunities for assistance, why do students fail? We have discovered that the nonpassing student usually falls into one of two groups: (1) those who either "blow off" the course or don't have the discipline to maintain the pace of the course and produce written submissions in a timely manner, or (2) those who work hard but simply need more time to master the underlying skills necessary to competently think, write, and speak as a lawyer. Because the work product of students in these two categories usually reveals a consistent pattern of poor performance, my colleagues and I can readily agree that these students should repeat the course.

However, a student sometimes falls into a third category: the student who barely misses passing the class because of one or two poor grades. Before deciding to fail this student and thereby have the student repeat the full-year course, my colleagues and I look carefully at the student's pattern of writing grades and the student's performance on in-class exercises. If this review reveals that the student's overall work product reflects a mastery of essential skills, then the LRW faculty may decide that the student should pass the class on the basis of participation and performance. Our syllabus, in fact, notes that each LRW faculty member reserves the right to add a participation factor into the final grade for the year. Thus, a student who has mastered the skills and has participated meaningfully in the course need not be disproportionately penalized by occasional poor performance.

Who Should Repeat?

My conversations with other directors about students who fail lead me to believe that most law schools have a situation similar to that at West Virginia: a small percentage of students fail at the

"With all these opportunities for assistance, why do students fail?"

[1] This number does not include the students who have dropped out of the course before the end of the year. Students drop for a variety of reasons, e.g., health problems, a decision to go part time, fear of failing the course, the need to concentrate on other courses because of a low GPA, etc. These students also will be repeating the course the following year, sometimes driving our repeating student numbers as high as 15.

"Skill building is a highly individualistic task, and any good skills program will give individual students many opportunities for feedback and practice."

end of each year.[2] A few directors have said, however, that aside from the students who drop the course before it is completed, they generally have no students who work through the entire course and then fail at the end of the year. I was taken aback when I learned that some programs may not have students who fail, but I then realized that this phenomenon can be explained, at least in part, by program design. Skill building is a highly individualistic task, and any good skills program will give individual students many opportunities for feedback and practice. In schools having a reasonable student-LRW teacher ratio, the LRW teacher will have more time to track individual students, schedule conferences, and read redrafts and rewrites of papers. In fact, the program is likely to be designed to provide rewrite opportunities (or multiple drafts) for all major writing assignments in the course. This attention the LRW faculty member gives to each student throughout the course permits the student to better understand his or her own strengths and weaknesses in analysis and writing so that the student can target goals to achieve with each draft or rewrite. With instructor guidance in this continual rethinking and redrafting process, even the weakest students are likely to raise their grades enough to pass the course.

Clearly, LRW teachers in good writing programs deserve medals for assuming the Sisyphean task of helping individuals overcome their specific weaknesses. But there is a danger in providing too much help. As one director noted, permitting students to rewrite all papers sometimes allows the weakest students to pass when they really aren't ready to function independently of the assistance offered through program resources. These students aren't fully prepared to move on to more advanced writing tasks in upper-level courses or summer clerkships where they will be expected to work independently and efficiently under the pressure of a deadline.

The American Bar Association's *Sourcebook on Legal Writing Programs*[3] notes that one of the goals of a good legal writing program is to teach students to educate themselves:

> It is ... highly valuable for law students to learn how to educate themselves on legal doctrines with which they have no previous familiarity, to determine the issues involved in the problem under consideration, and to begin formulating a research strategy to find a solution. They need to attain confidence that, when faced with an unfamiliar issue or area of law, they will be well equipped to master the subject and solve the problem within a reasonable time.
>
> ... Legal writing teachers do not teach a body of knowledge (such as contract law or civil procedure). They teach an art which students can master only by learning decision-making skills that are based on professional judgment.[4]

Thus, the *Sourcebook* recognizes that an LRW program should give each student the opportunity to achieve the level of skill mastery that will permit the student to work independently to solve legal problems.

Some law schools, including West Virginia, have taken a "hard-nosed" approach to the problem of students who demonstrate only marginal skills at the end of the first-year LRW program.[5] West Virginia has decided to "raise the bar" in two ways: (1) the last two assignments of the year cannot be rewritten, and (2) the student must earn a grade of C or above to pass the course. Several years ago, we adopted the "no rewrite"

[2] This article repeatedly draws upon information I have acquired through conversations and e-mail correspondence with other LRW program directors. Thus, this article is based on anecdotal information and not a scientific collection of data.

[3] ABA Section on Legal Education and Admission to the Bar, *Sourcebook on Legal Writing Programs* (1997).

[4] *Id.* at 35, 52.

[5] Some law schools have legal writing and academic support programs that extend through the three years of law school. In those schools, the first-year LRW faculty may feel that a very weak student can continue to improve skills through upper-level programs that offer continued instruction in the basics. The upper-level programs can assume the responsibility of moving the weak student to a level of proficiency before graduation. However, in schools that have full-time writing professionals teaching only in the first year, there may be very little opportunity for students to get the kind of practice and feedback that they need to continue to improve their lawyering skills. Thus, the first-year LRW program carries the heavy responsibility of helping each student become proficient in many of the basic skills needed for the practice of law.

policy for the last two of the eight yearly LRW assignments to put the burden back on students to draft an effective document under the pressure of a deadline (what the lawyer does in practice).[6] While preparing these two writing assignments (an intra-office memorandum of law and a trial court brief), the students can get help from the LRW faculty member, teaching assistant, and writing specialist, but the papers may not be rewritten after submission.

The last two assignments build on the skills learned throughout the year and reflect the kind of research and writing tasks the students will be expected to undertake as first-year clerks. Thus, when deciding at the end of the year whether a student should retake the course, faculty members can compare the student's performance on the last two assignments to performance on the earlier assignments that were rewritten with assistance. A disparity in performance can indicate that the student is not ready to work independently of the writing program.

Not allowing rewrites at the end of the year also permits the LRW faculty member to give a more objective opinion when speaking to a student's prospective employer who has called for a recommendation. For example, I recently got a call from a Washington, D.C., law firm considering a second-year student for a summer position paying almost $2,000 per week. The lawyer who called was keenly interested in whether the law student's writing portfolio contained documents that had not been rewritten with instructor guidance. In other words, the lawyer was trying to assess whether the student's excellent LRW grade and writing samples accurately reflected the work the student would be able to do as a summer clerk. I responded that two of the documents in the folder were not rewritten under my guidance, but that the student may have redrafted in response to comments I made on the papers when I graded them. Thus, the documents were an accurate reflection of the kind of work the student would do as a clerk with a minimal amount of guidance from a supervising attorney.[7]

The second way West Virginia addresses the problem of the student with minimal skills is to require the LRW student to pass the course with a C.[8] Years ago, the College of Law faculty agreed that students must demonstrate more than a "barely passing" skill level and ability to problem-solve before leaving the LRW program. Therefore, the student with a grade below C at the end of the year must repeat the year-long course.[9]

The faculty felt that the stringent grade requirement was important for several reasons. First, the law school faculty noted that competency in written communication is a prerequisite for the practice of law. Second, as the only law school in the state, the College of Law has a special duty to prepare students to be leaders in their communities and to be successful in their practices. Most of our graduates begin their practice of law in a relatively small firm setting (two to 10 attorneys). They report that they don't have the luxury of being closely supervised by a mentor during their early years of practice, but instead are expected to "pull their own weight"

> "[Graduates] report that they don't have the luxury of being closely supervised by a mentor during their early years of practice."

[6] We continue to have a high student-teacher ratio in our program (55 to 1) and were faced with the problem of not having enough time to go through a rewrite process on all assignments during the year. In discussing student and instructor needs, we came to realize that there was a good reason not to rewrite every assignment and a good time to ask students to begin to produce documents that did not need multiple revisions with instructor help.

[7] Some of today's practicing attorneys have graduated from strong writing programs offering extensive instruction, individual consultation, and opportunities to rewrite. These attorneys sometimes distrust the final work product offered by the student as a writing sample. They remember how much help was available to them, and as potential employers they are now concerned about whether the writing sample reflects the student drafter's ability or the ability of those who may have assisted the student in creating the document.

Hiring attorneys' distrust of writing samples was documented in a recent National Law Journal article. Ritchenya Shepherd, *Firm Exam Tests Writing Skills*, Nat'l L.J. (Feb. 15, 1999) at A16. The article describes a timed exam designed by a Chicago labor and employment boutique firm. The applicant is given a hypothetical fact pattern and a packet of case law and is asked to draft a brief supporting summary judgment in the case. *Id*.

One member of the firm explained that the test is given because excellent law school grades aren't always indicative of an ability to produce good written documents in a timely manner. She noted another advantage: the written product will reflect the applicant's ability to edit the document. She said that the student applicant's writing portfolio may contain only documents that have been rewritten multiple times with the help of a teacher or teaching assistants, and that such documents do not truly reflect the student's own editing skills. *Id*.

[8] In fact, this requirement is not limited to the LRW course. At West Virginia, students must pass all the required skills courses with a grade of C or better. The requirement makes sense in light of the studies conducted by the American Bar Association that document the value of skills in the practice of law.

[9] The University of Missouri–Kansas City School of Law also requires students to pass LRW with a C.

almost immediately. They also report that the five skills they use most often (in descending order) are problem solving; oral communication; written communication; legal analysis and reasoning; and reading and interpreting legal opinions, statutes, and regulations.[10] These (and other) skills are taught in the first-year LRW course.

A third reason the faculty imposed the "C to pass" rule is that the College of Law wanted its graduates to be marketable outside the state and recognized that a graduate who can demonstrate solid communication skills will have more choices.[11]

When deciding to raise the grade requirement at West Virginia, the faculty did not consider the correlation between skills mastery and the likelihood of passing the bar exam on the first try. But it is a concern that has been compounded by the recent development of the Multistate Performance Test (MPT) as a component of the bar exam. The MPT, which was developed by the National Conference of Bar Examiners to assess "six fundamental skills lawyers are expected to demonstrate," was first available in 1998 and now has been adopted as part of the bar exam in many states, including West Virginia.[12] The MPT is a 90-minute test that asks the test taker to read a case file and a library of materials, including legal authority. The test taker then must assess the client's legal problem and draft one or more legal documents related to the problem.[13] Clearly, the test taker who "barely passes" the LRW course because he or she has not mastered the professional skills that permit quick and accurate assessment of legal problems and their solutions will be at risk when taking the performance test.

West Virginia is not alone in being concerned about skill mastery;[14] other schools have adopted these and other approaches to assess and improve student achievement. For example, a recent article in *Perspectives* described a very different approach to discovering which students have mastered LRW skills: second-semester LRW students at Howard University must complete a timed test that mimics the MPT.[15] The test not only helps them prepare for the skills component of the bar exam by showing them what will be expected, but also encourages them to review the content of the LRW program before taking the test. Furthermore, the "mock MPT test" gives the LRW faculty at Howard an additional tool to assess achievement of individual students.[16] In fact, after giving the test for the first time, the director noted that the results suggested "too many students are dependent upon help from others (both LRW faculty members and classmates) for analysis of the law for their regular LRW papers … and [that t]hey have not yet learned to analyze and synthesize the law quickly and well enough on their own."[17]

Whether deciding to require a higher grade to pass the course, to require students to demonstrate mastery without rewrite opportunities, to limit students' opportunities for collaboration, or to administer an achievement-type writing test at the end of the year, program directors are making "brutal choices" in program design that will allow the LRW faculty to better assess individual achievement when deciding who should "fail." These choices address the concern articulated by the director who thought that her weakest students were being permitted to leave LRW without necessary skills. On the other hand,

[10] West Virginia University College of Law Self-Study Committee, *Self-Study Report*, ch. 7 at 6 (September 2000) (prepared for Reaccreditation Site Review Team from the American Bar Association and the Association of American Law Schools).

[11] Law firm salaries have skyrocketed in urban areas, making out-of-state jobs very attractive to College of Law graduates. Our placement office reports that the top third of the class is being heavily recruited and that many 1999 and 2000 graduates have taken jobs in other states.

[12] National Conference of Bar Examiners, *Multistate Tests* (last updated October 5, 2000) <http://www.ncbex.org>. At the time I visited the site, 25 jurisdictions had adopted the MPT.

[13] Examples of documents the applicant might draft are a memorandum of law, a letter to a client, a trial or appellate brief, a will, a settlement proposal, etc. *Id*.

[14] Some schools that are concerned about bar passage offer courses or workshops that help third-year law students polish their writing skills. *See* Nancy L. Schultz, *There's a New Test in Town: Preparing Students for the MPT*, 8 Perspectives: Teaching Legal Res. & Writing 14 (Fall 1999).

[15] Steven D. Jamar, *Using the Multistate Performance Test in an LRW Course*, 8 Perspectives: Teaching Legal Res. & Writing 118 (Spring 2000).

[16] The test counts as 10 percent of the final grade for the course.

[17] *Id.* at 122.

deciding to have students repeat the course creates a number of problems.

Problems with Having a Student Repeat the Course

Most schools assign a repeating student to a different teacher with the belief that the student will benefit from working with someone who has a slightly different approach to teaching, presents the material with new language, and uses a "new" set of assignments. In theory, the repeater finds the course easier the second time around and appreciates the opportunity to hone his or her skills while improving the course grade. In fact, most students do adopt this attitude, work very hard, and demonstrably improve their skills. Unfortunately, however, some students resent having to take the course a second time and become the human example for the adage that "you can lead a horse to water, but you can't make it drink." In either case, retaking the course is a burden to the student, and the repeating student is a burden for the LRW instructor.

Problems for the Student

Repeating the course is a hardship for the student for the obvious reason that the demanding workload requires a serious investment of time and energy. However, repeating the course can be problematic for a number of less obvious reasons. First, the LRW class is usually an "overload" class for the student in the second year. The student does not want to get behind in credit hours and therefore seeks permission to "overload" his or her schedule with the LRW course. Often, the student who is struggling in LRW is the student who should not be taking an exceptionally heavy course load.

Second, the LRW class may conflict with other upper-level classes that the student would like to take, and the LRW class thereby bars the student from taking the preferred class.[18] Even if the two classes do not overlap, the student's writing deadlines in LRW can conflict with deadlines in upper-level classes.

Third, some schools make LRW a prerequisite to upper-level writing courses. As a result, the repeating student is not permitted to enroll in courses such as "Appellate Advocacy," "Legislative Drafting," or a required seminar without first passing the LRW course. Because West Virginia has adopted this approach, the repeating student must wait until the third year of law school to take the upper-level skills course.

Fourth, the repeating student must bear the embarrassment of attending a first-year course; despite the repeater's efforts in trying to keep a low profile, first-year students usually know by the second week of school that a "repeater" is in the class. Furthermore, the second-year teaching assistants in the program recognize the repeater as a classmate who obviously failed the course. This somewhat awkward situation can make the repeater reluctant to seek help from the teaching assistant.

The above-described stigma and scheduling burdens associated with repeating the course usually prompt repeating students to ask whether alternative arrangements can be made for improving writing skills and passing the course.

Problems for the Teacher

Having a repeating student in the class can be difficult for the faculty member as well. A first reason is that the institution can view a repeater as an overload student rather than an enrolled student in a capped section. Most schools distribute the first-year students evenly throughout the LRW sections, keeping in mind that class size should be limited. However, the school might then add repeaters to a class without regard to how large the class becomes!

Unfortunately, adding a repeater to a faculty member's class roll can create a second problem: the effect may be equal to adding several students to the class. The repeating student has known skill deficiencies and usually needs special guidance from the beginning of the course when analysis is the focus of the classroom interaction. LRW professionals in many programs continue to teach more than 45 first-year students each semester, thereby already exceeding the maximum 45-1 student-faculty ratio recommended by the ABA in its publication *Sourcebook on Legal Writing Programs*.[19] Placing repeating students in already

> "In theory, the repeater finds the course easier the second time around and appreciates the opportunity to hone his or her skills while improving the course grade."

[18] Of course, students can come up with novel ways to try to get around this problem. In one instance, I discovered that a repeating student was enrolled in another course taught at the same time as his LRW course. He was attending that course when he skipped my LRW class!

[19] The ABA's *Sourcebook on Legal Writing Programs* recommends a maximum 35-1 ratio for the LRW teacher who is also teaching another course in the curriculum, and a maximum 45-1 ratio for the teacher who is not teaching another course.

> "[A] repeater can bring a poor attitude that 'infects' the classroom atmosphere."

over-enrolled classes places an exceedingly heavy burden on the teacher.

A third problem for the teacher results from the repeater's lack of understanding of his or her weaknesses. Although most LRW programs change their assignments each year, the teacher has to deal with questions such as "Do I really have to sit through this class again? I've already done all this. Could I just turn in the assignments?" Or the student may ask for a waiver on the early, more simplistic assignments. Of course, the early foundational classes and assignments probably focus on the links that are missing for the struggling student and provide precisely the kind of review the student needs. The student's lack of understanding of the importance of the basic building blocks that underlie good analysis and legal writing, or the student's disregard of the writing program's schedule or deadlines, puts an additional burden on the instructor to counsel and motivate the repeater to stay involved in the course work, meet deadlines, and be successful.

Finally, a repeater can bring a poor attitude that "infects" the classroom atmosphere. For example, a student who complains on a consistent basis can, at a minimum, irritate classmates. In a worst-case scenario, the student can criticize the class and teacher so vehemently and consistently that other members of the class adopt the repeating student's attitude, e.g., "This class is too time-consuming. I have better things to do."

With this many problems in having students repeat the course, it is surprising that LRW faculty members are ever willing to fail a student!

Alternatives to Having the Student Repeat the Course

Because of the burdens on both the student and the instructor in having the student repeat the entire LRW course, schools have adopted a number of ways to provide review through alternative mechanisms.

Perhaps the most novel alternative was suggested and then implemented by Sam Jacobson, professor of LRW at Willamette University College of Law, in the 1994–95 school year. Because of exceptionally heavy enrollment that year (and, presumably, a high fail rate), Professor Jacobson designed a special four-week course and offered it on a trial basis in the summer to students who did not pass LRW.[20] This course, which "was designed to provide an intensive work experience in a small class setting,"[21] has proved to be so successful that Willamette now offers the summer course on a permanent basis. By teaching a small number of students, whose problems could be diagnosed and targeted, the instructor was able to work individually with the repeating students and provide consistent and timely feedback on a series of smaller assignments that gradually built to complicated problems. This summer program addressed the needs of individual students while also addressing most of the problems noted above with having a student repeat the LRW course.

But most law schools do not have the monetary resources to devote to a special summer course, and because the number of repeaters is small, cannot support the program by charging tuition and fees. Therefore, these schools have developed alternative ways to deal with students who need additional help.

Some schools permit the repeating student to skip the first semester and repeat only the second half of the course—the spring semester. This is usually where the student experienced the most difficulty because the course work grew appreciably more difficult as the year progressed. The drawback to this approach is that when a student repeats only the more difficult semester, the student is deprived of the opportunity to practice the basic skills covered in the first semester. It is this early "skill-drill" that the weak student probably would benefit most from repeating. On the other hand, if the student repeats only the first semester, then the student does not have the opportunity to write the more difficult assignments that caused the student to fail the previous year. Therefore, the student never gets the opportunity to feel confident about his or her level of proficiency.

Other LRW programs are willing to assign a grade of Incomplete at the end of the year and allow the student to work through the summer on one or more assignments to improve competency. But this alternative may place an unfair burden on

[20] For a detailed description of the summer program, see M.H. Sam Jacobson, *Providing Academic Support Without an Academic Support Program*, 3 Legal Writing, The Journal of the Legal Writing Institute 241 (1997).

[21] *Id.* at 242.

the LRW teacher if the teacher isn't being paid to teach this "independent study" course to a student who needs supervision. Furthermore, there is no assurance that the student will succeed after one or two rewrites, and the LRW faculty member may find that the student must repeat LRW anyway.

In at least one school, the LRW program addresses the repeater problem by barring the LRW student who does not pass the first-semester course from registering for the second-semester course. Other schools encourage or permit the weakest students to opt out of the second semester of the first-year LRW course and then come back as second-year students to take the complete course again. Thus, in both instances, the repeating student is not technically a repeater in the eyes of other students, and the LRW faculty member is spared both the time involved with working with the student through the second semester and the agonizing task at the end of the year of deciding whether the student should pass the course.

Another option is to place the repeating students in a special one-semester class in the fall of their second year. The instructor of this class would consider students' prior experiences and existing skills when creating a special syllabus tailored to the needs of this special group of students. The down side to this option is that taking the LRW instructor out of the first-year course might result in overloading other LRW instructors' first-semester classes.

Finally, although no law school seems to have taken this route, a summer tutorial for law students who do not pass LRW might be an economically feasible solution to the problems noted above. The failing student could be given a grade of Incomplete at the end of the year and enrolled in a summer tutorial designed to offer review and additional practice. The LRW teacher would have the responsibility of designing the tutorial and grading the final work product of the repeating student. However, the day-to-day operations of the tutorial would be closely monitored by a student teaching assistant who is familiar with the materials and problems and capable of providing instruction and assistance. Thus, the LRW teacher, who typically is a nine-month employee, would have time to do other things during the summer months.

The Student Who Fails Twice

Although rare, students sometimes fail the LRW course a second time, raising another question: Should a student who has failed twice be permitted to take the course a third, or fourth, or fifth time until the student passes?

Some schools have made the decision to say no and have imposed a two-year rule.[22] Under the two-year rule, a student may take the course twice, but will be dismissed from school if the student does not pass the course the second time. The two-year rule usually is applicable to all required classes; therefore, the LRW program is not singled out as the "weeder class" (although in reality, repeating students usually find it easier to pass other law courses on the second try). Usually, a student may petition for readmission after being dismissed under the two-year rule.

I think most LRW professionals would favor a two-year rule. Because most LRW programs operate on very limited budgets, LRW professionals are sensitive to resource issues associated with the student who repeats and repeats. After two tries, most LRW professionals would probably say that the resources being consumed in trying to help a third-time repeater would be better used to help other students in the LRW program. Furthermore, the problems associated with having a repeating student are only compounded when the student is repeating a third or fourth time.

LRW professionals would favor the two-year rule for another reason. The two-year rule places a burden on the student to show that he or she should be permitted to graduate from law school.[23] After working closely with a student for two years, LRW professionals have a good sense about whether the LRW student is going to be able to function in a setting that requires the student to exercise professional skill and judgment, as well as meet deadlines. If the student does not pass LRW on the second try, the instructor should be able to take the position that the student will not be able to competently perform the duties of a lawyer and should not be allowed to put clients at risk.

> "Should a student who has failed twice be permitted to take the course a third, or fourth, or fifth time until the student passes?"

[22] *E.g.*, Northwestern School of Law at Lewis and Clark, Chicago–Kent College of Law, George Washington University School of Law, Howard University School of Law.

[23] Directors in schools with the two-year rule say that virtually all students are successful in passing the course the second time because they know they must succeed if they want to graduate.

Conclusion

LRW programs teach essential lawyering skills, and the LRW professional has the opportunity to assess a student's progress in ways that other law professors cannot. Thus, LRW programs have a special burden in deciding which students should repeat the course to acquire mastery of fundamental skills. Often, the LRW professional finds that tough choices must be made in designing a curriculum that will permit the teacher to provide necessary individual assistance to a student, and at the same time will provide the teacher the opportunity and tools to accurately judge the student's progress. Those choices should result in a program of instruction that makes it possible for the LRW faculty member and the student to confidently agree at the end of the year that the student is prepared to move on to higher-level skill training in the process of becoming a lawyer.

Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research

BY SUSAN HANLEY KOSSE AND DAVID T. BUTLERITCHIE

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Editor's Note: Another Perspective on the Brutal Choice of CALR Access

Professor Paul Beneke recently argued in the pages of *Perspectives* that entering law students should be given immediate access to the full range of computer-assisted legal research (CALR) options when they arrive at law school.[1] This position is thought-provoking and interesting, but there are several persuasive arguments that suggest that the tradition of having students learn text-based research before exposing them to CALR is sound. Teaching the two research methods separately does not run counter to our universal goal of teaching students to be proficient in both approaches. In fact, we are convinced that staggering students' exposure to different research methods by introducing text-based research before CALR is more likely to lead to a higher level of overall research proficiency among a higher percentage of first-year law students.

There are three primary reasons that lead us to this conclusion. First, complete competence in text-based research remains vital. We suspect that the level of competence using text-based resources that we now expect of our students is likely to decrease if they have immediate access to CALR. Next, the reasoning process used in developing research paths for text-based resources is more easily illustrated in the classroom. When students begin their research by using CALR, there is a sense of serendipity involved.[2] Finally, we believe that law students should learn from the very beginning of their professional careers that the quickest and easiest path to completing a project is not necessarily the best or most complete path. The demands on a student's time are certainly great and anything seen as a shortcut will be embraced, but this shortcut mentality is both a professional and personal liability that we ought not reinforce. We discuss each of these positions in further detail below, and in the process of our discussion we address many of the arguments put forth by Professor Beneke. While we share his enthusiasm for the use of new technology—both in the classroom and in the profession—we tend to think that having students put one foot before the other is ultimately in their best interests.

The Importance of Text-Based Research

The use of text-based resources for legal research continues to be a vital skill for practicing attorneys. In many practice environments, attorneys are restricted in their access to CALR, either by financial or by practical concerns. Contrary to what the commercial CALR outlets would like us to believe, it is often not financially feasible for practitioners to use their services. Additionally, CALR often misses important sources of law that thorough text-based research will yield. While computer databases are becoming more complete as time goes by, there are still frequent instances where CALR fails to yield important sources. As a result of these considerations, the use of text-based legal research remains an important skill for any practicing attorney, and we are remiss if we fail to bring home this fact to our students.

Many attorneys represent clients who cannot afford to pay the exorbitant fees charged by for-profit computer research outlets. Other attorneys are finding out that their clients will refuse to pay for CALR. More and more clients maintain that they cannot justify paying the fees that commercial CALR outlets charge, even if this means paying for

"Teaching the two research methods separately does not run counter to our universal goal of teaching students to be proficient in both approaches."

[1] Paul Beneke, *Brutal Choices in Curricular Design ... Give Students Full CALR Access Immediately,* 8 Perspectives: Teaching Legal Res. & Writing 114 (2000).

[2] We owe this description to a conversation one of the authors recently had with Jan Levine.

more hours of an associate's time to do the research in a library. As a result, new associates often find that they are restricted from using the commercial computer databases that they became addicted to during law school. They must then relearn how to conduct text-based legal research, if they ever learned how to do it thoroughly in the first place. If we instill the fundamental importance of learning good text-based research strategies from the very beginning by concentrating our students' efforts on these strategies, they are likely to retain them longer. Skills teachers in upper-level courses should reinforce this initial concentration at every opportunity.

In Professor Beneke's *Perspectives* article, he suggests that limiting students' access in the way we suggest is irrelevant, as many of the materials that students can obtain through commercial CALR outlets can be found on free services on the Internet. While it is true that there are numerous resources available online, not all of these resources are as reliable or as thorough as commercial outlets. Because of the editorial and citator functions of commercial CALR outlets, it is doubtful these free online services would—or should—ever replace them. Part of what we should teach our students is how to discriminate between useful and authoritative sources and those that are not. One way to do this is to give them a thorough grounding in the official text-based sources available to them.

> "Part of what we should teach our students is how to discriminate between useful and authoritative sources and those that are not."

There is a more immediate and practical side to Beneke's position. He suggests that the problem with restricting students' access—either by withholding or by limiting their passwords for commercial CALR services—is that they can always access the information on the free services. Further, Professor Beneke contends that the limited-access passwords provided by the vendors are ineffective due to quality-control problems at their home offices that mistakenly allow many students to engage in comprehensive or full searches. This can lead to feelings of unfairness among members of the class. The implication of this position is that we should not stick our finger in a dike that is doomed to crumble. We find this position unpalatable. We believe there are simple solutions to these problems. At both Brandeis and Temple—as at most institutions—students receive no passwords until later in the fall term (after the use of print sources has been covered). This prevents some students from having an unfair advantage over others. If this is impossible at your law school, we suggest you simply make it an honor code violation for anyone to use the electronic sources before permission has been given by the instructor. While it is certainly the case that there will always be a handful of students who will violate the rules, ours is a profession of self-policing. We can instill this directly by holding students accountable for their actions.

Understanding the Research Process

It is undoubtedly true that students who are entering law school today are, generally speaking, much more comfortable with the use of technology both in the classroom and out. We agree with Professor Beneke that students should be encouraged in this, and that we should reinforce the notion that technology can serve as an important professional tool that can increase productivity and efficiency. It does not follow, however, that this position necessitates giving entering law students immediate access to online research products. In fact, teaching students traditional text-based research before exposing them to CALR can be useful in that it is somewhat easier to illustrate possible research paths in text-based media.

When we teach students how to research legal problems, we have a couple of goals. First, we are attempting to show them how to find relevant and useful resources that can help them answer the questions posed by the problem they are working on. We are also, however, forcing them to think through the logic of how these relevant and useful resources fit together in a coherent field of authority. Actually working through this process, seeing how the different resources fit together, and understanding where there are gaps and how they might be filled are all exceedingly important exercises for students to undertake. By using text-based resources, we can more easily illustrate in a way that is fairly easy to grasp exactly how this process works. In other words, it is far easier to make the logic of how the process of research is undertaken explicit by using text-based legal resources.

When students turn to CALR, they need not

think through the process of how different research paths fit together, how they transect, and how they can tell if they are being comprehensive in their research. All of this is hidden by the Boolean logic of the search programs. Typically, when students use CALR outlets they need only pick a database and enter a few general search terms. This invariably yields a large number of documents—usually very large, as students tend to use more general search terms early in their training—which may or may not contain the information that they ultimately need. On its face, this may not seem much different than having a student look in a regional (or, heaven forbid, a decennial) digest under a general term such as *negligence*. Both yield a great deal of data that may or may not be useful. The difference, though, is that we can explain—in a way that first-year law students who are not also computer scientists or logicians can understand—how what they have found fits into a comprehensive picture of available relevant resources.

It may be the case that students would still see the logic we are discussing here if they were to learn both text-based research and CALR simultaneously, but we doubt it. This is based on the nature of the students themselves. An increasingly large number of the students currently entering law school not only understand and are comfortable with technology, but also expect to learn by using technology. They get their news online, shop online, stay in touch online, conduct business online, and play games online. Given this propensity, it seems as though this generation of law students is more likely to prefer CALR over books. Because it is important that students be able to think through the process of research and understand the rationality involved in doing so, it is critical that we teach print sources before the CALR. We believe that their motivation to engage in this process seriously would be extremely reduced if CALR is introduced at the same time as text-based resources. If we stagger their exposure in the manner we suggest, a manner that traditionally yields sound results, students are much more likely to learn the print sources thoroughly.

The Quickest Path Is Not Always the Best

The final reason that compels us to maintain that students would benefit from having their access to CALR withheld relates to the fact that technology has the allure of offering quick shortcuts to seemingly time-consuming activities. In general, this is certainly true—at least to some extent. Using computers can decrease the time that we all spend on tedious tasks, and we actively encourage our students to use high technology both in and out of the classroom. Taking this too far, however, creates a dangerous presumption—a presumption that is potentially disastrous to law students, both to their work as students and to their work as professionals after they graduate.

When students enter law school, one of the first things they are likely to notice is that the demands on their time are varied and great. There is a tendency, then, for students to want to adopt any sort of shortcut that they can. Some shortcuts are not what they seem, however. Shortcuts can conceal the true complexity of an issue and have the effect of lulling us into complacency about the amount of effort that is truly required for a given project. This is one of the reasons why doctrinal faculty invariably advise their students to stay away from commercially produced briefs and outlines.

Exposing students to CALR too early in their law school careers would likely give them the impression that they can do all their research quickly and painlessly. Given that CALR databases are incomplete and considering that Boolean searches are not as comprehensive as our students might assume, it seems suspect to allow this sort of impression to linger. We are certain that all those who advocate exposing first-year law students to CALR, like Professor Beneke, attempt to drive home the point that text-based research is important at every opportunity. This message is bound to get lost, however, in the allure of the quick fix that CALR represents. By introducing text-based research first, we reinforce the notion that having the skill to use that body of resources is important. Such knowledge is an important foundation for students' thorough understanding of how all legal resources help them in their tasks as professionals. Holding the introduction of CALR devices and techniques in abeyance until after students have mastered text-based research techniques does not diminish skills that students need to have; it gives us time to set a strong foundation in place that students will need if they are to be successful in their chosen profession.

"Exposing students to CALR too early in their law school careers would likely give them the impression that they can do all their research quickly and painlessly."

Conclusion

The debate about whether CALR resources ought to be introduced early in a law student's career is surely a worthy and important topic for discussion. Many of the things we suggest may not seem as persuasive in the future as CALR resources become more reliable and comprehensive. At this point, however, having students master text-based research before they are exposed to CALR seems to be the most sound way to ensure that they learn each completely and thoroughly. Students need to learn text-based research methods thoroughly, as many will find that their CALR access is limited once they enter the work world. It is also important to have students understand the logic behind their research paths. Focusing on text-based research at the beginning of their first year will make this more likely. Finally, legal research and writing professionals would be remiss if we allowed our students to think that taking shortcuts wherever possible is a healthy habit to form. Professor Beneke makes strong arguments for the importance of giving first-year students immediate access to CALR resources, but we are convinced that we ought to guide our students as they take their first steps in legal research.

Teaching Students to Make Effective Policy Arguments in Appellate Briefs

BY ELLIE MARGOLIS

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Legal writing teachers frequently lament the quality of policy arguments contained in student briefs. They are vague, general, and unsupported by authority. They often start with the stock phrase "For reasons of public policy …" without identifying which "public policy" is being asserted or discussing specifically how the proposed rule will advance that policy.[1] As legal writing teachers, we can do a better job of teaching our students how to make these arguments more effective by focusing on policy argumentation as a specific and distinct skill. We very deliberately teach students different kinds of legal arguments (arguing from a rule, arguing by analogy, etc.), how to structure them, and how to support them with authority. We should do the same with policy arguments.

For most students, the introduction to policy-based reasoning occurs in doctrinal courses such as contracts and torts. In these courses, students are taught how to discern the underlying policy in a particular judicial decision. Many legal writing programs pick up on this and teach students how to identify the underlying policy of an existing rule and show how that policy applies to a particular fact pattern or client situation.[2] This is a very limited use of policy, however, and only part of the skill of making policy arguments that a student should learn in order to become an effective advocate.

An equally important part of the skill of policy argumentation is implicated when the advocate is urging a court to adopt a particular legal rule for a new situation, not just apply an existing rule to a set of facts.[3] This type of argument is particularly important in appellate brief writing, where advocates will frequently be addressing novel issues of law. This kind of policy argumentation is generally not taught in law school legal writing programs. Although many of the legal writing and appellate advocacy textbooks mention policy arguments, some do not, and none of them has any specific discussion of how to make those arguments effectively.[4] It is time for legal writing professionals to take up the task of teaching students to make sound, persuasive policy arguments.

The approach to teaching policy that is most consistent with legal writing pedagogy, and which provides a clearer understanding of how policy can be used in the real world of law practice, focuses on the "use" of policy rather than its "discovery."[5] Instead of trying to discern how policy considerations affected a particular decision, students should be taught to understand the nature of different types of policy arguments and how an understanding of policy can affect the way a legal problem is viewed. This will allow students to make choices about "what policy argument best

> "It is time for legal writing professionals to take up the task of teaching students to make sound, persuasive policy arguments."

[1] Although the focus of this article is on student writing and teaching students to make effective policy arguments, many practicing attorneys fall victim to the same errors in making vague, unsupported policy arguments (or relying solely on discussions of policy in reported cases) in appellate briefs. *See generally* Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S. F. L. Rev. 197 (2000) (hereinafter *Beyond Brandeis*).

[2] Most of the legal writing textbooks cover this type of policy argument. *See, e.g.*, Linda H. Edwards, *Legal Writing—Process, Analysis, and Organization* 107 (2d ed., Aspen L. & Bus. 1999) (hereinafter referred to as Edwards, *Legal Writing*); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing* 131 (3rd ed., Aspen L. & Bus. 1998); Diana V. Pratt, *Legal Writing: A Systematic Approach* 325 (3d ed., West 1999); Helene S. Shapo, Marilyn Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 44 (4th ed. 1999)(hereinafter referred to as Shapo).

[3] For a fuller discussion of the difference between arguing the policy of an existing rule and arguing policy for a new rule, see Margolis, *supra* note 1 at 211–213.

[4] *See, e.g.*, Ruggero J. Aldisert, *Winning on Appeal* (Revised 1st ed., NITA 1996) (no specific discussion of policy arguments); Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 100 (West 1998) (general explanation of equity and policy arguments); Edwards, *Legal Writing*, *supra* note 2 at 107 (discussing policy-based reasoning, but no discussion of how to make policy arguments); Neumann, *supra* note 2 at 271–272 (3rd ed. 1998) (discussing the importance of policy arguments, but not how to support them); Laurel Currie Oates, Anne Enquist & Kelly Kunsch, *The Legal Writing Handbook* 61–62 (2nd ed., Aspen L. & Bus. 1998) (listing policy as a "type" of argument with no explanation of what a policy argument is); Diana V. Pratt, *Legal Writing: A Systematic Approach* 320–326 (3d ed. 1999) (discussing policy arguments and sources for support, but no specific explanation of how to put together); Shapo, *supra* note 2 at 198–202 (section discusses types of policy argument, but not how to support them).

[5] Paul Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. Miami L. Rev. 409, 456 (1986).

"Because this approach has more of a real-world feel, students are more likely to learn what policy analysis is about."

supports a particular side in a particular dispute."[6]

This approach is most consistent with the way lawyers actually use policy in the context of representing clients. It doesn't assume that there is an objectively correct policy that requires a particular outcome, but rather that in a particular case, involving particular facts, there is a policy consideration that benefits one party more than the other. Thus, rather than encouraging students to find the "correct" policy, this approach encourages students to find the policy that best advances their hypothetical client's interests. Because this approach has more of a real-world feel, students are more likely to learn what policy analysis is about.[7]

This approach is also similar to the way most legal writing programs teach case analysis. Rather than reading cases simply to figure out what they mean, which is the approach generally taken in doctrinal courses, in legal writing classes, students read cases so that they can use them to solve problems.[8] Using this same functional approach, legal writing professors encourage students to articulate a rule from a case, or synthesize a rule from a group of cases, in a way that benefits their hypothetical client. For example, in some situations a narrow, fact-based statement of the rule may be more beneficial if it is to the client's advantage to apply the rule narrowly, while in other situations a more abstract articulation of the rule might allow the client to assert that the rule applies to a different fact scenario. This ability to use cases in different ways is a crucial skill, particularly for persuasive writing such as is necessary in an appellate brief.[9] Students recognize that this is a valuable skill they will need in practice and, as a result, struggle to master it. If policy arguments are taught in the same way, students should likewise be motivated to grasp them.

Why is teaching students to use policy effectively important? Because policy can play an extremely important role in judicial decision making, particularly in cases that require a court to resolve a novel issue of law or develop a new rule of law. Renowned judge Benjamin Cardozo recognized this in his famous book *The Nature of the Judicial Process*,[10] asserting that to address novel issues of law, judges must turn to "public policy, the good of the collective body."[11] Judges today recognize that this is still an important part of judicial decision making.[12]

Policy can play a role in almost any case, but policy plays an especially important role in three types of cases—common law cases of first impression, constitutional cases raising novel application of constitutional provisions, and cases of first-time statutory interpretation.[13] In these cases, there is no directly binding authority that directs the court to act in a particular manner. Instead, the court must create new law, assuming a "legislative" function. When faced with this situation, judges can employ a variety of approaches, including reasoning based on precedent, principle, and policy. When judges rely on policy-based reasoning, they often base this reasoning on intuition or experience, rather than on a well-researched argument.[14]

A lawyer writing a brief should be apprehensive about relying on judges' intuitions about public policy. If a lawyer is writing a brief in a case in which policy is likely to be a factor, she should make a sound, well-researched, effective policy

[6] *Id.*

[7] *Id.*

[8] *See* Ralph L. Brill, Susan L. Brody, Christina L. Kunz, Richard K. Neumann Jr. & Marilyn Walter, *Sourcebook on Legal Writing Programs* 6 (ABA Section of Legal Education and Admissions to the Bar 1997) (hereinafter *Sourcebook*).

[9] This is particularly true when an appeal raises an issue of first impression, in which there is no directly binding authority. I use an appellate brief problem that raises an issue of first impression for the express purpose of giving the students this experience and having them practice the skill of using cases that could arguably support a result for either party. Many other legal writing professors use similar problems, as evidenced by a review of Idea Bank submissions for the 1998 Legal Writing Institute Conference.

[10] Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

[11] *Id.* at 72.

[12] *See* Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 Loy. L.A. L. Rev. 673, 677 (1999) (a central tenet of modern jurisprudence is that "[j]udges should consider the effect of their judicial decisions on society and social welfare, rather than adhering solely to a mechanical jurisprudence of legal conceptions"); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 10 (1995) (state court judges, when dealing with issues of first impression or filling in gaps, "are frequently left to choose among competing policies").

[13] For a full review of these types of cases and why policy plays a critical role, see Margolis, *supra* note 1 at 219–232 (asserting that the American common law method creates gaps in the law that must be filled, even in cases involving statutes or other positive law, and that filling gaps is most often done with policy).

[14] *Id.* at 221 (citing Oliver Wendell Holmes Jr., *The Common Law* 1 (Little Brown & Co. 1990) (1881)).

argument in the brief, just as she should make sound, well-researched legal arguments.[15] In legal writing, we teach students to write briefs that precisely explain how a case supports a particular point. We emphasize the importance of presenting a case from the client's viewpoint, rather than letting the judge read the law and decide how it applies. We should do the same with policy, encouraging students to make effective policy arguments from the client's viewpoint to back up their legal arguments in appropriate cases.

The Nature and Types of Policy Arguments

In order to do this, we need to teach our students about the different kinds of policy arguments that can be made, as well as how to effectively support those arguments with persuasive authority. While there are several different types of policy arguments, all policy arguments share the common attribute of advocating that a proposed legal rule will benefit society, or advance a particular social goal (or, conversely, that the proposed rule will cause harm and should not be adopted). Because a new rule, or a new application of an existing rule, will have implications beyond the individual case, the appellate court deciding the case will be concerned with how the rule will work for future litigants, as well as for society at large. Thus, all policy arguments involve an assessment of how a proposed rule will function in the real world.

In constructing a policy argument, the advocate must first convince the court that the particular goal is a desirable one for the individual client, and also for society as a whole. The goals for most policy arguments are ideals for which there is general social consensus—ideals such as fairness, justice, efficiency, and promotion of public health and welfare. Identifying the goal is the simplest part of developing a sound policy argument.

Then the advocate must show the court how the proposed rule would serve to achieve that goal. In this two-step process, it is usually in the second step that brief writers fall short. When extracting policy from an existing source of law, the type of policy-based reasoning lawyers are generally trained to do, an advocate can generally argue for the application of that reasoning to a new situation. It is much more difficult, however, to construct this same kind of policy analysis when it cannot be found in a source of legal authority.[16] Students must have an understanding of the different types of policy arguments in order to successfully accomplish this.

There are very few sources in which to find information about the nature of different types of policy arguments.[17] Very few legal writing–oriented materials have any description of different types of policy arguments.[18] It is difficult to divide policy arguments into firm categories, since there is considerable overlap between different types of policy arguments. In order to provide a concrete overview, however, I have synthesized the various types into four broad categories, some of which have sub-categories: 1) arguments about judicial administration, including firm versus flexible rule arguments, "floodgates of litigation" arguments, and "slippery slope" arguments; 2) normative arguments, including moral, social utility, and corrective justice arguments; 3) institutional competence arguments; and 4) economic arguments.

A. Judicial Administration Arguments

First-year law students quickly become familiar with judicial administration arguments, though they may not be identified as such. These are the arguments that are most frequently identified in doctrinal courses. Judicial administration arguments are arguments about how a proposed rule will affect the workings of the justice system. These are arguments about the practical administration of the rule by the courts. The goal at the heart of these arguments is a fair and

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[15] In *Beyond Brandeis*, the author suggests that an attorney may, in fact, have an ethical obligation to make such arguments and support them with all available sources of authority, both legal and nonlegal. *See id.* at 206.

[16] Margolis, *supra* note 1 at 212.

[17] There may be information about different types of policy arguments in some doctrinal casebooks for courses such as contracts and torts. These discussions are by nature, however, limited to the particular subject they address, and are not generally accessible to an individual trying to find information on this subject.

[18] The exceptions are Shapo, *supra* note 2 at 198–202 (describing in some detail four types of policy arguments: normative arguments, economic arguments, institutional competence arguments, and judicial administration arguments) and *Sourcebook*, *supra* note 8 at 19 (describing four types of policy arguments: economic consequences arguments, administrative efficiency arguments, institutional competence arguments, and fairness and justice arguments).

efficient judicial system. There is little dispute that this is a valuable goal for society.

The dual goals of fairness and efficiency are sometimes at odds, however. This tension gives rise to the first type of judicial administration argument, the "firm versus flexible rule" argument. The argument for a firm rule is that a clear, specific standard will be easy for the court to administer, and therefore promote efficiency. A firm rule also promotes fairness by leaving little room for judicial discretion and leading to more consistent application, which makes it easier for citizens to understand the rule and act accordingly. A flexible rule would create confusion, be more prone to judicial abuse, and undermine the rule of law. Thus, the "firm rule" argument attempts to show how both fairness and efficiency are promoted by adoption of a clear, precise rule. The "flexible rule" argument, on the other hand, focuses more heavily on fairness. The argument for a flexible rule is that flexibility will allow the court to adapt to changing times and new circumstances, and take into account the individual circumstances of each case. Because a flexible rule will be more responsive and fair, it will promote greater confidence in the judicial system.

There are three other judicial administration arguments that focus primarily on efficiency. These can be made individually or combined with the firm/flexible rule arguments. The first is the "floodgates of litigation" argument.[19] This argument asserts that a proposed rule, if adopted, will inundate the court with lawsuits. This could either be because the rule is confusing, because it is very broad, or because the problem it addresses is extremely common. The "flood" of litigation would overwhelm the courts and lead to inefficient use of the courts' valuable time and resources.

The second of these arguments is the "slippery slope" argument. This is similar to the "floodgates" argument, but contains an element of fairness as well as efficiency. This argument asserts that if the proposed rule is adopted, the court will not be able to prevent its application to a broader and broader set of cases. First it will be applied to one new circumstance, then another, leading the court to hear a whole range of cases it never intended to entertain. This argument may also assert that adoption of the rule will lead to a large number of frivolous claims. This argument calls on the same efficiency themes as the "floodgates" argument, but also raises the specter of fairness by suggesting that it is unfair to open the door to a whole new type of liability, unexpected by both citizens and the courts.

The final judicial administration argument asserts that a proposed rule, even if firm, is so complex that it will be impossible to administer efficiently. The complexity of the rule will create unfairness to citizens by making it difficult to understand and comply with the law. The rule will also undermine judicial efficiency by requiring a large number of judicial resources in order to resolve claims under the rule.

B. Normative Arguments

The next major category of policy arguments is normative arguments—arguments that a proposed rule promotes or undermines shared societal values. Although there is significant overlap between different types of normative arguments, they can be broken down into roughly three categories: moral arguments, social utility arguments, and corrective justice arguments.[20] Normative arguments tend to appear more "political" in nature because, in today's complex society, there is rarely widespread social consensus on issues of morality or other social good. As a result, the goal in a normative policy argument is not always as obvious or easy to establish as the goal in a judicial administration argument.

Moral arguments generally take the form of asserting that a particular rule should be adopted because it is consistent with generally accepted standards of society. The goal is a system in which the laws are consistent with, and promote, those moral values society deems important. For example, an advocate might make a moral policy argument to support a rule that promotes public safety. The goal at the heart of this argument is a society in which we protect and care for one another, an altruistic view of the world not shared by all. Just as judicial administration arguments

[19]This argument is much overused and used inappropriately. Over the years, I have seen many student briefs making "floodgate" arguments because the students know they should make some kind of policy argument and this is the only one they can think of. While this argument still has value, it should be used selectively, and only where truly appropriate.

[20]Shapo, *supra* note 2 at 199.

raise a tension between efficiency and fairness, moral arguments raise a tension between individualism and altruism.[21] Moral arguments, therefore, often come in opposing pairs such as "form versus substance" and "freedom versus security."[22]

The next type of normative argument is the social utility argument. Under this argument, the advocate asserts that a proposed rule will serve a social good and benefit society or, conversely, will undermine a social value and harm society. In this type of argument, the goal is a society that promotes the health and well-being of its citizens. The argument asserts that the proposed rule either deters or encourages conduct that affects the goal. Social utility arguments often intersect with moral and economic arguments, and focus on goals such as public health, public safety, economic health, and national security. Social utility arguments are particularly useful in tort law cases[23] in which a court is asked to impose liability and compensate an individual for harm.

The final normative policy argument is the corrective justice argument.[24] This argument centers on the goal of fairness and asserts that as between two innocents, the one that caused the damage should be responsible. This is also an argument that is most useful in cases in which the court must determine tort liability. Because this argument focuses more directly on the actual parties before the court, it is less likely to be useful in cases raising novel issues. In common law cases of first impression, however, in which the court is being asked to establish a new cause of action, corrective justice arguments could be very useful.[25]

[21] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1737–1738 (1976) (hereinafter *Form and Substance*).

[22] James Boyle, *The Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003, 1058 (1985).

[23] Social utility arguments can also be made in cases of first-time statutory interpretation, in which a court uses policy norms to decide on the application of a statute to a new situation. *See* Margolis, *supra* note 1 at 226 (citing Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 Stan. L. Rev. 1, 16 (1998)).

[24] Shapo, *supra* note 2 at 199.

[25] For a more detailed explanation of the frequency with which state courts are asked to find new causes of action, see Margolis, *supra* note 1 at 223–223 (citing Kaye, *supra* note 12 at 7).

C. Institutional Competence Arguments

The third major category of policy arguments is "institutional competence."[26] These are arguments about which branch of government (generally the judiciary or the legislature) should address a particular issue. The goal at the heart of institutional competence arguments is the fair and efficient running of the legal system, as well as the maintenance of the constitutional separation of powers. While it is generally understood that legislatures create new law and courts apply the law and resolve disputes, there is a gray area that makes room for institutional competence arguments.

The gray area is a product of the common law method in American legal decision making, even in cases involving positive law (i.e., statutes and constitutions). Under the common law method, judges have the power to fill in gaps in the law and formulate new rules. Thus, judges have a degree of legislative power, creating the potential for arguments over whether an issue is better suited to the courts or the legislature.

An argument that an issue is better suited for the courts focuses on the nature of courts as institutions set up for resolving individual disputes and dealing with complex factual issues. The argument would emphasize the court's ability to be responsive to changing circumstances, and to be objective. In addition, the court has a unique ability to entertain witnesses and make objective determinations of credibility. Finally, this argument would emphasize the court's freedom from the political constraints faced by the legislature. Because courts combine all of these abilities, the legal issue is best resolved by a court.

The argument that the legislature is better suited to resolve an issue focuses on similar concerns. This argument asserts that courts are not competent to resolve the issue because resolution involves a change in the law, which is within the legislature's province. The legislature is better able to reflect changes in public opinion, and to hold hearings and gather complex and varied facts that may not be relevant in the context of litigation. Allowing the court to create law on such an important issue would threaten the separation of powers.

[26] Kennedy, *Form and Substance*, *supra* note 21 at 1752.

"The final challenge is teaching the students how to effectively support these arguments with authority."

D. Economic Arguments

Economic policy arguments have become more important in modern legal decision making as a result of the Law and Economics movement.[27] Most law students and lawyers are at least somewhat familiar with economic policy arguments. A lawyer with a background in economics can make very complex economic policy arguments, but there are simpler economic arguments that all students can be taught to make. Economic arguments place economics, rather than fairness or justice, at the center of judicial decision making.[28] The goal for economic arguments is economic efficiency and promotion of a free-market economy. Economic arguments can be very persuasive because they give the appearance of scientific rigor and neutrality, often masking the political choices inherent in the arguments.[29]

One form of economic argument focuses on the efficient allocation of resources, asserting that a rule should be adopted because it promotes the most efficient allocation. For example, a rule might be desirable because it spreads loss over a large segment of the population. On the other hand, a defendant trying to avoid liability in a products liability suit might argue that the cost of such liability will be passed on to the public, ultimately punishing those the rule was designed to benefit.

Another form of economic argument asserts that a cost-benefit analysis dictates that a rule should be adopted. Under this analysis, the arguer must show that the economic benefits created by the rule outweigh the costs of implementing it. If the benefits do not outweigh the costs, then the rule should not be implemented. The key to a cost-benefit analysis is the determination of the factors going into the cost. In addition to obvious costs, such as the monetary cost of fixing a defective part, costs such as emotional damage can be factored in. The inclusion or exclusion of particular factors can greatly affect the nature of a cost-benefit policy argument.

A third type of economic policy argument is that the proposed rule will have a positive or negative effect on economic efficiency and affect the operation of the free-market economy. The goal in this argument is a system that promotes competition and the growth of the economy. A free-market argument would assert that a proposed rule would either promote or inhibit competition, and should be adopted or rejected on that basis. This argument obviously overlaps the social utility argument described earlier.

There are, of course, many other types of policy arguments and many nuances to the arguments categorized earlier. This article outlines only the major, and most common, categories of policy arguments. If legal writing teachers give their students a solid grounding in these types of arguments, and an understanding of how policy works in conjunction with legal arguments, we will be making great strides in improving our students' ability to write persuasive briefs. The final challenge is teaching the students how to effectively support these arguments with authority.

Supporting Policy Arguments with Persuasive Authority

The biggest problem with policy arguments is that, even when they are made, they are not generally supported with authority. Without support, policy arguments convey the mushy, "any position can be supported by some policy, so why should the policy have any impact?" message that causes many to be cynical about the use of policy arguments. There can be little dispute that, to be persuasive, policy arguments should be substantiated. Policy arguments should be supported just like legal arguments are supported with authority. We would never teach our students to make a legal argument off-the-cuff, without any reference to statutes or precedent that supports the argument. Similarly, we should not encourage students to make policy arguments without teaching them how to effectively support those arguments.

One source of support for policy arguments is legal authority, including cases, statutes, and legislative history. Legal authority can be particularly useful in supporting the goal underlying the argument. For example, virtually every jurisdiction has a case that identifies public safety as a valuable social goal. For the second step in policy argumentation, however, traditional sources of legal authority are often inadequate.

[27] *See* Richard A. Posner, *Economic Analysis of Law* 211–22(4th ed. 1992) (asserting that economics in the law has come to the forefront over the last 30 years).

[28] *See generally*, Shapo, *supra* note 2 at 200.

[29] Boyle, *supra* note 22 at 1059–1060.

Because, by definition, the argument is advocating a rule or application of a rule that has never been implemented, it is unlikely that existing cases and/or statutes have addressed the effect the rule will have on the goal.

Nonlegal materials[30] are often the best, and sometimes the only, support for policy arguments. It makes sense that legal arguments, which are based on precedent, should be supported by precedent, while policy arguments, which are nonprecedential,[31] should be supported by nonprecedential, nonlegal sources. Policy arguments are arguments about the effect a legal rule will have, how it will operate in the real world. Therefore, facts about the real world, rather than legal principle, are most appropriate to support these arguments.

Used in this way, nonlegal materials play the same role as nonbinding, persuasive case authority.[32] In legal writing, we teach students to use relevant persuasive authority, particularly when there is no binding authority. We would never tell students to make an argument without any authority when there was relevant persuasive authority that would support the argument. In the same way, we should not be teaching students to make policy arguments without authority, as long as there is a source of information that supports the argument.

Conclusion

Policy arguments are an important, but often overlooked, part of appellate advocacy and brief writing. As teachers of legal writing and advocacy, it is time for us to take up the task of teaching our students to make clear and effective policy arguments in writing. It is no longer good enough to say "policy is important and you should support your legal arguments with policy rationales." We need to give our students clear, detailed information about the nature and types of policy arguments, as well as how to support them with persuasive authority. There are many challenges associated with teaching this subject. We need to learn more about policy arguments ourselves.[33] We need to think about how policy arguments should be structured, and how to effectively research nonlegal materials. Much more work can be done in determining what kinds of information provide the best support for different types of policy arguments. Finally, this is one more thing to teach in programs that already contain too much work for too little credit. In spite of the challenges, however, policy arguments are important, and the time has come to devote more attention to them.

> "We need to think about how policy arguments should be structured, and how to effectively research nonlegal materials."

[30] Nonlegal materials are factual or theoretical information that is not part of the trial record of the case on appeal. This information can include scientific theory and data, sociological data, statistical information, economic theory and data, psychological theory and data, and news of current events. *See* Margolis, *supra* note 1 at 201, n.27. For a more detailed analysis of nonlegal materials and why they are appropriate to use as authority in appellate briefs, *see id.* at 202–219.

[31] *See* Boyle, *supra* note 22 at 1055.

[32] *See* Margolis, *supra* note 1 at 209.

[33] This work is really just a beginning at understanding policy arguments and how they can be used in appellate briefs. There are many more issues to be explored as we learn more about writing and teaching these often complex arguments. *See id.* at 235–236.

THE SYNTHESIS CHART: SWISS ARMY KNIFE OF LEGAL WRITING

BY TRACY MCGAUGH

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Teachable Moments for Teachers ... *is a regular feature of* Perspectives *designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the* Teachable Moments for Students *column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own "teachable moments for teachers" to the editor of the column:* Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

The standard curriculum for first-year legal writing courses usually includes some time devoted to teaching students how to synthesize or fuse rules of law from several cases. The rule resulting from this synthesis can then be applied to a hypothetical client situation. This synthesis (or fusion) of the rule and its application to the client's situation is usually demonstrated by using a chart called a synthesis chart. Some professors use another name for the chart such as fusion chart, decision chart, or something along those lines. The chart usually looks something like this:

In the chart, the issues students will analyze, along with the result of each case, are listed across the top of the chart as the first row. The case names and jurisdictions are listed down the left side of the chart as the first column. In each square within the chart are the facts from the cases that correspond to the issues to be analyzed. Once students have categorized information in this way, they can derive a general rule that comes from synthesizing the cases. Next, students can use the chart to help them apply that rule to their client's situation. I describe the chart to students as a way to manage all of the information needed to synthesize cases.

To make sure that students are off to a sound start on their analysis of the first memo assignment, I have them prepare a synthesis chart for their client's case, and I give them feedback on the chart. After the students have synthesized the cases, received feedback on their chart, and begun to draft the memorandum, we leave the synthesis chart behind. My reason for leaving the chart behind has always been that it has served its purpose and is no longer useful: We have finished the analysis phase of the project and are ready to begin communicating that analysis. This year, I realized that I had been underestimating the synthesis chart by casting it aside so early. The synthesis chart was like a Swiss Army knife that I had been using only as a knife. This year, I realized that the gizmo has a corkscrew, a spoon, and nail clippers!

This realization struck me in the middle of class (where I get all of my best ideas). I was explaining how to construct a synthesis chart. I heard myself say that once the issues had been identified and the cases selected, filling in the chart was just a matter of selecting the facts from the cases that matched the issues. What I heard myself describing as the

Synthesis Chart for False Imprisonment Cases

	Element 1: Willful Detention	Element 2: Without Authority of Law	Result
Black v. Kroger Tex. App. 1975	• threatened with not seeing child and with jail • long-time employee	*not discussed*	Recovery
Morales v. Lee Tex. App. 1984	• threatened to call the police • plaintiff left and came back	*not discussed*	No recovery
Randall's v. Johnson Tex. 1995	• ER insisted that EE "stay put"	• supervisor restricted EE to office • on the clock • subject (theft) was job-related	No recovery
Our Case: Hall 2000	• threatened with detention order	• off the clock • subject (alcohol abuse) was job-related	Probable recovery

content of the chart was *legally relevant facts*. I have used those same words—the facts that match the issues—year after year to explain the difference between relevant and irrelevant facts. However, identifying legally relevant facts seems overly complex to students, even though filling in a synthesis chart does not.

After that class, I went back to my office and took a good look at a synthesis chart. Suddenly, it was a completely different animal. Instead of being a tool to be used exclusively for *analysis*, every part of the synthesis chart could be used as an outline or checklist for *drafting* different parts of a legal memorandum. I began using the chart to transition between developing the analysis and communicating the analysis.

First, I explained to students that if they filled in their charts with the facts that correspond to the issues, they would automatically have an issue-by-issue catalog of the primary legally relevant facts from each case. For the first time ever, I had a "trick" to help them learn legally relevant facts. Traditionally, students have real difficulty grasping the difference between legally relevant facts, irrelevant facts, and elements or factors. Once I showed them that the legally relevant facts were the ones in the internal portion of the chart, the irrelevant facts were the ones with no place in the chart, and the elements or factors of law were the issues listed across the top of the chart, those concepts that used to be so difficult to grasp became very clear very quickly.

Immediately following the first realization was the realization that this "trick" could also help students see when they had included legal conclusions in their statements of the issues. In the past, I would say in as many different ways as I could think of, "In your Issues Presented, you've included legal conclusions rather than legally relevant facts." That never really seemed to go anywhere. Now I realized that I could say, "You've included information from the top of your chart, which contains your legal rules, when you really need information from *within* the chart, which contains your legally relevant facts." Rather than having to describe those concepts in the abstract time and time again, I now had a quick, concrete reference I could point to to show the difference between the two types of information. The clicking sound of lightbulbs turning on has been almost audible this semester.

Those two new tricks would certainly have been sufficient to justify encouraging students to keep and refine their synthesis charts even after I had seen and evaluated them. However, I discovered that the chart had even more value. My students usually seem to understand that comparing the facts of their client's case to facts of previous cases is helpful. However, many students are unsure about exactly what that means in terms of drafting. Using the synthesis chart, I was able to show them that analogizing and distinguishing cases simply means comparing or contrasting the legally relevant facts that appear within one column of the chart. This seems to narrow the task of choosing facts to analogize. Rather than comparing the mountain of information in the case law to the mountain of information in the assignment, students had pre-categorized information in a manageable format. They simply had to take the information already organized in a single column and compare the squares from other cases to the square for their client's case.

Students no longer had to abandon the synthesis chart after synthesizing the cases. They could now use it as a way to identify legally relevant facts, differentiate between facts and law, and analogize or distinguish cases. In using the chart for these purposes during the drafting phase of the project, students began to see more clearly the link between the way legal problems are analyzed and the way they are communicated.

Because the synthesis chart now seemed to have so many uses, I thought the students could use a road map for the chart that summarized its various uses as they drafted their memos. To provide this road map, I drafted a handout that I called Anatomy of a Synthesis Chart (chart follows).

This is the first year I have recognized and accessed the many features of my Swiss Army knife. I have already noticed an improvement in student recognition of legally relevant facts and in the analysis in their memos. In addition to being very impressed with how brilliant a teacher I accidentally was on the day I had my epiphany, I learned something that was even more valuable than the many ways to use a synthesis chart: I apparently have a lot to teach myself if I'll only pay attention and listen.

"I began using the chart to transition between developing the analysis and communicating the analysis."

Case	Factor 1	Factor 2	Factor 3	Result
A v. B Int. Ct. 1972	Fact X			
C v. D Int. Ct. 1983	Fact Y			
E v. F Int. Ct. 1997	Fact Z			
Our Case 2000	Fact Q			

Anatomy of a Synthesis Chart

This chart is designed to show you how a thorough, completed synthesis chart can help you even after you have planned your analysis and begun to draft your argument.

- Facts X, Y, Z, and Q are *legally relevant facts.* Remember that one of the goals of this assignment is to demonstrate that you know the difference between relevant and irrelevant facts by including only the legally relevant facts. If you have already identified those facts in your synthesis chart, then you have a quick reference for the legally relevant facts in your case and in the precedent cases. You will need to use relevant facts in your Issues Presented, Short Answers, Statement of Facts, and Discussion.
- Remember that in CREAC (the organization of your Discussion section), the "A" stands for "Application." An effective way to demonstrate that a previous case does or does not apply to your case is through fact analogy. For example, if you want the same result as *A v. B* and *C v. D*, an effective way to argue for that result is to demonstrate how those cases are factually analogous to your case. For example, you would argue that Fact Q is significantly similar to Facts X and Y. Likewise, if you wanted to argue that you should not have the same result as *E v. F*, then you would argue that Fact Z and Fact Q are significantly different. Identifying and developing comparisons and contrasts between the cases is much easier if you have a chart with all of the facts organized.
- The elements (listed across the top of the chart) can help you organize your Discussion. They will guide you in deciding what points you will need to make to argue your case successfully. For example, if you have an aggregate rule that requires that you satisfy a majority of the elements, then the chart gives you a quick reference for which elements your case satisfies and, later, gives you a checklist to compare your Discussion with so you can make sure that you included all the elements you had intended to include.

MANDATORY V. PERSUASIVE CASES

BY BARBARA BINTLIFF

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Teachable Moments for Students ... *is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a "teachable moment," a brief window of opportunity when-—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the* Teachable Moments for Teachers *column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own "teachable moments for students" to the editor of the column:* Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

It's pretty typical for law students, especially first-year law students, to get so involved in a legal research project that they forget what they're really doing. They find law review articles, statutes, cases, treatises, and encyclopedia entries on their topic, and yet don't know which to use or why to use it. They lose sight of the fact that, in the end, most legal research is a search for authority, something that will cause a court to decide in your favor or, better yet, that will cause your opponent to settle a case in your favor before it gets to court. Authority comes in several versions: primary and secondary, mandatory and persuasive.

Primary authority is that coming directly from a governmental entity in the discharge of its official duties. Primary authority includes documents like case decisions, statutes, regulations, administrative agency decisions, executive orders, and treaties. Secondary authority, basically, is everything else: articles, Restatements, treatises, commentary, etc. The most useful authority addresses your legal issue and is close to your factual situation. While decision makers are usually willing to accept guidance from a wide range of sources, only a primary authority can be mandatory in application.

Just because an authority is primary, however, does not automatically make its application in a given situation mandatory. Some primary authority is only persuasive. The proper characterization of a primary authority as mandatory or persuasive is crucial to any proceeding; it can make the difference between success and failure for a client's cause. This is true of all primary authority, but this column will address case authority only.

Determining when a court's decision is mandatory or persuasive can be tricky, given the multiple jurisdictions throughout the country and the layers of courts within each jurisdiction. Our court systems are founded on the belief that there should be fairness, consistency, and predictability in judicial decision making. The doctrine that expresses this concept is labeled *stare decisis*. In essence, *stare decisis* considers mandatory, or binding, an existing decision from any court that exercises appellate jurisdiction over another court, unless the lower court can show that the decision is clearly wrong or is distinguishable from the case at hand.

The following is a brief explanation of when the decisions of a particular court should be characterized as mandatory or persuasive. It deals only with the decision of the majority of the court; no matter how appealing in content, dicta, concurrences, and dissents will always remain persuasive.

When Decisions Are Mandatory

Whether a decision of a particular court is mandatory, whether it must be followed by another court, depends on the source of the decision. As a general rule, the decisions of a court will be mandatory authority for any court lower in the hierarchy. Decisions from a court lower than the one in question are never mandatory.

> "While decision makers are usually willing to accept guidance from a wide range of sources, only a primary authority can be mandatory in application."

"[T]he degree of persuasiveness will vary, dependent on a wide range of considerations."

Federal Courts

United States Supreme Court—The decisions of the United States Supreme Court are mandatory authority in all courts, federal and state, when the decisions cover points of federal law.

United States courts of appeals—Decisions of the U.S. courts of appeals are mandatory on district courts and other lower courts within the circuit. Court of appeals decisions are persuasive authority in the other circuits, both for other courts of appeals and for lower courts. Federal courts of appeals decisions are not binding on state courts.

United States district courts—The decisions of U.S. district courts are mandatory on specialized lower courts if within the appellate jurisdiction of the district court (i.e., bankruptcy, territorial courts, etc.). District court decisions are not binding on state courts.

State Courts

State supreme courts, on decisions of state law—The decisions of a state supreme court on that state's laws are mandatory authority for all lower courts in that state. State supreme court decisions will also be binding on federal courts that are interpreting the state's law under diversity jurisdiction.

State appellate courts, on decisions of state law—Decisions of state appellate courts, when adjudicating that state's laws, are mandatory on all lower courts in the state. (Note: In some states, the appellate courts are divided into circuits or panels. If this is the case, decisions of an individual circuit or panel most likely will be binding within the jurisdiction of that circuit or panel, and will be persuasive authority for other courts in the state. Check the court rules or case law in the state involved to understand how the system works.

State trial-level courts—State trial-level decisions will be mandatory authority only if the trial-level court exercises review over a lower court's decisions. For example, in many states, parties can have a review or rehearing of cases originally heard in the county courts, traffic courts, or municipal courts.

When Decisions Are Persuasive

A court's decision can be used as persuasive authority in any state or federal courts that do not need to consider it mandatory. It is important to remember, however, that the degree of persuasiveness will vary, dependent on a wide range of considerations. For example, as a practical matter, the interpretations of federal laws by the federal courts of appeals and district courts might as well be mandatory on the state courts within the same jurisdictions, in situations where the state courts are interpreting federal law. That is, if a state court is hearing a case in which a federal claim is a part of a larger state claim, the state court will generally consider itself bound by the decisions of the U.S. district court of that state and the corresponding federal court of appeal on the federal matter.

Factual similarity is key to choosing among persuasive decisions; if the legal issues are the same, the decision based on the most closely matching factual situations will usually be the stronger persuasive authority. Other factors affecting the degree of persuasiveness of a decision include whether the opinion was particularly well reasoned, the stature of the jurist who authored the opinion, and the level of the court from which the decision came.

Courts frequently consider the larger context when choosing among persuasive decisions. A typical situation in which decisions from one state may be highly persuasive on another is where both states share a specific doctrine. For example, Texas courts may find decisions of Wisconsin courts in marital property cases quite persuasive because both states adhere to community property law. Rarely would either state consult its neighboring states on marital property law; both have neighbors that are common-law marital property states. In most other situations, however, Texas courts might find Oklahoma or Arkansas decisions more persuasive than those of Minnesota or Illinois (Wisconsin's neighbors), because demographic, geographic, or historic similarities may have led to the development of similar legal doctrines among neighboring states. Similarly, whether a state has adopted a particular uniform law can affect the persuasiveness of its decisions. Federal courts, too, look at the larger context when choosing among the range of persuasive decisions to consult.

Of course, a case cannot serve as precedent unless it is identified by the attorney and applied correctly in the case. Every time a case of interest is located, the researcher needs to ascertain whether it is mandatory or persuasive. Obviously, it's preferable to rely on a mandatory case than on a persuasive one. If only persuasive, its degree of persuasiveness must be identified. Reliance on many marginally persuasive cases will do much less good than reliance on one or two highly relevant ones. Efficient and effective legal research will allow you to locate the most relevant and persuasive cases available.

Case Authority: A Teachable Moment at the Law Firm Library

BY RACHEL W. JONES

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Every summer, law firm reference librarians work with a group of eager, need-to-know patrons: summer associates. Because these associates are auditioning for permanent, well-paid positions, they are motivated and ready to learn. Astute librarians will recognize that summer associates' research requests present a multitude of teachable moments.

Last summer, a summer associate asked me to compare Shepard's® and KeyCite®—and tell him whether one service was more authoritative than the other. Our reference staff attempts to be unbiased when these inquiries come before us. I replied, "In the ideal world, with unlimited time and resources to get research done, I would advise using both services." The associate and I quickly got into a discussion about case authority, because the two printouts appeared to be quite different. He wanted to know what he should focus on when analyzing these reports. I had escaped the "great debate" about which service is better, but I recognized a significant teachable moment within his question about these reports: Just how authoritative is the information in these lengthy printouts?

Citator services are well suited to online searching. We haven't had print Shepard's in our firm's library for a number of years. Case history and subsequent treatment is now just one click away from the case being consulted. The process of determining authority should be easier than ever, and yet, I believe that today's citator services create more opportunities for the newly initiated legal researcher to get on the wrong track. All too often new researchers defer to the graphic flags and signals of online citation services and neglect to read cases in their entirety. Today's hypertext environment and term locator features encourage online researchers to browse for "hits" rather than to read documents comprehensively. Reading cases carefully and critically, however, is the key to placing cases in context, determining which law applied and which cases are mandatory versus persuasive. Citator services can only report status; it is the researcher's responsibility to place this information in perspective. The summer associate sees where I am going with this teachable moment.

Citator services lead you to the appropriate authority when your research framework is sound. Before going online, determine what entity has authority in the area being researched. Then focus your attention on the highest level of authority on point, in the required jurisdiction, that has not been overruled or modified, or in the case of statutory authority, amended or repealed. While the flags and signals of online citators provide valuable guidance, you must draw your own conclusions about the significance of the history or subsequent treatment of a given case. The summer associate and I agreed: Searching and researching is not the same thing! This teachable moment concluded with a sense of renewed appreciation that online browsing cannot substitute for sound legal research methodology and careful analysis.

"The lessons … use a variety of formats to teach the desired skills and subject content."

USING CALI LESSONS TO REVIEW (OR TEACH) LEGAL RESEARCH AND WRITING CONCEPTS

BY JAMES E. DUGGAN

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Technology for Teaching … *is a regular feature of* Perspectives, *designed to introduce and describe the ways in which teachers of legal research and writing are using technology to enhance their teaching. In this issue, we present a training script designed for teaching Internet research to attorneys and staff in a law firm setting. Readers are invited to submit their own "technological solutions" to the editor of the column:* Christopher Simoni, Associate Dean for Library and Information Services and Professor of Law, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611-3069, phone: (312) 503-0295, fax: (312) 503-9230, e-mail: csimoni@nwu.edu.

Question: True or False: Legal research and writing instructors must come up with their own review exercises to help students learn the intricacies of citation, drafting, IRAC, and research methodologies.

Answer: False. Instructors should take advantage of the Center for Computer-Assisted Legal Instruction (CALI), which offers more than 150 lessons on a wide variety of legal subjects, from administrative law to wills and trusts in its "CALI Library of Lessons." At least 12 of the 150 exercises are categorized under the subject "Legal Writing and Research," and they offer research, drafting, and reasoning skills as their primary focus. This article looks at the CALI program and describes the specific lessons available for legal writing and research students.

CALI Lessons, In General

CALI lessons are available to member law schools (that pay an annual fee) and faculty at nonmember schools, agencies, law firms, and CLE programs (who pay a special annual site license). The lessons can be run via the Web (with a password provided by your school or organization) or on a local area network or individual computer (selected exercises will run only on a Macintosh® or Windows® platform). In addition, students at member schools can purchase individual copies of the CALI CD-ROM for a nominal price (in fact, for the past two years many law schools have purchased individual CALI CD-ROMs for their students).

The lessons are written primarily by law faculty and librarians and use a variety of formats to teach the desired skills and subject content. Many of the lessons use tutorials with multiple-choice and matching questions to lead students in applying concepts they have just learned to new or different situations. Also, many of the more recently written lessons provide a host of helpful features, including an outline feature that provides an overview of the entire lesson (this allows the user to pick up where she left off, if interrupted in the middle of a lesson) and a scoring feature that keeps track of how many correct answers were given (and offers the user the ability to view and print a "certificate" containing the user's name, lesson title, date and time, number of questions attempted, number answered correctly, and a percentage score).

Other features of newer lessons include a Grade button that determines whether the user's indicated answer to a specific question is correct (and if not correct advises the user to "try again") and an Answer button that provides the correct answer to the posed question (handy if the user wants to quickly learn the material without using "trial and error" to get a correct response). In addition, embedded links within the text of some lessons provide definitions and other helpful information for selected terms and concepts. All lessons use a Help button that offers directions on how to answer the specific types of questions posed in every CALI lesson. Member law schools that use The West Education Network® (TWEN®)[1] can link specific CALI lessons to course Web pages.

[1] *See* <http://lawschool.westlaw.com/twen>.

Legal Research and Writing Lessons

Legal research and writing instructors can take advantage of a number of excellent exercises that offer students the chance to both review and learn new skills in the areas of researching and citing authority, drafting contracts, briefing cases, using IRAC to learn analysis, and writing law school exams. The legal writing and research lessons' completion times run from 30 minutes to three hours depending on the individual lesson and user. Here is a quick rundown of the 12 currently available[2] legal research and writing lessons:

- ALWD Citation Form (written by Darby Dickerson, Associate Dean, Associate Professor of Law and Director of Research and Writing, Stetson University College of Law; lesson is available via Web and Windows download)

  This exercise introduces the recently published (2000) Association of Legal Writing Directors *ALWD Citation Manual* and provides questions that direct the student to read relevant portions of the *Manual*, and then respond to questions about specific citation examples and concepts. Covered topics include citation basics (typeface; abbreviations; spelling and capitalization; ordinal numbers; pinpoint, full, and short citations; and supplements); commonly cited sources (cases, statutes, books and treatises, and legal periodicals); incorporating citations into documents (citation placement and use, and introductory signals); and quotations. A final quiz with 20 questions rounds out the lesson, with answers that provide instant feedback, making this an excellent beginner exercise for *ALWD Citation Manual*. Approximate completion time: 2–5 hours.

- Citation Form for Briefs and Legal Memoranda (written by Cathleen Wharton, Director, Legal Writing Program, University of Georgia School of Law; Daisy Hurst Floyd, Associate Dean for Academic Affairs and Professor of Law, Texas Tech University Law School; and Bertis E. Downs, IV, Instructor, University of Georgia School of Law; available via Web and Windows download)

  Originally written in 1986, this exercise (although reviewed and revised during the 1999–2000 school year) teaches citation format for briefs and legal memoranda (but not law review footnotes) using the Sixteenth Edition of *The Bluebook: A Uniform System of Citation*. Three major types of authorities are covered: cases, statutes, and secondary authorities. Questions range from ones with simple multiple-choice answers to more difficult ones that ask the user to type the correct citation to an authority after being supplied with the relevant identifying information (the user must then compare her citation to the correct citation, which is provided). Approximate completion time: 1–1.5 hours.

- Drafting Contracts Using "Shall", "May" and "Must" (written by Debra R. Cohen, Associate Professor of Law, West Virginia University College of Law; available via Web, Windows, and Macintosh download)

  This 1987 lesson illustrates the differences between the drafting terms "shall" (obligation), "may" (authorization), and "must" (condition precedent) in contracts. Each term is treated in its own section, with an explanation about the operative language that the term suggests, commentary about when and when not to use, and specific interactive questions testing term usage. Three general exercise questions end the lesson by testing the student's mastery of the three terms. Approximate completion time: 45 minutes.

- Drafting with "And" and "Or" (written by Marjorie A. McDiarmid, Associate Dean and Professor of Law, West Virginia University College of Law; available via Web, Windows, and Macintosh download)

  Using Scott Burnham's discussion of "and" and "or" in his book *Drafting Contracts* (Michie, 2d ed.) as a basis for this exercise, McDiarmid explains when the use of each term is correct and when ambiguities are created by incorrect usage. Students are taught to recognize proper use of these conjunctions and to write clear

> "[C]ompletion times run from 30 minutes to three hours depending on the individual lesson and user."

[2] Please note that lessons are reviewed and revised on a periodic basis, and new lessons are added as they become available (e.g., *ALWD Citation Form* lesson was added to the CALI Library of Lessons in 2000 after the publication of the *ALWD Citation Manual*).

sentences using both the "several" and "joint" "and" and the "inclusive" and "exclusive" "or" with the aid of a mock client interview and drafting exercise. Approximate completion time: 30 minutes.

- Learning Legal Analysis Through Its Components: Issue, Rule, Application, Conclusion—IRAC (written by Peter Jan Honigsberg, Professor of Law and Director of Legal Research and Writing Program, University of San Francisco School of Law; available via Web, Windows, and Macintosh download)

  Designed to be used by a first-year law student very early in the first semester, this 1989 lesson introduces legal analysis using IRAC (issue; rule of law; application of the law to the facts; and conclusion). Students are provided with a definition of each IRAC component and then presented with a series of questions testing component mastery. A small closed-universe hypothetical concludes the lesson by inviting users to analyze a legal problem using the IRAC approach. Approximate completion time: 1 hour.

- Legal Research 101: The Tools of the Trade (written by Sheri H. Lewis, Associate Law Librarian for Research Services, Mercer University Law School, and Donald A. Arndt Jr., Associate Director/Head of Public Services, University of Nebraska Schmid Law Library; available via Web, Windows, and Macintosh download)

  Using "lawyer-under-construction" as a theme, this 1998 lesson introduces the first-year law student to the basics of legal research, including the differences between legal research and other types of research, types of legal research tools and sources, and ways that legal authorities are used and updated. Each component uses explanatory text and exercise problems to reinforce the specific tool, authority, or method being explored. A final section makes some additional research points before reviewing what has been learned with closing exercises. This lesson effectively uses humor to convey the fundamentals of legal research to beginners. Approximate completion time: 1 hour.

- Legal Research Methodology (written by Wendy Scott, Associate Librarian for Public Services and Instructor of Legal Research, Syracuse University College of Law, and Kennard R. Strutin, Senior Assistant Reference Librarian and Instructor of Legal Research, Syracuse University College of Law; available via Web, Windows, and Macintosh download)

  Although aimed at students who have some experience doing legal research (or who have completed the typical first-year course), this 1997 (but reviewed and updated during 1999–2000) exercise can also be used as a study guide for students who are initially learning legal research basics. The lesson is divided into five sections: *Brainstorming* (students are invited to analyze the research assignment by using active listening, interviewing behavior, and fact finding); *Developing a Query Statement; Documentation* (learning how to record the results and progress of research); *Research Process* (applying the appropriate research methodology and using cost-effective techniques); and *Finishing Research* (updating, knowing when to stop). Approximate completion time: 1.5–2 hours.

- Researching Federal Administrative Regulations (written by Sheri H. Lewis, Associate Law Librarian for Research Services, Mercer University Law School, and Donald A. Arndt Jr., Associate Director/Head of Public Services, University of Nebraska Schmid Law Library; available via Web, Windows, and Macintosh download)

  Originally written in 1997 (but reviewed and updated during 1999–2000), this lesson begins with a skills assessment quiz, which enables the student to determine her level of federal regulatory research knowledge. From there, the student is introduced to federal rules and regulations, their publication in the *Federal Register* and *Code of Federal Regulations*, finding tools, and research and updating techniques. Each section contains a review quiz that tests the student's comprehension of the section's components. Twelve factual research scenarios are presented with step-by-step instructions to illustrate how to locate specific types of information. The skills assessment quiz can be

retaken at the conclusion of the lesson as a measure of the lesson's effectiveness. Approximate completion time: 2–3 hours.

- Using IRAC to Develop an Objective Memorandum of Law (written by Peter Jan Honigsberg, Professor of Law and Director of Legal Research and Writing Program, University of San Francisco School of Law; available via Macintosh download)

  Available only for Macintosh platforms, this lesson builds on the concepts learned in Honigsberg's earlier CALI lesson, *Learning Legal Analysis Through Its Components: Issue, Rule, Application, Conclusion—IRAC*, by using a closed-universe contract release hypothetical for students to consider and analyze. The hypothetical includes a "client's file" with the facts of the case and a listing of the relevant authorities. Students must use the IRAC approach to properly identify and analyze each issue, and can then produce a memorandum of law (which can be compared with a sample memorandum prepared by Honigsberg). Approximate completion time: 3 hours.

  Although not specifically labeled as "legal writing and research" exercises, the remaining three lessons do have some writing components:

- Drafting a Contract: The Sale of Goods (written by Scott J. Burnham, Professor of Law, University of Montana School of Law; available via Web, Windows, and Macintosh download)

  This 1989 lesson was designed for students to use their knowledge of contract law in order to draft a contract. Principles of drafting (including caption writing, language of agreement, operative language, recitals, definitions, and closing) are explored with selective questions. Approximate completion time: 1–1.5 hours.

- How to Brief a Case (written by Professor Edward C. Martin, Samford University Cumberland School of Law; available via Web download)

  Available only via the Web, this lesson departs from the traditional CALI format by using only embedded HTML (Web) pages and does not offer the Next, Grade, or Score buttons available with other CALI lessons. Students are introduced to the reasons for case briefing and the 10 components of a basic case brief, and then are asked to read and brief two sample cases. Martin provides his own sample briefs for the two cases, which students can compare with their own work. Approximate completion time: 2 hours.

- Writing Better Law School Exams: The Importance of Structure (written by William R. Andersen, Judson Falknor Professor of Law, University of Washington School of Law; available via Windows download)

  This lesson, which should be viewed by every law student, discusses the writing format expected on the majority of "issue-spotting" exams, and provides opportunities for students to practice what they have learned. Approximate completion time: 1.5 hours.

Conclusion

CALI lessons can help students review (or even learn) concepts associated with most law school research and writing courses, and can be easily accessed by students from CALI-member schools via the Web or from individual CD-ROMs. Instructors should consider assigning (or recommending) legal writing and research lessons as needed. For more information about CALI, see CALI's Web site at <http://www.cali.org> or contact CALI at 1313 Fifth Street SE, Minneapolis, MN 55414, phone: 612-627-4908, e-mail: cali@umn.edu.

WRITING TIPS…

Organizing Facts to Tell Stories

BY STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL

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"Chronology is, then, the bread and butter of fact writers."

We have encountered very few writers—legal or otherwise—who have ever been taught how to organize and develop facts. Facts are just facts, right? You get them down on the page as best you can in some sort of order, usually chronological. Indeed, law school often reinforces this hasty approach with the unfortunate impression that facts are grubby little details that get in the way of the writer's true responsibility, which is to present "the law." In this atmosphere, fact sections of memos or briefs, for example, too often become rote, uninspiring sequences.

Organizing facts chronologically is not foolish, of course, for most clumps of facts have a chronological thread running through them. That is why we usually try to get our hands around new facts by putting them in chronological order. As a result, by the time we start to write, we probably have created a chronology that we can simply let fall on the page without any more organizational effort.

This temptation increases because chronology is often not only the easiest organization, but the most effective. If we are writing about facts, we are probably trying to tell a story, and—at least in legal prose as opposed to more inventive Hollywood scripts that use flashbacks, interwoven plot strands, and the like—stories are best told chronologically. Chronology is, then, the bread and butter of fact writers.

But precisely because it can so often be useful, chronology can become what we call a "default organization," structurally similar to the automatic moves a computer program will make unless the user instructs it otherwise. Defaults can be quite dangerous, and for facts, chronology can produce three different problems. In this short article we will cover one: Habitual chronology can distract us from telling an effective story that complements and enhances our legal argument. In a future column we will discuss the other two: the tendency of chronological presentations to include too much distracting detail, and the occasional inconsistency between chronology and the key factual issues at the center of a matter.

Using Facts to Tell Stories

To someone not personally connected to an incident, the facts are, well, just the facts. Even when they are organized sequentially to show connected events, the facts are still just a string of facts. A story is much more. It leads us to infer motive, to judge the nature of the acts performed, to understand their consequences, and to empathize with or distance ourselves from the people involved. In other words, a story can show us who is in the right, and where justice lies. Not that an artfully told story distorts the facts or forces conclusions on us. It simply arranges facts to lead us toward inferences that favor the writer's position. All this can be done without violating any duty to describe the facts accurately and thoroughly.

Here, for example, are two stories crafted from the same facts, but leading us to quite different conclusions:

The prosecution version

On September 5, 1998, G.L., a minor, was arrested by the Smithville police and charged with trespass and destruction of property under Sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

At approximately 9:00 p.m. on September 5, John and Julia Barr and their son, Roger, returned home from a PTA meeting. When they reached their front door, they found that it was ajar. Mr. Barr entered the house and

noticed muddy footprints leading across the living room carpet toward the kitchen. In the kitchen, he found food strewn across the kitchen table, and a broken plate on the floor. He then looked through the other rooms on that floor and proceeded upstairs. In his son's bedroom, he saw that clothes had been pulled from an open drawer and dropped on the floor. In the master bedroom, he found G.L. asleep on the bed. As he entered, she awoke, knocked him over as she pushed by him, and ran out of the house. She was later found and arrested by the police on the nearby golf course.

The defense version

On September 4, 1998, G.L., a 15-year-old girl living in the Smithville Home for Orphans, had an argument with her dormitory supervisor and ran away from the Home. She had no money or food with her and only the clothes she was wearing. She spent the night of September 4 and most of September 5 hiding on the Smithville Country Club golf course.

On the evening of September 5, it began to rain. Her clothing became drenched. At that point, she had not eaten since her lunch on September 4. She left the golf course and began to walk through the adjoining neighborhood. In the fourth block after leaving the golf course, she walked up the drive to the largest house she had so far passed. She rang the doorbell, but no one responded. She rang again and knocked, but still received no response. She then tried the door handle, and found the door unlocked.

Entering the house, she went directly to the kitchen, took some food from the refrigerator, and ate some of it. In the process, she dropped and broke a plate on which there had been a piece of chocolate cake. She then went upstairs, found some dry clothes in a bedroom, and put them on. She then went into another bedroom and fell asleep on the bed.

When the Barrs returned, she awoke and ran out of the room. Mr. Barr tried to grab her as she went past, and was knocked over as she pulled away from him. He was not injured. She then ran out of the house and back to the country club grounds, where she hid in a clump of bushes. After being apprehended by the Smithville police, she was incarcerated in the Smithville City Jail and charged with trespass and destruction of property under sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

There are many other ways of telling an up-to-date version of "Goldilocks and the Three Bears." But these two demonstrate how easy it is to construct different stories from the same facts without distorting them.[1]

At the core of a story—a legal one, at least—is a theme: a proposition about the nature and meaning of what happened. For example, "My client, desperate to find food and shelter, meant no harm—and did very little harm." Or "Morissette took only what appeared to be old, valueless junk abandoned on uninhabited land." At some point in a brief, you may want to state this theme explicitly. In the fact section, however, the rules of brief writing forbid you from characterizing facts or drawing explicit inferences from them. You have more leeway in introductions and preliminary statements but, even there, you will usually be more persuasive if you allow inferences about the equities of a situation to emerge as if spontaneously in your readers' minds. If you try to make those inferences explicit, your readers—lawyers and judges, at least—are likely to take that as a challenge: Does your characterization of the facts really hold up?

To organize facts to create inferences, lawyers need to think more methodically about how to tell a story than they are usually trained to do. Here is a framework for that thinking. The basic elements of a story are:

Opening situation

—

Primary character — *Plot* — *Secondary characters*

—

Closing situation

"At the core of a story—a legal one, at least—is a theme: a proposition about the nature and meaning of what happened."

[1] Our thanks to Paul Perrell, of the Toronto firm of Weir & Foulds, for introducing us to the Goldilocks litigation during a writing program in Toronto several years ago. We have since seen it used also in Steven Stark's *Writing to Win* (Doubleday, 1999).

With each of these components, your job is to create inferences that favor your client. More specifically, you want the reader to

- characterize the plot in both legal and common-sense, human terms. Are we dealing with the malicious invasion of a home, or a desperate search for food and shelter?
- characterize the opening situation: What circumstances led the characters to act as they did?
- characterize the closing situation: What were the consequences?
- characterize the motives of the people involved, and feel empathy with or distance from them.

To achieve these goals, four choices turn out to be critical:

1. Where does the story begin? If we begin at the Smithville orphanage, as G.L. runs away with only the clothes she is wearing, we tell one story. If we begin with a list of G.L.'s alleged crimes, followed by a vignette of the Barrs' returning from a PTA meeting to find their home violated, we tell a very different story.
2. Where does the story end? With an intruder running out of the house, or with a frightened child hiding in the bushes, then captured and "incarcerated" by the police?
3. Through whose eyes do we see the story? Generally, though not always, we tend to empathize with someone when the story is told from his or her perspective. Are we looking through the eyes of family members coming home to find their house violated, or through the eyes of a wet, hungry child?
4. Where do we add detail, and where do we omit it? With important facts, we have no choice but to include them even if they are bad for our side. With "color" facts, the facts that add flavor and descriptive fullness, we usually have a good deal of choice. Do we add the details that suggest the Barrs are wealthy? What about the chocolate cake, which contributes to the portrait of G.L. as a child? Or, on the other hand, the muddy footprints, "strewn" food, and clothes dumped on the floor, which contribute to the portrait of a home invaded?

The following example shows how much trouble litigators can get into if they do not know how to tell a story, and instead fall back on a chronological recital of facts, especially facts drawn from a record. These facts come from a brief appealing the conviction of a prison guard who was caught carrying drugs into the prison. The brief makes two arguments:

- Although the guard had signed a form consenting to being searched by the prison authorities, the consent applied only if they had reason to suspect him of possessing drugs.
- Although he had drugs in his possession, there was no evidence that he intended to distribute them.

As you read these facts, think about how the first, third, and fourth of the decisions above were made: Where does the story begin? Through whose eyes are we looking? And where is detail added or omitted?

Statement of Facts

The evidence presented at the motion to suppress hearing showed that on Sunday, March 18, 1990, Drug Enforcement Administration (DEA) Agent Thomas Jones was called to the Sam Houston Correctional Facility in Hilltop, Texas. (3 R. 8) Jones indicated that Sandra Smith, the prison administrator in charge of security, had obtained information from an unidentified inmate that a number of correctional officers had been bringing narcotics into the facility. (3 R. 10) Prior to March 18, 1990, Jones had conducted surveillance of the facility on the basis of these communications, but he had not obtained any evidence or further information. (3 R. 18)

Smith had informed Jones on Friday, March 16, 1990, that she intended to conduct searches of all the officers at the prison as they arrived for work on the morning and evening duty shifts on March 18. (3 R. 12, 31) Jones was asked to remain in the area of the facility in the event that contraband was found during these searches. (3 R. 21)

Smith had also told Jones that there was a

facility policy that allowed the prison administrators to conduct searches of entire shifts. (3 R. 11–12) The policy was admitted into evidence at the hearing, as was Defendant's signature showing that he had read and understood it. (3 R. 6–7) In pertinent part, the manual stated as follows:

> It is not the policy of [the prison] to routinely search its employees or their property. However, when the Facility Administrator has reason to suspect that an employee is in possession of contraband items, which, if introduced, could endanger the institution, the Facility Administrator may authorize the search of an employee or his personal property. Searches may also be authorized where the Facility Administrator has reason to suspect that an employee is removing contraband from the facility.

Secure Corrections Corporation, *Standards of Employee Conduct*, § D.2. Jones did not know whether a similar search of all employees had been conducted at any time before March 18, 1990, or at any time between that date and May 2, 1990, the day of the suppression hearing. (3 R. 18–19) No evidence of any other such search was presented to the district court at the suppression hearing or at trial. (6 R. 59)

Beginning with the morning shift, each of the officers appearing for work was searched. (3 R. 13. 30) The procedure followed during these searches was that each officer would be stopped in the "sally port," an area between a barred outside door and a barred door leading to the inside of the facility. (3 R. 14) The searches were conducted by prison supervisors. (3 R. 29) At 8:00 a.m. Smith called Jones and told him that they had found contraband, including marijuana, syringes, and a balloon of heroin, during the search of James Green, a guard assigned to the morning shift. (3 R. 12) Green told Jones that he obtained the contraband from a person at a store across from the facility. (3 R. 21) This was consistent with the prior information that Jones had obtained from the prison employees. *Id*. Jones conducted surveillance of the store and of a residence, without result. (3 R. 13–14, 21)

At 3:15 p.m. Smith again called Jones and told him that controlled substances had been found during a search of Defendant. (3 R. 14) Defendant had been subjected to a pat-down search and to a search of his shoes and socks, during which marijuana was discovered. (3 R. 16) Defendant had been taken to the captain's office, and other contraband had been found in a wastebasket into which Defendant had thrown some tissue paper. (3 R. 17) Defendant was advised of his constitutional rights, and he admitted that the marijuana was his, but he denied that he had possessed any other contraband. (3 R. 18) Although Agent Jones searched and questioned Defendant after contraband had been found, (3 R. 26) he did not witness the circumstances of Defendant's initial and subsequent searches. (3 R. 22)

Because the writer relies so much on pure chronology, he falls into two traps. First, a key fact—the language in the prison manual about the circumstances under which the prison could search its employees, language that is at the core of the first issue on appeal—does not receive the emphasis it deserves. Even worse, because the writer begins with the first pieces of the chronology the record contained, and recites those facts from the perspective of the witnesses who described them, the story he tells creates exactly the wrong theme: The prison had a legitimate problem, and it tackled it energetically and professionally. The DEA agents were just going about their jobs. With whom, then, are we likely to be empathizing by the time we first see the defendant (especially, of course, because we are introduced to him as "Defendant," not by name)?

Consider the different effect if the story had been told from the guard's perspective, beginning differently and focusing on different details:

> Mr. McKay's limited consent to being searched.
>
> When Robert McKay was hired as a guard at the Sam Houston Correctional Facility, he signed a form that provided [here follows a description of the form's language, with the emphasis on its limited scope].

"[A]s effective stories will, it brings you around to that reaction as if you discovered it yourself."

> The prison administration's grounds for searching Mr. McKay
>
> [A brief summary of the prison's reasons for suspecting drugs were entering the prison, emphasizing that they had no reason to suspect the defendant individually—a key to his defense.]
>
> The search of the defendant
>
> On March 18, 1990, Mr. McKay arrived at the prison for his shift. He was immediately taken aside by [name] and subjected to a strip search . …

This story was about the underlying facts of a case. But stories can be made out of the legal process as well. Here is a final example:

> David Smith, a professional art dealer and an expert in prints, bought "The Blue Seal," a well-known print by Pablo Picasso (the "Print"), at an auction conducted by defendant Galerie Moderne in June 1990. Galerie Moderne shipped the Print to Smith shortly thereafter, but Smith never paid for it. For the next 16 months, Galerie Moderne pursued Smith to collect the debt, but Smith consistently claimed he was unable to pay. Smith, meanwhile, attempted to sell the Print, but could not find a buyer at the price he was demanding, apparently because of the decline in the art market.
>
> Finally, after extending the payment period again and again, Moderne threatened to take action to collect the debt. Smith then made the charge that underlies every count of his Complaint: that the Picasso signature on the Print (the "Signature") was not authentic. Ten days after he first made this allegation, he filed suit in this Court seeking to rescind his purchase of the Print—that is, seeking to be relieved of his payment obligation—and claiming $20 million in alleged "punitive damages." The defendants later counterclaimed to recover the debt Smith still owes.

After these paragraphs, can you avoid a strong suspicion about why Smith is suing? Yet the story never makes this suspicion explicit. Instead, as effective stories will, it brings you around to that reaction as if you discovered it yourself. From the reader's perspective, the story's theme now seems legitimate rather than manipulative or heavy-handed.

Electronic Research Skills Assessment Survey As an Instructional Tool

BY DAVID SELDEN

David Selden is Law Librarian at the National Indian Law Library in Boulder, Colo., which serves the Native American Rights Fund's attorneys and the general public.

Background

The National Indian Law Library (NILL), with a staff of three full-time-equivalent employees, serves as both a public library and a small law firm library. The library attempts to meet the Indian law information needs of the public by providing reference and research services and by developing a unique collection that includes, among other things, tribal codes and constitutions, legal pleadings from important Indian law cases, and hard-to-find reports and manuals dealing with Indian law issues. As a law firm library, NILL strives to anticipate and meet the informational needs of the Native American Rights Fund's (NARF's) 40 employees in three offices by providing reference and research assistance, current awareness service, research instruction, and other services typically provided by law firm librarians. Eighty percent of the employees work out of the Boulder, Colorado, office and the remaining 20 percent of the NARF staff work in satellite offices in Washington, D.C., and Anchorage, Alaska. An important goal of the library staff is to improve the electronic research competencies of the NARF attorneys, legal assistants, and other researchers through electronic research instruction. In order to meet this goal in the past, the law librarian has provided both one-on-one and small-group Westlaw® research instruction. Most researchers had either very basic or intermediate electronic research skills so it was easy to group people together with very similar skills. Currently, NARF has almost two dozen Westlaw password holders. With the recently negotiated Westlaw flat fee contract, the library has committed itself to raising our researchers' Westlaw search skills in order to take advantage of the efficiencies and cost savings that the flat-fee arrangement allows. As the newly hired law librarian, I decided that one-on-one training would be the most productive method of instruction based on the assumption that the NARF researchers have varying electronic skills and the fact that the organization has a relatively small number of Westlaw users. Individualized instruction keeps attention level high, allows the trainer to customize instruction, and creates an environment where it is safer and easier for trainees to ask questions. As an added benefit, one-on-one training sessions would provide an opportunity for me to develop rapport with the researchers and demonstrate research expertise. For these reasons, I opted not to use free training support provided by the vendor.

The Survey

In order to provide Westlaw instruction that would meet the diverse individual needs of NARF's researchers, I constructed and distributed a Westlaw self-assessment skills survey. Prior to developing the survey, I researched library and legal literature to find articles discussing electronic research self-assessment surveys. When no pertinent information was found on the topic, I asked other law librarians on several different electronic mailing lists if they had any experience in electronic skills assessment. Two law firm librarians graciously shared ideas on creating self-assessment surveys. Their examples revealed a difference in approach and assessment. Their surveys are identified as "Survey A" and "Survey B."

Survey A focused on assessing electronic research experience. The following is a sample question used:

> "Have you ever used Westlaw for Windows®?"
> Responses to choose from are "never/rarely, occasionally, frequently."

Survey B assessed specific LEXIS-NEXIS® skills in a multiple-choice format. The following is a sample question used:

> "You need to review the full text of 11 USC 101. The most effective way to retrieve the statute is:
> a) lexstat 11 USC 101, b) 11 USC 101,
> c) Statute 11 USC 101."

Since Survey A assessed experience rather than

specific skills or comfort level, I decided not to use it as a pattern. Although the style of Survey B might have served well because it surveyed specific skills, it did not assess comfort level, and the respondent had a one in three chance of guessing the right answer. While both surveys served a valuable purpose, they did not quite meet our unique needs, so I decided to design my own survey. The goal of the survey was to get an accurate assessment of the current Westlaw skills and comfort levels of NARF's researchers using a short, simple, and clear survey that would aid the instructor in tailoring instruction to meet individual needs. To construct the survey, I made a list of the basic and intermediate skills each researcher should possess; organized the skills into specific categories; and worded the survey questions and responses in a way that revealed the respondent's own level of skill and comfort on specific tasks.

The survey (see Appendix A) was distributed to researchers in all three NARF offices.

The Training

After I issued a few reminders to return the survey, the survey response rate was close to 100 percent. Much to my delight, all surveys were properly filled out and complete. I decided to focus training efforts on specific skills that were marked "somewhat skilled" and "not very skilled" in the self-assessment survey. For all "highly skilled" responses, I decided to verbally confirm that the trainee had mastered those skills during the training session. For each question on the survey, two instructional exercises were designed that could be performed during the one-on-one training sessions. The plan was to present one exercise per skill and present the second exercise if more experience was needed. The training would consist of the researcher performing hands-on exercises while being coached by the instructor. One-hour training sessions were scheduled for each Westlaw user. I believed that anything longer than an hour would be overwhelming and unproductive. For those researchers needing more than an hour to complete the training, another appointment would be scheduled.

Results of Training

Over a three-week period, I provided individualized training to NARF researchers, including telephone training to researchers in our satellite offices. The responses on the self-assessment surveys proved to be quite accurate. Trainees who checked the "highly skilled" box for a particular action generally were very competent in that area and people who checked the "somewhat skilled" and "not very skilled" boxes responded honestly and accurately too. The survey proved to be a big time-saver since I was able to focus the training on improving specific skills and technique while skipping over topics in which the researchers were proficient. By receiving feedback from the researcher in advance of instruction, I was able to prepare exercises that related to the researcher's particular practice areas. Feedback following each training session was very positive. In general, all trainees thought that the training was very relevant, focused, and productive.

Conclusion

The self-assessment survey and the resulting training were a success. The survey results helped me focus on improving specific research skills, and the researchers benefited by learning important new skills in a short period of time. Self-assessment surveys such as this can be an important tool to any librarian interested in planning individualized electronic research instruction for his or her clientele.

APPENDIX A

WESTLAW SKILLS ASSESSMENT SURVEY

In the next few months I will be providing individualized Westlaw instruction tailored to meet your needs. Please take a few minutes to fill out the self-assessment survey below to help me determine your current skill level, which will help me customize training.

Please complete the survey below and return it to David by June 26, 2000, or ASAP.

Assess your skill level in each of the following actions. Check only one box for each action.

Your Name:

USING FIND

I can find and print case law and law review articles.

____ highly skilled
____ somewhat skilled
____ not very skilled

I can find and print public laws, codified laws, and regulations.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to determine the correct abbreviation to use with the Find feature.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to determine whether Westlaw has the cited document I seek.

____ highly skilled
____ somewhat skilled
____ not very skilled

USING TERMS AND CONNECTORS

I can use terms and connectors (&, /p, /s, /n, +n, etc.) to pinpoint my research with high accuracy.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know the difference between "/n" and "+n" as well as "!" and "*".

____ highly skilled
____ somewhat skilled
____ not very skilled

USING SPECIAL WESTLAW FEATURES

I know how to quickly determine which database to search.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to determine the date coverage and comprehensiveness of any database.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to quickly review research tips for a specific database.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to access Westlaw via the Internet from any terminal while on the road.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to reduce costs by modifying print options.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to view a list of legal authorities cited in a case on Westlaw.

____ highly skilled
____ somewhat skilled
____ not very skilled

MANAGING YOUR SEARCH RESULTS

I know how to save my research project to be resumed at another time.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to view or revisit any search results or "Found Documents" during my current session.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to send a document to a fax machine or a printer.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to print to an e-mail address or fax machine or download to a disk.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to cancel a print request on Westlaw.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to cut text from Westlaw and paste it into a WordPerfect® document.

____ highly skilled
____ somewhat skilled
____ not very skilled

SEARCHING USING FIELDS

I can use the "date," "words and phrases," "citation," and "synopsis" fields to pinpoint my case law research.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to find cases that have a particular West topic and key number.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to find cases that define a term.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to search for words in CFR section headings.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to limit my search results by date.

____ highly skilled
____ somewhat skilled
____ not very skilled

USING KEYCITE

I know what the **** mean in KeyCite®.

____ highly skilled
____ somewhat skilled
____ not very skilled

I know how to use KeyCite to locate cases that cite my case in a particular jurisdiction relative to a West topic.

____ highly skilled
____ somewhat skilled
____ not very skilled

THANKS FOR YOUR INPUT!
PLEASE RETURN TO THE LIBRARY ASAP.

LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

Donald J. Dunn is Dean and Professor of Law at Western New England College in Springfield, Mass. He is a member of the Perspectives *Editorial Board.* *This bibliography includes references to books, articles, bibliographies, and research guides that could potentially prove useful to both instructors and students and includes sources noted since the previous issue of* Perspectives.

Thomas E. Baker, *Federal Court Practice and Procedure: A Third Branch Bibliography*, 30 Tex. Tech. L. Rev. 909 (1999).

This is an effort to provide a comprehensive, but unannotated, bibliography of books and articles about various aspects of federal courts and federal procedure. It is arranged by topic and is more than 200 pages in length.

Chad Baruch & Karsten Lokken, *Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners*, 77 U. Det. Mercy L. Rev. 303 (2000).

Consisting primarily of law review articles and law-related books, this subject-arranged bibliography contains a basic listing of primary sources, plus scholarly works on Jewish law of particular interest to law students and practitioners.

Carol M. Bast & Susan Harrell, *Has the Bluebook Met Its Match? The ALWD Citation Manual*, 92 Law Libr. J. 337 (2000).

The Bluebook now appears to have a viable competitor in the *ALWD Citation Manual.* The reviewers describe why this new citation guide will likely replace the old standard.

Christine Alice Corcos, *International Guide to Law and Literature Studies*, 2000. [Buffalo, NY: William S. Hein & Co., 2 vols.]

Identifies thousands of secondary works that have been published in the area of law and literature studies from 1990 to 1995. Sources are first arranged by topic, e.g., "Law in Mystery and Detective Fiction," followed by an arrangement by specific authors, works, subjects, and characters.

Simone Friedman, *E-Commerce by the Numbers: Research Sources and Solutions*, Searcher, vol. 8, no. 8, Sept. 2000, at 58.

"[P]resents four approaches to finding e-commerce information: press releases, article research, research aggregators, and universities, nonprofits, and government agencies." Contents Page Abstract, at 3.

Gerald F. Hess, *Monographs on Teaching and Learning for Legal Educators*, 35 Gonzaga L. Rev. 63 (Special Edition, 2000).

Seventeen monographs on teaching and learning published since 1990 were selected for review because of their "relevance, timeliness, readability, and applicability." *Id.* at 65.

Anne Morrison, *Comparison of Web-Based Caselaw Search Engines for State Research*, Legal Information Alert, vol. 19, no. 6, June 2000, at 1.

Evaluates the search results for state research conducted using westlaw.com®, Lexis.com, Versuslaw, Loislaw, the National Law Library, Jurisline, and the Maryland Judiciary home page. Not surprisingly, Westlaw® and LEXIS® produce the best results, although other sources show increasing promise.

Theodore A. Potter, *A New Twist on an Old Plot: Legal Research Is a Strategy, Not a Format*, 92 Law Libr. J. 287 (2000).

The author argues that today's law students are so accustomed to using computers for legal research that focusing on print materials first is not the proper pedagogical approach. He suggests that instruction in research should be on strategy, not format.

Herbert N. Ramy & Samantha A. Moppett, *Navigating the Internet: Legal Research on the World Wide Web*, 2000. [Buffalo, NY: William S. Hein & Co., 112 p.]

Provides an introduction to legal research on the Internet using a practical, problem-based approach that includes step-by-step instruction combined with follow-up exercises.

Peter C. Schanck, *Mandatory Advanced Legal Research: A Viable Program for Law Schools?*, 92 Law Libr. J. 295 (2000).

Marquette University's law school has adopted a mandatory advanced legal research requirement for its students. The author describes how the program came to be and what it entails.

Beth Smith, *Nebraska Practice Materials–A Selective Annotated Bibliography*, 79 Neb. L. Rev. 118 (2000).

This selective bibliography of primary and secondary materials for law practice in Nebraska covers materials published between 1991 and June 30, 1999. It updates an earlier bibliography found in 70 Neb. L. Rev. 519 (1991).

Esther M. Snyder, *Israel: A Legal Research Guide*, 2000. [Buffalo, NY: William S. Hein & Co., 123 p.]

"This work is a survey of the bibliographic sources of law in Israel. It is intended for the law researcher, lawyer and information specialist/librarian who seek to discover and use Israel legal materials." Preface, at xii. Covers primary and secondary sources and electronic formats. It is number 37 in the publisher's "Legal Research Guides" series.

Arturo López Torres & Mary Kay Lundwall, *Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, 35 Gonzaga L. Rev. 1 (Special Edition, 2000).

The 209 articles in this annotated bibliography cover the period from June 1993 to December 1999 and represent those sources that offer practical suggestions on pedagogy.

I. Wes Wheeler, *2000 Recommended Web Sites for Wetlands Law*, 15 J. Land Use & Envt'l L. 305 (2000).

Each year this journal selects a particular field or specialty for a bibliography. For the year 2000, the topic is wetlands law. Although the focus is on Florida sources, references for more expansive research are provided. It does not contain 2,000 citations as the title seems to suggest. The "2000" is the year.

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