

# PERSPECTIVES

## Teaching Legal Research and Writing

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### REVIEWING STUDENT PAPERS: SHOULD THE “BROKEN WINDOWS” THEORY APPLY?

BY JOHN D. SCHUNK

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A legal writing teacher begins each year knowing that he or she will need to comment on approximately 1,500 pages of writing each semester submitted by an average of 43 students.<sup>1</sup> When faced with this task, legal writing teachers need to make difficult choices about the extent and frequency with which they comment on student papers.

As they approach another round of papers submitted by first-year law students, many legal writing teachers may feel like a physician assigned to a mobile army surgical hospital (M\*A\*S\*H) unit. The written work needing review may suffer from multiple ailments, and the legal writing teacher may comment on only a few of the more serious “injuries” found in the body of writing. The ABA’s *Sourcebook on Legal Writing Programs* makes a quick reference to a legal writing teacher as a physician. “[A]n effective legal writing teacher knows how to subject a list of student errors to triage.”<sup>2</sup>

Into this triage and commenting process, I want to suggest the possibility of applying a law enforcement theory—the “broken windows” theory—as a way of creating in students the discipline necessary to achieve the ultimate goal,

<sup>1</sup> Association of Legal Writing Directors/Legal Writing Institute 2003 Survey, Responses to Question 82. The 2003 Survey results are available at <[www.alwd.org](http://www.alwd.org)>.

<sup>2</sup> American Bar Association, The Communication Skills Committee for the Section of Legal Education and Admissions to the Bar, *Sourcebook on Legal Writing Programs* 43 (1997).

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in the ABA's words, of making "each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem."<sup>3</sup> Much like the thrust of a recent article in *Perspectives*, applying the broken windows theory to a legal writing course requires a teacher to make students "sweat the small stuff."<sup>4</sup>

### The Broken Windows Theory

In a famous article appearing in the March 1982 issue of *The Atlantic Monthly*, James Wilson and George Kelling suggested that police could help reduce more serious crimes and help improve communities by fixing broken windows and emphasizing the order maintenance function of police work. In a line or two, the article summarized the theory by saying, "[I]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. ... [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."<sup>5</sup> (Emphasis added.) The article suggested "that 'untended' behavior also leads to the breakdown of community controls."<sup>6</sup>

This article appeared at a time when the authors had concluded that police officers had prioritized their crime-solving function over their traditional order-maintenance function.<sup>7</sup> In the authors' view, police had lost sight of "the link between order-maintenance and crime-prevention."<sup>8</sup> This also had caused some to "wish to 'decriminalize' disreputable behavior that 'harms no one.'"<sup>9</sup>

When Rudolph Giuliani became the mayor of New York City, he put the broken windows theory into effect. The New York police began confronting individuals who committed smaller crimes or crimes that "harm no one." The NYPD began stopping the infamous squeegee men and

the individuals jumping turnstiles in the subway, and began addressing other smaller quality of life violations. Coincidentally, the city of New York began to see a reduction in its serious crime rate as well.

### Applying the Broken Windows Theory to Legal Writing Courses

Without much difficulty, a legal writing teacher can apply this theory when reviewing student writing, and, I think, begin to see positive results within a short period of time.

If one views the student writing submitted as a community suffering from a series of crimes, one can divide the crimes into different categories. Serious crimes include such things as the inability to present a syllogism or to create an analogy. On the other hand, broken windows in student writing would include such things as format errors, misstating basic facts, grammar mistakes, incorrect pronoun usage, incorrect citations, and incorrect punctuation.

The presence of these kinds of broken windows in a student's writing become important because they evidence a lack of discipline and a lack of attention to detail necessary to research, write, and analyze complex legal problems. In short, students who misstate basic facts in a short writing assignment may not be the ones who see careful ways to distinguish adverse cases in later, more complex assignments. Students who do not take the time to master the basic citation rules from either *The Bluebook* or the *ALWD Citation Manual* may be the students unwilling to pay attention to the detail necessary to write professional legal documents.

The presence of broken windows in early writing assignments also may provide a good prediction of high quality writing later for the same reasons. For example, each year, first-year students in my legal writing course receive directions in the course syllabus about the correct format, based on local court rules, for the assignments they submit. They also receive a reminder before the first assignment becomes due. Every year, a small minority of students submit their first few assignments in the correct format. At the end of each year, if I compare the students who received the highest scores at the end of the

<sup>3</sup> *Id.* at 8.

<sup>4</sup> See Stephen V. Armstrong & Timothy P. Terrell, *Sweating the Small Stuff*, *Perspectives: Teaching Legal Res. & Writing* 128–31 (2003).

<sup>5</sup> James Q. Wilson and George L. Kelling, *Broken Windows: The police and neighborhood safety*, *The Atlantic Monthly*, March 1982, 29, 31.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 34.

<sup>8</sup> *Id.* at 34.

<sup>9</sup> *Id.* at 35.

year against those students who followed the correct format at the beginning of the year, there consistently exists a high correlation between the two groups. Over time, I have concluded that these students show early in the academic year the ability to pay attention to detail and the discipline to do it consistently throughout their legal research, analysis, and writing.

While describing types of neighborhoods, the authors of the *Broken Windows* article correctly describe types of students most legal writing teachers see each year. First, for the authors, some “neighborhoods are so stable and serene as to make foot patrol unnecessary.”<sup>10</sup> Every year, each legal writing teacher probably has students who already write well and take the class seriously. For these students, very few broken windows exist in their writing assignments, and when noted, the students quickly fix them. For these students, legal writing teachers can focus on solving the more serious crimes in their writing if they exist.

Second, “[s]ome neighborhoods are so demoralized and crime-ridden as to make foot patrol useless; the best police can do with limited resources is respond to the enormous number of calls for service.”<sup>11</sup> Again, each year, most legal writing teachers will have some students whose writing just contains so many errors, both serious crimes and broken windows, that all cannot be addressed at one time. Given the number of pages of writing the average legal writing teacher faces each semester, one probably cannot comment on all the errors in these assignments. Papers with these many broken windows probably foreshadow a year during which the legal writing teacher may spend a disproportionate amount of his or her time attempting to help the student fix serious problems.

Third, most students fall into the next group. As the *Broken Windows* authors describe it, “[t]he key is to identify neighborhoods at the tipping point—where the public order is deteriorating but not unreclaimable, where streets are used frequently but by apprehensive people, where a window is likely to be broken at any time, and must quickly be fixed if all are not to be

shattered.”<sup>12</sup> By applying the broken windows theory to these students early in their first-year legal writing course, one has a better chance of “tipping” these students in the right direction and fostering in them the discipline necessary for later success in legal research, analysis, and writing.

Many students fall into this group for a number of reasons. For some, a first-year legal writing course provides the first time anyone has examined their writing line-by-line or word-by-word with the goal of providing constructive criticism. Others in this group may not view their legal writing course as a “real” course because their law schools either do not grade the course or do not count the grade in their grade point average. Finally, others in this group may not view the effort required by their legal writing course as being commensurate with the units of academic credit awarded for it. Being future lawyers, these students calibrate their efforts to the perceived worth of the class with “broken windows” appearing in their writing as a consequence of that decision. For whatever reason they fall into this group, students here have the ability but not the discipline to produce high quality legal writing initially. These students are “at the tipping point” much like some neighborhoods.

### Applying the Broken Windows Theory Effectively

To apply the broken windows theory effectively, one must guard against being seen only as nitpicker or as only interested in fixing broken windows in a student’s writing. Students probably will not react favorably if they perceive their legal writing teacher as only commenting on grammar, punctuation, and citations.

Rather, the legal writing teacher actively should seek to solve the serious crimes in a student’s writing while bringing all the broken windows to the student’s attention as they go along. In this way, the legal writing teacher acts much more like the police officer utilizing the plain view doctrine.<sup>13</sup> In essence, the legal writing teacher begins reviewing the student work because he or she has probable cause or a reasonable suspicion to

“Students probably will not react favorably if they perceive their legal writing teacher as only commenting on grammar, punctuation, and citations.”

<sup>10</sup> *Id.* at 38.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

“In general, students will pay more attention to every line or word in their writing if they believe their legal writing teacher will do the same when reviewing it.”

believe some serious crimes may have been committed, but while there, the legal writing teacher finds a series of minor offenses and broken windows in plain view. Just like the police officer, the legal writing teacher should not ignore these items in plain view.

In addition, a legal writing teacher needs to identify these broken windows and minor offenses with consistency before students will take the commenting or suggestions seriously. In my experience, students do not seek to make small errors in their writing assignments, but, except for a few students, they do not take these errors seriously unless they perceive that their legal writing teacher does. For example, law students generally will take the time to learn and use basic citation rules correctly if their legal writing teacher consistently marks incorrect citations or if they see that incorrect citations may have some marginal effect on their score for some assignment. Either way, bringing the student's attention to these broken windows helps create more discipline and attention to detail in each student. In general, students will pay more attention to every line or word in their writing if they believe their legal writing teacher will do the same when reviewing it.

Once a student has this discipline and attention to detail, the need for a legal writing teacher to comment on these types of items in writing assignments declines quickly. Students typically do not lose this discipline once they have it. Students begin to realize that writing samples for jobs and clerkships need a professional quality. Students often look back at their earlier assignments in amusement or horror once they attain this level of discipline. More importantly, this discipline and attention to detail, once obtained, generally transfer to other skills in the legal writing course. Students who pay attention to the small details in their own writing find it easier to pay attention to the small details in other people's writing ranging from court decisions to opposing briefs.

Finally, every legal writing teacher needs to make sure to manage his or her workload effectively. To apply this approach effectively, one should have students write relatively short assignments at the beginning of the course. This becomes important for three reasons. First, relatively long initial assignments (e.g., over five pages) provide students with the opportunity to

repeat mistakes without having received any constructive criticism. A student who struggles with presenting a syllogism in writing, e.g., an IRAC (Issue, Rule, Application, Conclusion) or CRAC (Conclusion, Rule, Analysis/Application of Rule, Conclusion Restated) large-scale organization, does not benefit from having to present it incorrectly multiple times in an initial assignment. Second, relatively short initial assignments allow the legal writing teacher to comment on all aspects of the writing within a reasonable period of time rather than having to prioritize certain major issues with each student. This avoids misleading any student into thinking aspects of their writing that do not receive comments or any attention are fine. Third, relatively short initial assignments allow for repetition. This will result in more frequent writing experiences and more frequent comments from the legal writing teacher. This increased frequency provides an opportunity to create more disciplined legal writers.

### Conclusion

The ultimate goal of any legal writing program “should be to make each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem.”<sup>14</sup> Achieving this goal requires students to develop a necessary level of discipline and attention to detail. For those students entering law school without these skills, the legal writing teacher can spur the development of these skills during the initial stages of a first-year legal writing course. To do so, a legal writing teacher may need to view himself or herself less like a physician in a triage ward and more like a neighborhood police officer seeking to help the community by ridding it of broken windows. In the legal writing context, this requires the teacher not to ignore the many small errors that infest early legal writing submissions from many first-year students. By bring these broken windows consistently to their attention, the legal writing teacher can help convey and foster the discipline and attention to detail necessary for quality legal research, analysis, and writing.

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<sup>14</sup> American Bar Association, *supra* note 2, at 8.

## BRUTAL CHOICES IN CURRICULAR DESIGN ...

## HOLISTIC SCORING

BY WILLA WOLCOTT

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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.*

## Prologue

Holistic scoring, though most commonly associated with national or statewide writing assessments, offers definite potential for legal writing classes as well. For example, it can provide legal writing teachers an alternate way of grading selected written assignments. Not only are teachers experienced in holistic scoring able to grade large numbers of essays efficiently, but the very use of this scoring approach also forces teachers to evaluate global, as well as surface, features of the essays. Training new teachers in holistic scoring procedures can thus help to prevent novice instructors from overattending to mechanics or to any single writing trait in their grading procedures. In addition, as previously reported in *Perspectives*, proposed changes to the Law School Admission Test (LSAT) include the possible addition of a scored writing assessment, designed to emphasize critical and analytical writing skills.<sup>1</sup> Having familiarity with holistic scoring procedures should, therefore, be beneficial to legal writing instructors.

Law students themselves can benefit from having some of their assignments holistically

<sup>1</sup> Annemarie Bridy, *A New Direction in Writing Assessment for the LSAT*, 11 *Perspectives: Teaching Legal Res. & Writing* 61 (2003).

scored.<sup>2</sup> For example, holistic scoring guides enable students to see the breadth of criteria on which overall writing judgments are based and to engage in classroom discussions about what good writing entails. Although holistic scoring does not provide specific, diagnostic feedback about individual writing traits the way that analytic scoring does, students can, nevertheless, see from the descriptions contained in scoring guides the typical qualities embodied by the scores their own work has received. Students may then use these guides (which they sometimes help to develop) to practice rating either a series of sample essays or their own writing drafts.

## Nature of Holistic Scoring

Based on the theory that the whole is more than the sum of its parts,<sup>3</sup> holistic scoring emphasizes the need for having scorers evaluate an essay in terms of its overall impression. The impression is not a snap judgment; rather, it is derived from the readers' thorough understanding of the criteria and their training in applying those criteria to papers. Considering all writing elements without focusing unduly on any single trait, scorers make no marks on an essay; instead, they read each paper quickly, and then, without rereading it, assign a single score on the basis of how successfully various writing traits, such as development, focus, clarity, organization, diction, and mechanics, combine to work together within a piece.

## Background

Holistic scoring has been greatly influenced by the classic work of Paul Diederich, John French, and Sydell Carlton,<sup>4</sup> who sought to determine grading standards and the factors that accounted for grading differences among essay readers. They asked 53 professionals from six diverse fields each to rank order in nine separate piles according to quality about 50 papers (300 papers in all) written

<sup>2</sup> For a discussion of the use of holistic scoring in classrooms, see M.L. Rodgers, *How Holistic Scoring Kept Writing Alive in Chemistry*, 43(1) *College Teaching*, 19–22 (1995).

<sup>3</sup> Miles Myers, *A Procedure for Writing Assessment and Holistic Scoring* (1980).

<sup>4</sup> *Factors in Judgments of Writing Ability*. Research Bulletin RB-61-16, 1961.

“Based on the theory that the whole is more than the sum of its parts, holistic scoring emphasizes the need for having scorers evaluate an essay in terms of its overall impression.”

“Holistic scoring emphasizes the importance of building—collegially—group consensus as to the standards adopted...”

at home by college freshmen from different universities. No training or guidance was provided the readers. A large percentage of the essays (94 percent) received at least seven of the nine possible grades, and no paper was given fewer than five grades. Differences among readers fell into five broad areas: ideas, form, flavor, mechanics, and wording. The authors stressed both the need for general consensus among readers and the importance of providing them with training and direction if scorings were to serve major purposes.

A second influential study was *The Measurement of Writing Ability* by Fred Godshalk, Frances Swineford, and William Coffman.<sup>5</sup> The authors used holistic scoring to evaluate each of five essays written by nearly 650 high school juniors and seniors throughout the country. Although their study was undertaken primarily to validate multiple-choice items, they concluded with several recommendations for holistic scoring procedures.

Other studies explored the elements that evaluators focus upon when making judgments about writing quality. Some researchers found readers to be strongly influenced by organization and content,<sup>6</sup> whereas others found readers to be greatly concerned with such elements as mechanics, spelling, vocabulary, or length.<sup>7</sup> Still others concluded that readers' expectations about the writers can influence results.<sup>8</sup> However, it is important to note that, as Brian Huot cautions, several studies used methodologies other than

traditional holistic scoring procedures, a factor which might have affected the findings.<sup>9</sup>

### Training Procedures

Procedures currently used for formal holistic scorings often follow those established by the Educational Training Service. Holistic scorers are typically trained to evaluate essays according to established criteria contained in a scoring guide, which conveys the qualities a generic essay reflects at each score point for a particular exam.

These guides may be derived either descriptively or prescriptively. That is, in some assessments the guides have been descriptively written based on qualities reflected in papers actually scored on two or three occasions. In other assessments, the scoring guides are prescriptively written beforehand to reflect the qualities expected at each scoring level.

In a scoring guide, the criterion for a trait such as diction may be generically described as “sophisticated and precise” in a top-scoring paper, whereas it may be labeled “pedestrian” or “general” in a lower-half paper. Because an actual essay rarely matches the entire criteria described for each score point, sample papers on current topics are essential for training purposes. The sample papers are preselected from actual assessment essays by chief readers and then validated by scoring leaders prior to a scoring session in order to illustrate how the scoring guide can be applied at each scoring point to papers on a given topic.

Holistic scoring emphasizes the importance of building—collegially—group consensus as to the standards adopted, and both the training and monitoring procedures are designed to facilitate this group consensus. At the start of a scoring session, readers are reminded of the testing conditions under which students wrote their essays and to keep certain principles in mind.<sup>10</sup> Readers are urged to a) disregard the significance of length per se as some short papers may be compact and

<sup>5</sup> ETS Research Monograph No. 6 (1966).

<sup>6</sup> See Sarah Freedman, *How Characteristics of Student Essays Influence Teachers' Evaluations*, 71(3) *Journal of Educational Psychology* 328–338 (1979); see also Hunter Breland & Robert Jones, 1(1) *Perceptions of Writing Skills*, 1(1) *Written Communication* 101–119 (1984).

<sup>7</sup> See Cary Grobe, *Syntactic Maturity, Mechanics, and Vocabulary as Predictors of Quality Ratings*, 15(1) *Research in the Teaching of English* 75–85 (1981). See also Bennett Rafoth and Donald Rubin, *The Impact of Content and Mechanics on Judgments of Writing Quality*, 1(4) *Written Communication* 446–458 (1984). See Carl Stach, *The Component Parts of General Impressions: Predicting Holistic Scores in College-Level Essays*, 1987 *Dissertation Abstracts International*, 48, 07A. (University Microfilms No. DES 87-22706).

<sup>8</sup> See Loren Barritt, Patricia Stock & Francelia Clark, *Researching Practice: Evaluating Assessment Essays*, 37 *College Composition and Communication* 315–327 (1986).

<sup>9</sup> See *The Influence of Holistic Scoring Procedures on Reading and Rating Student Essays*, in *Validating Holistic Scoring for Writing Assessment: Theoretical and Empirical Foundations* 206–236 (Michael Williamson and Brian Huot, eds. 1993).

<sup>10</sup> For a good listing of procedural scoring criteria, see *A Guide to the New SAT Essay* 12 (2004).

succinct, whereas long papers may ramble or collapse, b) remain alert to any papers that may trigger their own biases, and c) turn papers with difficult handwriting or other problems over to scoring leaders for review. Then scorers begin their training by rank ordering from best to worst a set of preselected sample papers known as rangefinders. The rangefinders serve as “anchor papers,” or papers that reflect each scoring level on the currently assigned topic. As the set of papers contains at least one anchor paper for each point on the scoring scale, the rank ordering procedure enables scorers to see the quality of essays in relation to one another. This concept of rank ordering is important, for it means, as Edward White points out, that a given score is not an absolute.<sup>11</sup> Rather, it must be understood in the context of the entire scale against which the essays are ranked. Thus, unlike a classroom grade of B or A, a paper cannot be given a holistic score—a three, for instance—out of context. Once scorers have rank ordered the papers, in centralized scoring sessions they are asked to reveal publicly the scores they have assigned. This public tallying of scores enables scorers to see how closely their scores correspond to those given by other readers. (Online scoring has taken the place of centralized scoring sessions for some assessments; however, readers still are trained and monitored by scoring leaders online.)

Throughout the scoring session, readers are subsequently given at regular intervals pairs of additional prescored sample papers that they, in turn, must grade to ensure they are continuing to uphold group standards. At this point, readers are not explicitly rank ordering papers; rather, they are assigning scores to papers by employing the criteria they have internalized for each scoring point. Their performance is further monitored by two additional methods—first, by scoring leaders who randomly select papers from each reader for review and second, by check readings, in which all participants—the chief readers, the scoring leaders, and the readers—score a batch of new essays to ensure they are scoring alike as much as possible. The emphasis placed on consistency of scores has

been criticized by some writing scholars, who question the validity of such readings, given the complexity of the writing process.<sup>12</sup> However, studies done by Brian Huot and later by Judith Pula and Huot to determine the issue of validity, rather than reliability alone, found that the very training procedures entailed in holistic scorings not only assisted readers in making their evaluations of essays but actually freed the scorers to engage in a fuller response to the essays they scored.<sup>13</sup> Certainly, the group consensus established helps to minimize idiosyncratic preferences on the part of scorers, thereby increasing interrater reliability rates and ensuring more fairness for the writers. Scorers who are unwilling to adopt the group standards may be disqualified from participating.

### Scorers and Scoring Scale

For many assessments, scorers are chosen with a strong writing background in their professional field. Essays are generally scored by two readers who assign coded scores independently of one another. Although the breadth of the scale used varies according to the purpose of the assessment, a scale of six points is typical in that it allows for some discrimination among scoring levels without requiring readers to make too fine a distinction. Further, most scales used contain an even number

“Essays are generally scored by two readers who assign coded scores independently of one another.”

<sup>12</sup> Davida Charney, *The Validity of Using Holistic Scoring to Evaluate Writing: A Critical Overview*, 18 *Research in the Teaching of English* 65 (1984). Charney states, “Holistic ratings should not be ruled out as a method of evaluating writing ability, but those who use such ratings must seriously consider the question of the validity of the scores that result.” *Id.* at 79. See also Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* (1986). Like Charney, Elbow expresses reservations about an evaluation model that requires agreement among judges. Not only may it result in an overemphasis on surface features of grammar and mechanics, in his view, but also it requires readers to suspend their own judgments in favor of other standards. Similarly, William Smith points out that disagreements are bound to occur even among trained scorers, just as they occur among such other groups as “trained literature specialists” and “trained critics.” See Smith, *Assessing the Reliability and Adequacy of Using Holistic Scoring of Essays as a College Composition Placement Technique*, in *Validating Holistic Scoring for Writing Assessment: Theoretical and Empirical Foundations* 142, 198 (Michael Williamson and Brian Huot, eds. 1993).

<sup>13</sup> *Supra* note 7. See also Judith Pula and Brian Huot, *A Model of Background Influences on Holistic Raters*, in *Validating Holistic Scoring for Writing Assessment: Theoretical and Empirical Foundations* 237–265 (Michael Williamson and Brian Huot, eds. 1993).

<sup>11</sup> Edward White, *Teaching and Assessing Writing* (1985).

“Regardless of the number of score points, it is important to recognize that each score point represents a range along a continuum.”

of points so that readers do not settle arbitrarily for the middle point. Indeed, readers are urged to distinguish first in their own minds whether a paper is upper half or lower half before deciding on the actual level.

Regardless of the number of score points, it is important to recognize that each score point represents a range along a continuum. There can be a strong “six” paper, for example, or a “six” paper that is “looking down,” just as there can be a weak “two” or a solid “two” paper. Precisely because each score point signifies a range, contiguous scores from two readers are usually considered acceptable. For example, whereas one reader may see a given essay as a strong “four,” another reader may view it as a weak “five,” and they both may be right. If essays are scored two or more points apart, on most scales they are considered “splits”—that is, papers reflecting disagreement—and the essay is given to a third designated party such as the scoring leader to resolve. Splits may arise from a variety of factors: If a scorer becomes fatigued, the room is too warm, or other external conditions occur, then the scores a reader assigns may begin to drift upward or downward; conversely, if the papers themselves are problematic, such as showing a marked disparity in quality between content and surface features, then readers may tend to weigh these elements differently, and their scores may vary as a result. Although holistic scoring entails some subjectivity by the very nature of the human judgment involved, the extensive training and ongoing monitoring procedures are designed to minimize as much as possible the occurrence of splits and to maximize the consistency, and therefore the accuracy, of the scores that result. The value of the training and monitoring was noted by one scoring leader who participated in a holistic scoring study I previously conducted:

As a table leader, I have observed the monitoring process as a tempering of our individual prejudices and preconceived notions about how the papers should be graded. We must set aside our whims, caprices, and dogmatism in the interest of fairness and competency. Readers, table leaders, and chief readers balance papers

against group standards, adjusting skillfully as we proceed.<sup>14</sup>

### New Scoring Developments

The increase of writing assessments at both state and national levels has focused new attention on computer-based or automated scoring. Different versions of computerized scoring are being developed, and several states have experimented with computerized essay scoring in pilot tests. According to some supporters, the technology offers the potential for increased cost-effectiveness, faster turn-around time, and a need for fewer human scorers.<sup>15</sup> Advocates further note that computer evaluations are very reliable and that computers can agree more highly with human readers than pairs of readers do. However, as Donald Powers, Jill Burstein, Martin Chodorow, Mary Fowles, and Karen Kukich point out, the issue of validity is troublesome in that computers have been criticized for focusing on grammar, mechanics, and vocabulary.<sup>16</sup> In an effort to see how well results obtained by one automated scoring system corresponded to other external writing criteria, Powers and his colleagues explored relationships between the scores that examinees for the GRE Writing Assessment received and non-test indicators, such as undergraduate writing samples, self-reports of writing grades, and self-evaluations of writing criteria. They found that the automated scores obtained by the automated scoring system e-rater related “modestly” to the other indicators of writing skill and in a “reasonably similar” manner to those obtained by human raters. They point to “the potential of automated scores as (valid) indicators of prospective graduate students’ writing skills, especially when they can be combined with scores provided by at least one human reader.”<sup>17</sup>

<sup>14</sup> See Willa Wolcott, *Perspectives on Holistic Scoring: The Impact of Monitoring on Writing Evaluation*, 1989 Dissertation Abstracts International 51, 05A (University Microfilms No. DA9028582).

<sup>15</sup> Andrew Trotter, *States Testing Computer-Scored Essays*, 21 (38) *Education Week*, May 29, 2002, at 1–2.

<sup>16</sup> Donald Powers, Jill Burstein, Martin Chodorow, Mary Fowles & Karen Kukich, *Comparing the Validity of Automated and Human Scoring of Essays*, 26(4) *J. Educational Computing Research* 407 (2002).

<sup>17</sup> *Supra* note 14, at 421–422.



In addition to matters of validity, automated scoring raises questions about public acceptance. Researchers Mark Shermis, Chantal Mees Koch, Ellis Page, Timothy Keith, and Susanmarie Harrington note at the end of their study: “Because the acceptability of computer ratings will be a long-term issue (as it has been with other technology innovations, e.g., computerized adaptive tests), human raters will most likely be used as a second rater to protect against bad-faith essays, cheating, and so on. Eventually, we foresee a time when the computer will be used as the only grader for low-stakes activities; but again, this will take some time.”<sup>18</sup> (Certainly, the potential for cheating is a legitimate concern; in one statewide scoring with which I was involved, two students had, in the apparent belief their papers might be scored by a computer, done nothing more than copy over repeatedly the writing assignment.)

In fact, Anne Herrington and Charles Moran explore the profound question of what impact computer scoring will ultimately have on students’ writing when the audience for that writing is a computer—when students are, in effect, not just writing on a machine but to a machine; they conclude from their own experiment that writing to a machine desensitizes writers.<sup>19</sup> As I myself have argued in a previous work, it is critical that the interchange between writer and reader so fundamental to written communication not be devalued by the replacement of human scorers with machines.<sup>20</sup>

### Uses of Holistic Scoring

The growth—and valuable impact—of holistic scoring is noted by Edward White:

To the atomization of education [holistic scoring] brought a sense of connection, unity, wholeness; to the bureaucratic

machinery of fill-in-the-bubble testing, it brought human writers and human readers; to a true-false world of memorized answers to simplified questions, it brought the possibility of complexity; to socially biased correctness, it brought critical thinking. On behalf of students, it had the human decency to ask them what they thought as well as what they had memorized; on behalf of teachers, it asked them to make complex community judgments as well as to give grades.<sup>21</sup>

Holistic scoring has a wide number of uses, such as in classrooms, pre- and post-evaluations of writing programs, college placement essays, statewide essay exams, and national and professional tests. It seems especially suitable for large-scale assessments in that qualified, trained readers can evaluate substantial numbers of essays quickly, efficiently, and quite reliably.

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“To the atomization of education [holistic scoring] brought a sense of connection, unity, wholeness ...”

<sup>18</sup> Mark Shermis, Chantal Mees Koch, Ellis Page, Timothy Keith & Susanmarie Harrington, *Trait Ratings for Automated Essay Grading*, 62(1) *Educational and Psychological Measurement* 5, 16–17 (February 2002).

<sup>19</sup> Anne Herrington and Charles Moran, *What Happens When Machines Read Our Students’ Writing?*, 63(4) *College English*, 480–99 (March 2001).

<sup>20</sup> Willa Wolcott with Sue Legg, *An Overview of Writing Assessment: Theory, Research, and Practice* (1998).

<sup>21</sup> Edward White, *Holistic Scoring: Past Triumphs, Future Challenges*, in *Validating Holistic Scoring for Writing Assessment: Theoretical and Empirical Foundations* 79, 88 (Michael Williamson and Brian Huot, eds. 1993).

“Is this really a job that can continue to capture one’s interest, provide a creative outlet, and foster professional satisfaction ...?”

## LONG-TERM JOB SATISFACTION AS A LEGAL WRITING PROFESSIONAL

BY MARY DUNNEWOLD

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I have been teaching legal writing for 12 years. Halfway through my legal writing career, after a lengthy debate, the faculty at my school finally abolished the existing three-year caps on legal writing positions. For the next six years, until now, the legal writing faculty has been laboring to convince the rest of the faculty to grant us job security in the form of long-term contracts and status in the form of new titles and other benefits. We are close to achieving that goal, but we are still not quite there. The long process has left some of our instructors dissatisfied and unhappy.

This is a familiar story in the legal writing community. It is true that the incremental progress toward better working conditions, salaries, and job security for legal writing faculty, not just at my institution but at many others, is encouraging, and I applaud the people working so hard to make it happen. Employment caps are largely gone, many legal writing faculty now have professorial titles, many teach other courses in the curriculum, and a growing number of directors (and sometimes non-directors) have tenure track positions.

But living in the midst of this story, where progress seems so slow, I sometimes reach a low point where I wonder whether the payoff—the ability to teach legal writing for my entire career if I so choose—is worth the tremendous amount of work and frustration involved. Is this really a job that can continue to capture one’s interest, provide a creative outlet, and foster professional satisfaction, not just for a few years, but maybe for a few decades? Or, heaven forbid, could those legal writing-cranky doctrinal professors down the hall be right: that contract caps on legal writing jobs are appropriate, and in fact even kind, because no

one can teach legal writing for more than a few years without dropping from boredom?<sup>1</sup>

After wrestling with this question over the last year, I have reached a happy conclusion: yes, I can find satisfaction over the long term in a career as a legal writing teacher. In fact, I have renewed conviction that my job can continue to be both challenging and satisfying for the indefinite future. But I have also concluded that given the circumstances that potentially erode the job satisfaction of legal writing professionals over the long term, we need to consciously take steps to balance the more negative aspects of the job with positive aspects. To accomplish this, I believe we must first consciously and realistically examine the benefits and drawbacks of the job, and then we must deliberately incorporate creative and challenging new opportunities into our careers to offset some of the very real downsides.

### The Pros

On the positive side, the profession of teaching legal writing has a lot to recommend it. Teaching itself can of course be quite rewarding. There is great satisfaction in grading a well-crafted paper submitted by a student who really struggled to write it, but ultimately figured it out. And there is great satisfaction in hearing from a former student who tells you just how much the skills he learned in your class last year helped in his summer job. Developing mentoring relationships with students and watching those students blossom into confident professionals can be incredibly rewarding.

Also, there is value in being part of a developing profession and watching it, or even helping it, mature, especially when that happens within the context of a larger collegial and supportive legal writing community. Those who have the time and support to engage in scholarship can take pride in contributing both to the legal writing community and the legal academy in that particular way. Finally, the academic schedule and

<sup>1</sup> See Mary Beth Beazley, “Riddikulus!” *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 *Scribes J. Legal Writing* 79, 80–81 (2000) (debunking arguments against the appointment of long-term legal writing faculty).

the flexibility it affords alone are a significant benefit. Although the work is incredibly intense during certain months of the year, having most of June and July available to “regroup” is a real advantage. And some days, you can grade at your kitchen table in your pajamas, and no one needs to know.

### The Cons

Sometimes, however, the myriad of problems can seem to outweigh the rewards. The downsides of teaching legal writing, which raise the risk of long-term dissatisfaction with the job, are well known and well documented.<sup>2</sup> As most people working in the profession know, and the yearly Association of Legal Writing Directors’ survey documents,<sup>3</sup> legal writing professors usually have extraordinarily heavy workloads. They may be teaching writing, a time-intensive undertaking requiring significant individualized instruction and grading, to 50 or more students at a time. They generally are underpaid, often earning less than half the salary of their doctrinal colleagues and less than the recent law school graduates they taught to write.

Further, most legal writing professors struggle daily to combat the invidious and sometimes blatant status issues that plague the profession. They get smaller offices and worse class schedules. Their classes are accorded fewer credits while being perceived by students as being more work. Their biographies and pictures do not appear on the school Web site. Their contact information is placed in a separate legal writing category at the end of the faculty phone sheet. They are not

recognized as “professors” (because, as one doctrinal colleague argued, we don’t “profess”), and instead are given lower-status titles like “instructor” or “lecturer.” When legal writing faculty try to better their positions by raising these issues in their law schools, they may be ignored, they may be treated like children, or they may have to listen to seemingly endless and hurtful debate in faculty meetings about whether they “deserve” any of the benefits the “regular” faculty are routinely awarded.

The actual hard work of teaching legal writing to first-year law students can also, frankly, become somewhat routine. Every year in August, the legal writing teacher is confronted with basically the same raw material that must be molded all over again. There is never a year where the students already know what a rule of law is and how to use IRAC (Issue, Rule, Application, Conclusion) to organize an issue, so the class can skip that part and do something different. Further, no matter how the course is taught, the students cannot learn legal writing without doing it; so at some points during the year, legal writing teachers must sit down and slog their way through stacks and stacks of papers on an identical topic.

Also, many of us are in a perpetual quandary about who we are and what we should be doing. We think that to become more like “Them” (doctrinal professors) we need to act like Them. If They see that we are just like Them, then they will start to treat us (and, we hope, pay us) like Them. So we decide we need to publish articles, participate in law school committees, attend admissions events, and do all the other things They do. But even before we shoehorned all those activities into our schedules, we were already working twice as hard as They work, it seemed, for half as much money (if we’re lucky). Although these additional activities should in theory help us find long-term job satisfaction, we are now working *three* times as hard for half as much money, a pace we cannot sustain. So in addition to exhausting ourselves trying to do our job *and* do the job we think will increase our status in the eyes of the law school, we exhaust ourselves trying to figure out what our priorities should be and

“Every year in August, the legal writing teacher is confronted with basically the same raw material that must be molded all over again.”

<sup>2</sup> The various problems of working as a legal writing professor have been documented numerous times. See, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 *Temple L. Rev.* 117 (1997); Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 *Legal Writing* 95 (2000); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 *Vt. L. Rev.* 371 (2003); Jan Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 *J. Legal Educ.* 530 (1995); Jill Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 *Legal Writing* 1 (1996).

<sup>3</sup> See <[www.lwionline.org](http://www.lwionline.org)> for annual Association of Legal Writing Directors survey results.

“Try scheduling a full-day legal writing faculty retreat every three years or so, and hold it away from school where you can relax.”

whether any of this hard work will ever make any difference.

Further, the time drought for legal writing professionals, occasioned by the need for intensive individual work with students and long grading hours, robs us of the time to do the things that might contribute to long-term job satisfaction. We have little time and energy to fight for status changes, which perhaps contributes to the slow rate of change. Although writing scholarly articles might ultimately increase job satisfaction, it can be difficult to trade one of the more tangible benefits of the job, time to regenerate during the academic breaks, for time to pursue larger scholarly projects. And that assumes that the rest and regeneration possible during breaks are not essential to finding the energy to tackle the upcoming semester.

Finally, even the very satisfying aspects of the job, like just plain teaching, can get tedious after 10 years if no breaks or course variations are available. Even the glow of excellent teaching evaluations and the resulting determination to do even better next year can fade in weeks. Last May's teaching evaluations, no matter how good, may not provide enough sustenance in October to keep you going until December if you are at the end of your rope. And while in the fall, a couple of returning students may be effusive about how much they learned and how important the class was to their education, they then go away, leaving you to face all those new students who don't understand IRAC until the fourth or fifth explanation.

### Can the Pros and Cons Balance?

Weighing these pros and cons can be disheartening. The problems sometimes seem more numerous than the rewards, and there are many problems within the profession that as individuals we may not be able to fix, at least in the short term. This does not mean, however, that we must conclude that the struggle is not worth the effort. Rather, it means we need to take deliberate action to fortify the positive side of the equation so that we can make the teaching of legal writing a long-term career, not just a stop along the way. So as we continue to push for changes, what can we do to maintain our enthusiasm for

the work as it is now and as it may be for another decade?

Most importantly, we may need to recognize that teaching the same subject over and over, year after year, if that is what we have contracted to do, may not be enough to maintain professional enthusiasm, even if we pursue creative new ways to do it. If we recognize that limitation on the job, we can then consciously commit ourselves to engaging in other activities that help us grow professionally. One option is to deliberately make more time for nonteaching activities, which most experienced teachers can probably do without actually becoming less effective teachers. Reuse tried and true writing problems and class exercises; for one semester, rely solely on old class notes so that more time is freed up for a new, creative project. This does not mean you must become a bad teacher; just decide to lighten up for one semester and instead devote that energy to something else, like your own writing. The new ideas and enthusiasm that a creative project can generate will ultimately enhance classroom teaching.

Second, although it is completely legitimate to slow down in the summer to recover from the academic year, volunteering or working in a legal practice setting during long academic breaks can be energizing. Working at a legal aid office or for an environmental advocacy organization for two months, or writing a few briefs for the state public defender's office, can remind you why you went to law school and can help reconnect you with the actual practice of law. It can also help refresh the skills you are teaching, help you keep up with changes within the profession, and provide material for new writing assignments.

Also, every few years, with your colleagues, re-examine in depth what and how you teach, which can provide a much-needed boost. Try scheduling a full-day legal writing faculty retreat every three years or so, and hold it away from school where you can relax. At the retreat, don't limit the discussion to the current details of the program. Instead, pretend you are starting all over and need to decide how to structure the course. Think big. Examine your priorities. Decide whether you would come out with a program any different from the one you have now. The conclusion may

be that the current program works perfectly well. But that conclusion can itself be quite gratifying, and the discussion it takes to get there can reinvigorate your teaching. A retreat can also help strengthen relationships with your colleagues, which may help sustain both individuals and a legal writing department through stressful times.

In addition to connecting with local colleagues in meaningful ways, connect with the wider legal writing community. Regional conferences are held regularly, and the Legal Writing Institute organizes an excellent conference every other year, attended by several hundred of its members.<sup>4</sup> The conference includes presentations on a variety of subjects related to legal writing, including teaching and scholarship. It also provides a great opportunity to get to know other legal writing faculty who can offer support and mentoring, especially during difficult career phases. Attending a conference can help individual faculty members feel connected to a greater purpose of promoting and fostering good legal writing in the legal profession as a whole, which can contribute significantly to job satisfaction. Also, it does not take much time to participate in the legal writing e-mail discussion list, and having a network of peers who fully understand both the limitations and the joys of the job can be invaluable.

Although unlike doctrinal professors, most legal writing professionals are not contractually entitled to a sabbatical, most deserve and probably need one. If financially possible, consider self-funding a sabbatical to make time for a renewing project, or ask to teach half time for a semester or a year. While many law school deans are unwilling to pay for legal writing faculty sabbaticals, they may approve a well-conceived plan that will not cost them anything. Two legal writing professors could job share for a year, or one could teach fall semester and the other teach spring. A job exchange with a legal writing faculty member at another school might provide a change.<sup>5</sup> This may

seem like admitting defeat and allowing our employers to take advantage of us since law schools *should* be funding sabbaticals for legal writing staff. But realistically, some of us just need some time off for renewal, and we are not going to have the stamina to fight for funded sabbaticals for another 10 years if we don't get it.

Finally, look for day-to-day opportunities that can make life within the workplace more rewarding. Make connections within the law school community. Not all doctrinal professors are the enemy; some of them actually have taught legal writing and know all about its problems, and some of them just get it or are good people who can make the workplace more enjoyable, or both. Get involved in the local bar association in some small way. Ask to teach summer school courses, or to participate in a clinic as an adjunct, or to substitute in doctrinal classes. Make a conscious effort to do something different in your professional life, even for just a semester.

### Conclusion

The legal writing professional community and the legal education community as a whole could potentially suffer significant damage because of the stresses on individual legal writing professionals and the personal dissatisfaction that can result. We stand to lose experienced and knowledgeable teachers who have developed expertise both in teaching methods for legal writing and the craft of legal writing itself. The consequential loss to legal education in general is, I hope, obvious. While some schools have made significant progress on status and equity issues, allowing individuals at those schools to be quite professionally active and to pursue creative projects that nourish them over the years, many have not. The legal writing faculty at less progressive schools may have trouble seeing legal writing teaching as a profession that can offer them professional satisfaction over the long term.

Undoubtedly, legal writing faculty will slowly continue to make gains and improve their position. And those gains and improvements will enhance opportunities for legal writing professionals to do more varied and thus ultimately more satisfying work: more scholarship, more involvement in professional organizations, more contribution to their law school communities, and

“Make a conscious effort to do something different in your professional life, even for just a semester.”

<sup>4</sup> See <[www.lwionline.org](http://www.lwionline.org)> for information on conferences sponsored by the Legal Writing Institute.

<sup>5</sup> See Terri LeClercq, *A Challenge from the Future: Legal Writing*, 2009, 9 Legal Writing 111, 116 (2003) (suggesting job exchange as a positive development for the legal writing community).

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more opportunities to teach new and challenging courses. These improvements will probably lead to better working conditions, eliminating some of the large-scale problems, like low salaries, and smaller-scale irritations, like inferior offices and lack of institutional recognition.

Although I sometimes find the slow pace of change within the profession discouraging, and some of the corresponding conditions that plague the profession frustrating, implementing a few of these “job satisfaction boosters” has helped me find new enthusiasm for my work and has allowed me to balance out some of the dissatisfactions. I believe that consciously recognizing the potential pitfalls in teaching legal writing and regularly making plans about how to step around them will help keep me challenged and engaged over the long term.

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**“Learning is usually treated as a supply-side matter, thought to follow teaching, training, or information delivery. But learning is much more demand driven. People learn in response to need. When people cannot see the need for what’s being taught, they ignore it, reject it, or fail to assimilate it in any meaningful way. Conversely, when they have a need, then, if the resources for learning are available, people learn effectively and quickly.”**

—From John Seeley Brown and Paul Duguid, *The Social Life of Information*  
(Harvard Business School Press, Boston) 2000 at p. 136.

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## TEACHABLE MOMENTS FOR TEACHERS ...

LIFE-CHANGING  
MOMENTS: LEARNING  
TO ACCEPT YOUR  
STUDENTS' CHOICES

BY KARIN MIKA

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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](mailto:sirico@law.vill.edu).*

Without a doubt, having a child diagnosed with leukemia is a life-changing moment. In many ways, you leave everything you ever knew behind and embark upon a new life in which each day brings new challenges, new insights, and, in the end, a rebirth into a different world. This different world looks like the world that you formerly lived in, but it is so vastly different that you have a hard time explaining its differences, especially to yourself.

My daughter's diagnosis and subsequent two-and-a-half years of treatment were the impetus for my teachable moment. I should properly say, teachable moments, because there were so many subtle things that happened during that time frame that it would be difficult to pinpoint a moment of epiphany, and I can't even say that I had an epiphany. However, I did change, maybe imperceptibly to some, but I changed nonetheless. Interestingly enough, the ways in which I changed, especially as a teacher, might seem contradictory at first. However, the changes are cut from the same cloth and have managed to peacefully coexist.

Before I explain how I changed, it might be best to give some background as to who I was as a legal writing professor. When I first began teaching, I had the normal zeal associated with being a young teacher. I had started out at my law school as an assistant in the Legal Writing department. I was responsible for distributing assignments and materials to 12 adjunct professors, and I was the universal tutor for all first-year students.

In my position as assistant, it was easy to proclaim what were the flaws in the system and I spent each day thinking about how I would correct those flaws if I were allowed to teach. The next year I had that opportunity.

Once I became a full-fledged legal writing instructor, I came at the job believing that there was no student who could not be taught to write well and that I would ensure that this would happen. Thus, I took personal responsibility for the success of each of my students. If they didn't get it, it was a blow to my ego, and thus I spent all of my time doing things such as chasing students down the hall, modifying and remodifying assignments, and, of course, getting up in the middle of the night because I had an idea about how to "fix" a particular problem.

I did this for several years until experience taught me two fundamental truths: 1) that some students did not particularly care about succeeding, and 2) that no matter what I did, some students did not have the potential to succeed. Coinciding with this was a move in our school to do "more weeding out" and to "use the full range of grades," especially in legal writing. Thus, although I don't think I became less of a nurturer, I limited it to those who wanted to be nurtured. I no longer had mandatory conferences, and I no longer chased students in the hall. If they wanted to see me, they knew where to find me. Nevertheless, I still jotted down ideas in the middle of the night, but those related mostly to the salary and status issues that were often the focal point of all of my hours not related to student services.

My world changed on December 25, 2001, in my 11th year of teaching legal writing. On that day, I decided to "brave" a lengthy wait in the local emergency room because my then 12-year-old

“When I first began teaching, I had the normal zeal associated with being a young teacher.”

“While I haven’t lost any of my fight or spirit, I no longer see academic problems as life-and-death matters.”

daughter had been feverish for weeks and, despite several reassuring doctor visits, I was bound and determined to get an antibiotic for her before we left on our December vacation to the American Association of Law Schools meeting. Six hours later, we found ourselves in a room at the Cleveland Clinic discussing a bone marrow biopsy, surgery for a chest port implantation, and the lengthy protocol for childhood leukemia.

Without getting into the nitty-gritty of leukemia treatment, let me just say that the trip is daunting. Girls are treated for two-and-a-half years, and boys are treated for three-and-a-half years. The treatment involves a perpetual toxic cocktail of drugs that is sometimes intravenous with pills, sometimes pills with leg shots, and sometimes leg shots with intravenous drugs. Then there are the spinal taps ... somewhere between 20 and 30 over the course of the two-and-a-half years. As my daughter joked, “You know you’re here too often when you’re on a first-name basis with all of the personnel in the operating room.”

The regimen of drugs cannot be described as anything less than heinous. The object of these drugs is to destroy cells, and destroy cells they do. Not only the leukemic cells, but stomach cells, red blood cells, platelets, liver cells, heart cells, mouth cells, intestinal cells, and, of course, the cells that produce hair. In addition, part of the object of leukemia treatment is to keep the immune system barely functional. This pretty much means isolation for the child, and also means that at the hint of an illness, you can expect at least a 48-hour hospitalization. You spend much of the time anticipating what may come next and come to expect the inevitability that you will have to drop everything in order to take your child to the hospital. This is in addition to the sometimes tri-weekly appointments that you are going to during the first nine months of treatment.

Then of course there are the other side effects—nausea, lack of appetite, excessive appetite, water weight gain, rashes, soreness, mood swings, watery eyes, and, in the case of a drug called Vincristine, leg cramps and a complete loss of reflexes. Aside from this, there are the other things that go along with such an illness—constant disinfecting to prevent germs, dealing with friends and family (which included a younger sibling), paying the bills, and, in general, just

trying to figure out how you will get through the next day with a shred of sanity left. It is at that point, just when you don’t know if you can do it for one more day, that you go to one of your regular appointments, glance down the hall, and realize that you and your child are the lucky ones. At least you were given a chance. Many others are not. Such is life in the pediatric oncology department.

All this while, I was having my teachable moment, except that I didn’t know it at the time. About all I knew was what I was doing in the next minute, and sometimes not even then. I did teach during this time period, and I would hope that I even did a credible job. But I couldn’t say that this was the result of anything other than intuition and experience. My world was a grand fog, and there were many points when I was sure it would never lift.

I think I first discovered I had had a “teachable moment” in the fall of 2003. My daughter was a mere seven to eight months away from the conclusion of treatment, was having no complications, and was attending high school and participating in extracurricular activities. The perpetual worry about what the next minute was to bring was slowly lifting.

One day in the fall, we were having a brown bag luncheon to discuss methods of helping students pass the bar exam. This topic had always caused a contentious debate amongst our faculty, and I was often in the thick of things. This time, however, I decided not to go to the luncheon. I found that I did not care what was said, and had no interest in having my opinion heard. I was a little bit surprised at my own disinterest and spent a long time assessing what was going through my head.

The feeling becomes difficult to describe. It is not that I no longer cared about whether students did or did not pass the bar exam, it is that I had somehow completely lost the ability to be moved by the contentiousness surrounding academic bureaucracies or law school hierarchies. It is not that I don’t care that my office is windowless and in the basement, but that I have lost the ability to consider this to be a major issue in my life. While I haven’t lost any of my fight or spirit, I no longer see academic problems as life-and-death matters.



The students may not see it, but I believe my teaching changed dramatically this year. I recall in years past arriving at legal writing class steamed over some faculty slight, and leaving legal writing to pen some memo to the dean or some other committee chairperson. Although I never tried to let any of this preoccupation pervade any of my interactions with students, I'm sure it did on numerous occasions, especially with a wisecrack or two. I'm sure that whether it was done willingly or perhaps subconsciously, I made students my personal soldiers in whatever was my quest for the week, and I'm sure that when I had that ever-important memo to write, I would have to grit my teeth and smile when a student approached asking whether I could explain something.

As a result of my teachable moment, whatever current quest I have is completely separate from my teaching. It is no longer intertwined. Because peripheral issues no longer "get to me," my teaching has really become all about the students. No longer do I have to feign enthusiasm when a difficult student walks in my office because now I actually feel that enthusiasm and am delighted to give that student all the time he or she requires to either get it, or perhaps not get it. Naturally, I'm still not thrilled to spend several hours with a student who will fight me every step of the way, but I no longer am subconsciously impatient to move on to that important memo to write, or that quandary I need to sort out regarding salary, status, or why we've got a 35-year-old copy machine.

The concept of the "difficult" student brings me to my second teachable moment. This one, however, can probably be traced to an actual moment in time as opposed to one that developed over the period of two-and-a-half years. Again, a little bit of background is required.

When my daughter began treatment for leukemia, she was 12 years old. At the time, she had been poked by a needle only once in her life, and was pretty much a homebody who loved reading and hanging out with mom. For about one-and-a-half years after her diagnosis, I became responsible for everything in every moment in her life. This stemmed from dispensing medication, to keeping appointments, to being emotional

cheerleader, to deciding when she should go somewhere, to home-schooling (including reading her assignments to her and writing down her answers), to feeding, to monitoring every waking *and* sleeping moment.

But during the course of treatment, she turned 13, and then she turned 14. Then she started high school.

It's not that I dreaded my daughter starting high school, but I was still wrapped up in the "what ifs?" What if she got sick during the day? What if the class load was too much? What if she was hospitalized and she fell behind? What if the school wasn't as accommodating as middle school? What if I was required to start teaching subjects I knew nothing about?

Thus, when she started high school at full steam, even participating in extracurricular activities, I spent the majority of my time worrying, and far too much of my time asking her, "Are you sure you're OK?"

On one particular Sunday night, my daughter was doing what she typically does—playing the Sims, or Civilization, or reading Harry Potter fiction on the Internet. Then I did what I typically did. I started getting edgy because she hadn't yet started her weekend homework. On this Sunday, I kept asking her how much homework she had, and whether she needed any help. I also kept reminding her that she needed to finish before she got too tired. Finally, my daughter turned to me and said, "Mom, my homework is not your responsibility. It's mine. Even if I chose not to do it all, it would not be your responsibility, it would be mine."

It was at that point that I had my epiphany: At some point one has to let go of control over some things. My daughter was no longer 12 and completely understood herself and her world. She knew which meds she had to take and when; she knew when she was too tired to do something, or when she should pick herself up despite how she felt. She knew the difference between a minor ache and something that should be reported. She also knew how much time she needed to complete her homework, and just how much effort she wanted to put into the assignments given her.

“Because peripheral issues no longer ‘get to me,’ my teaching has really become all about the students.”

“What my daughter taught me is that sometimes people make choices that you would not make for yourself, but that you must still accept those choices.”

Numerous times I felt the urge to say, “I don’t think you should do that,” or “Why don’t you try this?” or even, “I think there’s another section you can include in this essay,” but I have held my tongue. I must accept that she has made choices and will continue to make choices long after I’m out of the picture entirely. Whatever those choices are, whether I would agree with them or not, she must be able to make them and I must accept living with them.

So too is the situation with my students. At the onset of my career, I would not accept that students in my class would not succeed, nor could I accept that a student would choose not to succeed. I took failures personally, and believed that I had a responsibility to make students be all they could be.

However, even though my “chasing” days are long over, I have always had a problem with the student who could do so much better but seemingly did not. I may not have chased that student, but I have no doubt that my frustration likely seeped into my grading commentary on occasion, or that my feelings were made known either implicitly or explicitly. What my daughter taught me is that sometimes people make choices that you would not make for yourself, but that you must still accept those choices.

In many ways, it is all related to ego—replacing your idea that people should be what you want them to be with the idea that it is OK if people choose not to be the thing you want them to be. (This happened to Julia Roberts in *Mona Lisa Smile*.) Although I am hopeful that I am still the teacher who would provide whatever guidance is necessary for a student to succeed, I am now comfortable with the thought that there are students out there who do not necessarily want to be as good as I would like them to be. In fact, just this year I had such a student. But that might very well be another teachable moment!

Currently, my daughter has completed treatment and is heading to her sophomore year of high school. There is not a day that I don’t worry, nor a day that I am not learning something about myself and about the world around me.

The leukemia experience has had and still has an impact on everything that I do. It might very well have made me a better teacher, if for nothing else, than for my expanded understanding of virtually everything related to human emotion and vulnerability. It is an experience, however, that I would not wish upon anyone.

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## THINK BEFORE YOU TYPE: OBSERVATIONS OF AN ONLINE RESEARCHER

BY PATRICK MEYER

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The prevailing notion among law students is that it's easier and faster to conduct research online, and that everything is online anyway, so why should they bother learning how to research in the books? In contrast, many firms now expect associates or law clerks to utilize some combination of online and print research, because they know what many of us know—there are times when one should use print resources instead of electronic resources, and vice versa. This article addresses some reasons why, and instances when, print resources should be used and what you may do to ensure that your students understand the pitfalls of sloppy research habits.

### Not Everything Is Online

So how much is really on Westlaw® and LexisNexis®? Nearly all current primary U.S. federal and state law is online. However, although there are numerous secondary materials on Westlaw and LexisNexis, there are many others that are unavailable. A large percentage of the approximately 3,600 legal looseleaf treatises listed in *Legal Looseleafs in Print 2004* are not on either service.<sup>1</sup> A good way to help ensure that students

<sup>1</sup> The exact percentage of legal looseleaf treatises that one has access to on Westlaw and LexisNexis varies depending on the contract. For instance, law schools don't have access to CCH or BNA materials unless they pay for premium service, although if you look in the database directories, several of those titles would be listed. Small firm practitioners may have access to only a small piece of either service, and subsequently would have access to a smaller percentage of treatises.

Less than 15 percent of all titles in *Legal Looseleafs in Print 2004* (Arlene L. Eis, comp. & ed. 2004) are listed as being located on either Westlaw or LexisNexis. There were occasions when the compiler did not specifically list a source as being on either service

are not ignoring print resources is to assign a problem where you are reasonably certain the answer is contained in a looseleaf treatise that is not online: find a specific fact pattern in such a treatise and then check online to see if there is a source with a matching pattern. If there is no match, then you have accomplished your goal, and students may well come up with an inadequate answer because they only searched online.

### Diminished Analogical Reasoning

The biggest concern with online legal research is that users often employ sloppy research techniques. At the most elementary level, this is a result of the workings of the search engines. Searches are conducted literally. If you phrase your terms and connectors search query too broadly or too narrowly, or if you misspell a keyword, then the relevance of retrieved documents will be diminished. There are two reasons why relevance may be worse if one conducts a natural language search. First, one does not have the benefit of using connectors when conducting a natural language search, which lessens the ability to determine relationships between search terms.<sup>2</sup> For example, one cannot craft a natural language search to find two keywords within the same sentence. Second, since computers search literally and not conceptually, a natural language search cannot automatically retrieve synonyms.<sup>3</sup> Many

but did note that the title was available through a commercial Web site of a publication owned by the parent corporations of Westlaw and LexisNexis or by a company whose materials typically appear on either service. For instance, some Matthew Bender titles were not listed as being on LexisNexis (even though the same company owns both) but were listed as being on the Bender Web site at <bender.lexisnexis.com>. Other examples were BNA at <web.bna.com>, RIA at <www.checkpoint.riag.com>, and Thomson at <www.thomson.com>. If those sources appeared in the 2003 *Westlaw Database Directory* or the 2003 *LexisNexis Database Directory* then they were added to the initial tallies. Even with the additions, only 15.52 percent of all titles listed in *Legal Looseleafs in Print 2004* were on either service. This rate may be high for most users who likely do not have access to everything that is available in Westlaw or LexisNexis, or both.

<sup>2</sup> See Amy E. Sloan, *Basic Legal Research: Tools and Strategies* 310 (2d ed. 2003). See also Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 *Law Libr. J.* 285, 299 (2001).

<sup>3</sup> See Sheila E. Desert, *Westlaw Is Natural v. Boolean Searching: A Performance Study*, 85 *Law Libr. J.* 713, 719 (1993). See also John Zeleznikow & Dan Hunter, *Building Intelligent Legal Information Systems* 23 (1994).

“The biggest concern with online legal research is that users often employ sloppy research techniques.”

“Sadly, online researchers tend to rely more heavily on fact-pattern keywords while neglecting the legal concepts of their fact pattern.”

researchers assume that natural language searching automatically adds synonyms when your query is processed. Instead, the user must know to include the synonyms in the search. In fact, natural language searching in Westlaw and LexisNexis basically involves the ranking and retrieval of documents based on the frequency and uniqueness of search terms<sup>4</sup> (other products employ more sophisticated natural language search capabilities). Natural language processing does not assign a legal theory to queries or insinuate relationships between terms.

But at the deepest level, the problem with online research is one of diminished analogical reasoning. Successful research involves both the recognition of facts and the understanding of key legal concepts. Sadly, online researchers tend to rely more heavily on fact-pattern keywords while neglecting the legal concepts of their fact pattern.<sup>5</sup> In an attempt to force students to think about theory, professors often devise fact patterns that suggest, but do not specifically mention, a cause of action. Students often do not include a cause of action in their search query, and their retrieved document pool will include many documents that concern legal issues that are irrelevant to the research problem. Perhaps the problem of relying solely on keywords is most apparent when legal writing professors purposely give their students a fact pattern that is not “on all fours” with any case. Many of my students struggle for several hours to find a case when one on all fours does not exist. Alas, allowing for legal theory in a search isn’t a surefire means of success. After all, we are still depending on the computer, as an intermediary, to retrieve what we’ve requested. The assumptions that we think bind keywords and concepts together are not understood by the literal workings of computer search engines. On the other hand, print indexes and digests are built upon proven legal concepts and terms.

<sup>4</sup> See Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell* 83 (8th ed. 2003). See also Jean Sinclair McKnight, *The LEXIS Companion* 49 (1995).

<sup>5</sup> See Scott P. Stolley, *Shortcomings of Technology: The Corruption of Legal Research*, *For The Defense* 39, 40 (April 2004). See also Bast, *supra* note 2, at 297–298.

The altering of the research process may be attributed to the speed and ease with which one can produce a simple list of retrieved documents.<sup>6</sup> It may also be because the normal research process, which requires critical analysis and comparison, is split up by the design of online services.<sup>7</sup> Renowned Stanford law professor and author Lawrence Lessig puts it another way: we are being subject to new laws, called computer code.<sup>8</sup> One prime example of adhering to the laws of the computer at the expense of sound research technique is in the phenomenon of “output overload,” or the retrieval of too many documents for one to reasonably assess.<sup>9</sup> This causes some users to arbitrarily add keywords to the initial search query (or to use connectors that are too restrictive) so as to limit the number of retrieved documents they have to look through. The result is the retrieval of fewer relevant documents. I constantly observe this strategy and I spend the whole semester trying to change that habit by showing my class a comparison of documents retrieved via a search that is too restrictive and one that isn’t. From day one I also stress the importance of starting with a broad search so as not to miss the retrieval of relevant documents.

There is the argument that digitized storage actually expands the user’s ability to find relevant materials because the user has the immediate ability to search the whole database, whereas one who uses the print indexes is confined to the parameters set by someone else.<sup>10</sup> This argument assumes that online research is being conducted correctly, and thus fails in practice. If the researcher is unfamiliar with an area of law, the best strategy is to start by using the books where

<sup>6</sup> See J.D.S. Armstrong & Christopher A. Knott, *Where the Law Is: An Introduction to Advanced Legal Research* 100–101 (2004).

<sup>7</sup> See Richard Haigh, *What Shall I Wear to the Computer Revolution? Some Thoughts on Electronic Researching in Law*, 89 *Law Libr. J.* 245, 249 (1997).

<sup>8</sup> See Lawrence Lessig, *Code and Other Laws of Cyberspace* 6 (1999). See also Bast, *supra* note 2, at 286.

<sup>9</sup> See Jon Bing, *Performance of Legal Text Retrieval Systems: The Curse of Boole*, 79 *Law Libr. J.* 187, 197–201 (1987) for a good explanation and discussion of output overload.

<sup>10</sup> See Gordon Russell, *Re-Engineering the Law Library Resources Today for Tomorrow’s Users: A Response to “How Much of Your Print Collection Is Really on WESTLAW or LEXIS-NEXIS?”*, *Legal Reference Services Q.* Nos. 2/3, 2002, at 29, 37.

the enhanced ability to browse and cross-reference, and the availability of theory-based indexes and digests, should lead to a better understanding of the legal concepts involved.<sup>11</sup> Immediately jumping online has caused more than one uninitiated law clerk or associate to incur thousands of dollars of excess research costs because it took a lot of trial and error to find the material online.

It's often easier to conduct statutory research in the books.<sup>12</sup> This is partially a browsing issue in that it's just not as easy to move between code sections online<sup>13</sup> as it is when using books, which makes it harder to see the relationship between code sections within an act.<sup>14</sup> If you miss the connection between code sections, you could make grave errors in your research. One of the most common mistakes that my students make is failing to determine the relationship between various sections of an act, or for that matter even realizing that code sections do not stand alone. If they don't see that relationship, which is easy to do if conducting full-text searches, they've opened themselves up to committing error. For instance, students in the past have erroneously applied the penalty section of an act without bothering to read the preceding section that laid out the exceptions to the penalties, one of which my fact pattern specifically included. The best way to determine the relationship between code sections is to view the act's table of contents or to page through all sections of the act, which you can easily do in the print version of the code. The process online simply cannot replicate the ease with which it's done in print. The ability to browse becomes of magnified importance in code databases, which are notorious for using esoteric language, which is particularly difficult to allow for in a search query.

Statutory research is also difficult to conduct online because of a lack of understanding as to the differences between annotated and unannotated

codes. Unannotated codes focus on the statutory language. If you need to retrieve specific statutory text but conduct your search in an annotated database, you're in for a lot of work sorting through documents that were retrieved because your terms occurred in the often-voluminous annotations. If you need to find an interpretation of code text, you need to search the annotations following each code section for cases or secondary sources.

I have my students perform secondary source and code assignments (federal and state) both online and in print resources so they see firsthand the benefits and liabilities of both. The comment that I hear most often is how much easier it is to use the books. Those assignments are not crafted in a vague manner so as to play to the strength of books over online sources. However, if you would like to accentuate the differences between the two, you could craft a fairly vague problem. Chances are that your students will have a much more productive time using the print resources.

### Limited Browsing Capabilities

The customary method of starting a research project using print resources is to look up specifically chosen legal concepts, keywords, and phrases in a secondary source index while watching along the way for better or alternative terms or phrases. It is both an opportunistic and conceptual approach. Being able to browse an index or table of contents adds necessary breadth to the research process.

In an attempt to mimic the ability to browse materials more like one can do with print resources, Westlaw and LexisNexis have added tables of contents to many databases. This is a major improvement. However, you'll find that the online tables of contents may not be as easy to navigate as their print versions are: you may have to click several times in order to arrive at the desired destination and there is an increased likelihood that you will lose track of where you are along the way.<sup>15</sup> Browsing capabilities online are nonexistent if one conducts a full-text database

“One of the most common mistakes that my students make is failing to determine the relationship between various sections of an act...”

<sup>11</sup> See Josh Blackman, *How to Use the Internet for Legal Research* 73 (1996). See also Sloan, *supra* note 2, at 334, 336.

<sup>12</sup> See Sloan, *supra* note 2, at 334, 336.

<sup>13</sup> Moving between successive code sections in LexisNexis is accomplished by using the Book Browse function, and in Westlaw is accomplished by using the Documents in Sequence (Docs in Seq) function.

<sup>14</sup> See Sloan, *supra* note 2, at 336.

<sup>15</sup> See John K. Hanft, *A Model for Legal Research in the Electronic Age*, *Legal Reference Services Q.* No. 3, 1999, at 77, 79.

“In several classes of my electronic legal research course, I have students conduct both online and print research using the exact same fact pattern.”

search. The only “browsing” one can do in this instance is confined to analyzing retrieved documents.

A good way to make sure that your students become familiar with and fully utilize the online browsing functions is to assign a problem in a database that has a table of contents, such as *American Jurisprudence 2d*, and where the answer may be fairly intuitive to find in the table, but which is likely to be more difficult to find when performing a full-text search. Consider this example: may an owner recover damages for emotional distress for injuries inflicted to her cattle? It should only take a minute or two to answer this question using the *American Jurisprudence 2d* table of contents. However it may take quite a bit longer to answer if students do not include *livestock* or *animal* in their full-text search query. A good in-class exercise is to instruct some students to perform a research problem using a full-text online search while others perform the same problem using a print index or an online table of contents. Compare the time it takes both groups to find an adequate answer.

### Database Currency Issues

Users assume that if a source is online then it is up-to-date with current laws. However, that’s not always true. The obvious example is older law review articles, which users forget may be based on old law. However, state secondary legal materials may not be updated every year.<sup>16</sup> If the publisher doesn’t update the source every year then it won’t be updated just because it’s on Westlaw or LexisNexis. You will often see an update date near the top of retrieved documents, just under the document title. However, you’ll also find a current copyright year in all databases in both services. To avoid relying on outdated material, I admonish my students to pay attention to the update date and to check more than one secondary source before moving on to primary materials and citator services.

<sup>16</sup> For instance, I looked at the CEB’s *Handling Construction Disputes* database on LexisNexis on June 23, 2004, and it was updated through Spring 2002. On that same date, I also looked on Westlaw and found that *Settlement of Estates in Connecticut* was last updated January 2003. It is possible that new laws have made some parts of these sources outdated.

Students may be tested on their ability to recognize outdated material if you craft an issue that is answered one way in an outdated law review article and in the correct, but less direct way in a current secondary source. There are several areas of law that you can readily identify as having changed over the last few years, such as cyberlaw and communications. Thorough students will recognize outdated material if they research in more than one secondary source database and if they use a citator service before relying on any primary authority garnered from their secondary source research. I include this type of exercise at least once each time I teach a course, and it is definitely a teachable moment when you review the question in class.

### Time

Most students feel that it’s always faster to conduct research online as opposed to in the books. In several classes of my electronic legal research course, I have students conduct both online and print research using the exact same fact pattern. Some students are given the print research exercise first and often finish it quicker than they subsequently finish the same research issue online. Although there are many factors that determine if print or online research is quicker to use, my experiences indicate that it’s often at least as quick to conduct research in print resources assuming that one has close access to both. For the reasons mentioned previously, unless you have a highly refined idea as to what you are to look for, it will probably be quicker to conduct research in the books. In addition, the esoteric language found in statutes makes for quicker research in print resources. On the other hand, if you have a citation and need to retrieve the corresponding document, or if you are looking for a specific phrase, it’s very quick to do so online.

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## Cost

Access to Westlaw and LexisNexis in a firm setting can cost several thousand dollars per month (large firms) whereas you may have close access to a library's collection of books for little or no cost. In addition, you have to be on your toes when conducting online research or else you will incur excessive database charges beyond what the firm's contract covers. For example, your company's pricing plan may include unlimited Shepardizing™, but may not encompass the cost associated with opening certain documents linked from within the Shepard's® results. So you may incur an unexpected extra charge by opening a case that perhaps distinguished or explained an issue in the Shepardized case. You may have to determine the cost-effectiveness of conducting research on a per-minute basis or by the transaction; how much it costs to conduct a search in various databases; how much it costs to Shepardize®; the cost of retrieving documents by citation; printing costs; etc. Unless students are taught the pricing basics before graduating, they may have to learn by trial and error in their first employment setting. Finally, as the giant legal publishers acquire more and more legal titles, you'll have to pay for a subscription to both Westlaw and LexisNexis if you want the majority of the major federal and state law treatises.

I use many assignments in the courses that I teach. A great way to bring home the costs of conducting online research is to show students a range of how much money each potentially billable task will cost them as you review the assignments in class. Even if it's a broad range, students quickly get the message. Students are aghast when I do this for the first time each semester.

## Conclusion

One cannot usually plop down in front of a computer, log on to a legal service of choice, run a quick search, and live happily ever after. Unfortunately, such is the mindset of so many of our students. The efficient online researcher must be aware of the nuances and limitations of the online services. Online legal research is a valuable tool, but it must be both fully understood and used in the proper combination with print research. Adequate teaching requires unconventional methods, lots of work, and plenty of patience—but the effort is worth it.

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“Online legal research is a valuable tool, but it must be both fully understood and used in the proper combination with print research.”

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Please note that beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at [west.thomson.com/customerservice/newsletters/perspectives](http://west.thomson.com/customerservice/newsletters/perspectives).

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## THAT OLD FRIEND, THE TREE-BRANCHING DIAGRAM

BY ANNE ENQUIST

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*Writers' Toolbox ... is a regular feature of Perspectives. In each issue, Anne Enquist will offer suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles will share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at [ame@seattleu.edu](mailto:ame@seattleu.edu).*

Sometimes we forget about a tool that's been around a long time. It's a tried and true part of our own writer's toolbox, so we may assume that our students have it in theirs as well.

Tree-branching diagrams are exactly that kind of tool. While most legal writing faculty have used them to walk through any number of legal and nonlegal problems, many Gen X law students have not. When asked to create a chart of a complex combination of legal rules, today's law student may think more in terms of an Excel spreadsheet. After all, tree-branching diagrams are a bit old-fashioned and hard to create on a computer. Nevertheless, they can be a godsend when figuring out how the pieces of a complex law fit together.

Several of us at Seattle University realized this all over again this last semester when our legal writing classes tackled an issue that fell under the Family and Medical Leave Act (FMLA):<sup>1</sup> The students struggled mightily to understand how all

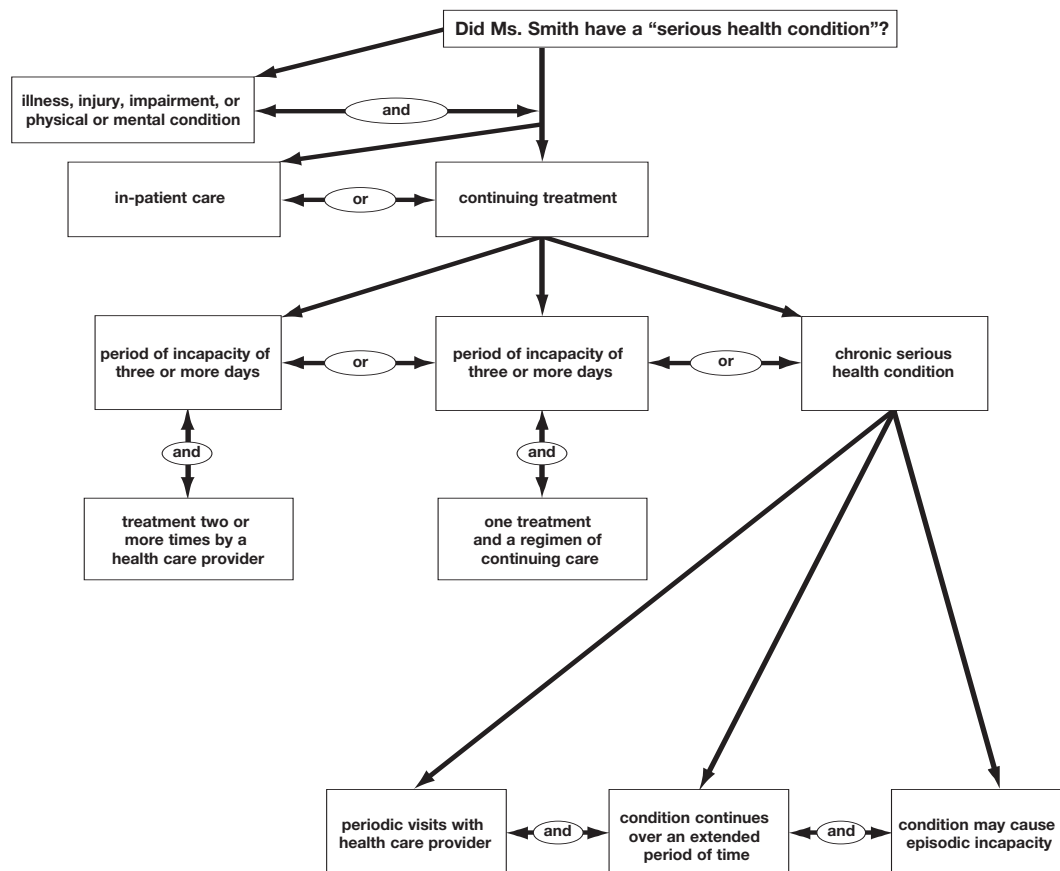
the parts fit together, and unfortunately some of them started drafting their office memoranda before they had mapped the legal terrain. The result was that many of these students wrote themselves into a corner. Others kept quoting from the statutes and *Code of Federal Regulations* sections and trying to break down the elements, sub-elements, and sub sub-elements (much as they had been taught to do in previous assignments) but, with no larger conceptual framework to keep the pieces straight, their writing often dissolved into confusion.

The breakthroughs came when one of the legal writing professors had the students step back and create tree-branching diagrams of the applicable law. The chart on the next page is an example of how many students figured out the intricacies of the disputed element in their assignment: whether an employee has a serious medical condition.

Once the students had a map of how the pieces fit together, they then had to figure out how to convey the information to a reader in a memo format. The key, of course, was to insert headings, roadmaps, signposts, transitions, and mini-conclusions along the way of their analysis so that a reader could stay oriented and easily follow their explanations. By creating a coherent number and lettering system for the headings, they signaled how the pieces fit together. In addition, as a general rule, we recommended that they use a roadmap sentence to introduce each "branch" in the diagram and signposts to make it clear when several "twigs" were all under one branch. The students quickly saw that transitions such as "in addition to proving [insert element or sub-element]" for conjunctive elements or "in the alternative" to signal disjunctive elements served as important reminders to readers about how the parts worked together. They immediately understood that including mini-conclusions to wrap up a section or sub-section also kept their readers (and themselves) clear about how the pieces were adding up.

<sup>1</sup> Thanks to my colleagues Laurel Oates, Julie Heintz, Janet Chung, and Patrick Brown, all of whom designed and used this problem.





The outline below contains only the headings, roadmaps, signposts, and transitions; the ellipsis indicates where the analysis would be developed. The citations are omitted.

I. Did Ms. Smith have a serious health condition?

To establish that she had a serious health condition, Ms. Smith must prove the following: (1) that she had an illness, injury, impairment, or physical or mental condition that prevented her from working for three weeks and (2) either that she received (A) inpatient care or (B) continuing treatment.

...

1. Did Ms. Smith have an illness, injury, impairment, or physical or mental

condition that prevented her from working for three weeks?

...

2. Did Ms. Smith receive either inpatient care or continuing treatment?

In addition to proving that she had an illness, injury, impairment, or physical or mental condition that prevented her from working for three weeks, Ms. Smith must also prove that she received either (A) inpatient care or (B) continuing treatment.

A. Did Ms. Smith receive inpatient care?

...

B. Did Ms. Smith receive continuing treatment?

Even if Ms. Smith cannot prove that she received inpatient care, Ms. Smith can try to prove that she received continuing treatment. To do this, she will have to prove (1) that she was incapacitated for three or more days and received treatment two or more times by a health care provider; or (2) that she was incapacitated for three or more days and received treatment by a health care provider on at least one occasion, which resulted in a regimen of continuing treatment; or (3) that she suffered from a chronic health condition.

- (1) Was Ms. Smith incapacitated for three or more days and did she receive two or more treatments?

Although conceding that Ms. Smith was incapacitated for three or more days, we will argue that she did not meet the additional treatment requirement.

- (2) Was Ms. Smith incapacitated for three or more days and did she receive one treatment that resulted in a regimen of continuing treatment?

In the alternative, Ms. Smith can try to prove that in addition to being incapacitated for three or more days, she received treatment by a health care provider on at least one occasion that resulted in a regimen of continuing treatment

...

- (3) Did Ms. Smith have a chronic serious health condition?

Assuming Ms. Smith will be unable to prove the first option, that she received two or more treatments, or the second option, that she received one treatment resulting in a regimen of continuing treatment, she is left with a third and last option for proving she received continuing treatment: showing that she has a chronic serious health condition.

Once the students had the tree-branching diagrams worked out, their memos almost wrote themselves. They were amazed at how easy it was to keep themselves and their readers oriented and on track. With the organization under control, they could focus their energy on which cases and facts to use to create the best arguments. Like a trusty old tool, the tree-branching diagrams served their purpose so well that it was almost easy to forget the writing messes that had existed before the students used them.

Maybe that is also why it is easy for those of us who teach legal writing to forget to tell our students about things like tree-branching diagrams. They are the old friends we take for granted; it is easy to overlook them when we are dazzled by all the new technology and ideas that we are eager to introduce to our students. Our goal, of course, is to share with students any good idea—old or new—that makes their work more efficient and effective. Indispensable tools like tree-branching diagrams turned light bulbs on for us back in the day when we were students. They will continue to do the same for decades of students to come, if we just remember to tell those students about them.

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## WRITING TIPS ...

## THE MATTER OF MISTAKES

BY MARTHA FAULK

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Modern technology greatly simplifies the legal writing process. Rather than looking up words in a dictionary, for example, we can simply rely on our spell Czech function to correct those irritating orthographic irregularities. Sometimes, though, the computer program fails to recognize important semantic distinctions, and the result can be both costly and embarrassing. Consider the famous case of Judge Jacon the Terrible.

**Attorney's Fees Reduced**

In the U.S. District Court for the Eastern District of Pennsylvania, Magistrate Judge Jacob Hart reduced an award of attorney fees because the lawyer's written work was "careless to the point of disrespectful."<sup>1</sup> The case involved attorney Brian Puricelli, who represented a Philadelphia police officer in a wrongful discharge suit. Puricelli competently performed in the courtroom, but his documents lacked attention to proofreading. Judge Hart therefore reduced Puricelli's fees to \$150 per hour for the pleadings rather than the \$300 per hour rate for courtroom activity. The judge noted in his opinion, "[Puricelli's] errors, not just typographical, caused the court a considerable amount of work. ... Hence, a substantial reduction is in order. We believe that \$150 per hour is, in fact, generous."<sup>2</sup>

Among Puricelli's errors, he referred to the court as the "Easter" district of Pennsylvania. Judge Hart, who is Jewish, opined that considering his religious persuasion, "the Passover district

might have been more appropriate."<sup>3</sup> The final insult came when Puricelli misspelled Judge Hart's first name as "Jacon." This caused some merriment among other members of the court, who began referring to the Judge as "Jacon the Terrible." After he penalized Puricelli, Judge Hart began to scrutinize his own writing more carefully and now proofreads his opinions "three or four times because the first time that I write an opinion now that has more than one typo, the people at the local legal paper are going to pick it up and have a field day with it."<sup>4</sup>

**Proofreading:  
What's Good for the Judge ...**

As Judge Hart's experience suggests, proofreading can benefit everyone in the legal profession. There are reasons why careful attention to detail still matters in the age of computer software, and there are several techniques that can improve your proofreading ability.

- Read the material carefully, looking for wrong words and omissions.
- Read aloud. Articulating each word will slow down the reading process and help you to see mistakes.
- Read backwards, from end to start. Reading backwards will focus your attention on each word or figure instead of on entire phrases.
- Always check identifying and reference material. It's easy to overlook errors in identifying material such as names, places, and dates with which you are familiar.
- Check titles and headings as well as the body of the material.
- Check consistency of format such as placement of page numbers and size and type of fonts.
- Try to have someone else proofread your writing. If you proofread your own, allow a couple of days for "cool-off."

“There are reasons why careful attention to detail still matters in the age of computer software ...”

<sup>1</sup> Melissa Block, "Interview: Magistrate Judge Jacob P. Hart discusses his fight to get lawyers to clean up their written work," National Public Radio [transcript], March 4, 2004.

<sup>2</sup> Devore v. City of Philadelphia, No. Civ.A. 00-3598, 2004 WL 414085, at \*3 (E.D. Pa. Feb. 20, 2004).

<sup>3</sup> *Id.* at \*2.

<sup>4</sup> Block, *supra* note 1.

“Linguistic nuance eludes the most sophisticated software even though shades of meaning are essential to effective communication.”

Lack of care in producing written documents may indicate a lack of respect and consideration, as Judge Hart pointed out. Readers expect a level of competence, care, and sophistication in writing. When those elements are missing, the writer presumably does not possess the necessary legal skills or fails to display consideration for his audience. The fact that software programs can monitor our writing does not excuse a failure to exercise diligence—it exacerbates it. If we rely solely on mechanical means to clean up our writing, we neglect the uniquely human capacity for language that adds depth, complexity, and meaning to communication.

Linguistic nuance eludes the most sophisticated software even though shades of meaning are essential to effective communication. Precisely because of his witty, acerbic attack on sloppy legal writing, Judge Hart became a minor media celebrity. Consider just one example from the opinion. After Puricelli incorrectly spelled Hart’s first name, Hart wrote “I appreciate the elevation to what sounds like a character in *Lord of the Rings*, but alas, I am but a judge.”<sup>5</sup> Humor and irony seldom emanate from the grammatical lexicon of electronic editors.

### Wrong Words Embarrass Us

Moreover, as our Czech speller shows, programmers fail to catch semantic differentiations. When Puricelli wanted to strike back at the opposing counsel, to illustrate, he informed the judge: “Further, had the Defendants not tired [sic] to paper Plaintiff’s counsel to death, some type [sic] would not have occurred.” As the judge suggested, “If these mistakes were purposeful, they would be brilliant.” Puricelli’s work, unfortunately, suggested otherwise.

<sup>5</sup> Quoted in Shannon P. Duffy, “Trouble with Typos Cuts Fees; Judge Praises Lawyer’s Courtroom Work—but Pleadings Draw Wrath,” *Nat’l L.J.*, Mar. 1, 2004, at 5.

To conclude with the words of an anonymous poet, here is a cautionary verse:

#### Spell Czech

I half a spelling checker,  
It come with my PC,  
It plainly mark four my revue,  
Mistakes I cannot sea.

I’ve run this poem threw it,  
I’m sure your pleas too no,  
It’s letter perfect in it’s weigh,  
My checker tolled me sew.

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## AN IDIOM, A CATCH PHRASE, AN APHORISM: A REFERENCE QUESTION

BY MARTHA CAMPOS

*Martha Campos is a visiting reference librarian at the University of Colorado Law Library in Boulder.*

*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.*

Researchers are often puzzled about the original use of a word or phrase found in legal materials and other documents. It's not unusual for them to have relied on the word or phrase for many years, and yet suddenly be intrigued by its derivation, history, and usage. When this happens, suddenly it is imperative to find out everything possible about the word or phrase.

Finding the derivation of a word through its roots, and discovering the meaning of the roots, is fairly straightforward—any good dictionary should provide the information. But how do you trace the development and changes in meaning and usage of most English words? Happily, the answer to that question also is straightforward. *The Oxford English Dictionary* (the OED) is the

reference source for the origin and meaning of English and American words. It defines and illustrates the historical usage and meanings of both current and obsolete words. Following each definition of a word is a series of quotations that shows the changes in the word's usage, beginning with its earliest known appearance and concluding with its present form. The OED is such a standard reference work that even the smallest public library will have one or more editions. The OED is also available as an online subscription service at <http://dictionary.oed.com>.

Definitions, derivations, changes, and usage of individual words in the English language can be readily identified, but what if you need to find the origin or history of a phrase or an idiom? While "all roads lead to Rome," or at least to the OED, for words, is there a comparable source for phrases?

The answer is, unfortunately, no. Finding information on phrases and idioms takes some detective work. For example, there are many specialty dictionaries like the *Dictionary of American Slang*, Chapman (Harper & Row 1986), the *Dictionary of American Proverbs*, Mieder (Oxford University Press 1992), and the *Random House Dictionary of America's Popular Proverbs and Sayings*, Titelman (Random House 1996) and popular monographs such as *An Exaltation of Larks*, Lipton (Grossman 1968) and *Hog on Ice*, Funk (Harper & Row 1948) that are useful in your research. General reference works that collect quotations are frequently helpful in finding basic background information on a phrase or quotation, as are movie trivia dictionaries and related resources. However, many of these sources only cover selective expressions, proverbs, jargon, or slang. None is definitive. Some are indexed only under one keyword, or by theme, while others only give meanings and not origins. In any event, most law libraries will not have an extensive collection of such reference books. What, then, is an efficient strategy to employ when looking for phrase origins?

“Finding information on phrases and idioms takes some detective work.”

One approach that has proven successful is to take advantage of several online research tools in combination to answer these questions. The *Oxford English Dictionary Online* is a popular destination for phrases just as it is for words. To find the history of “all roads lead to Rome,” begin your travels with the OED’s online Advanced Search option, select *quotations* and enter the words *roads*, *Rome*, and *lead*. Three quotations are displayed from the OED’s second edition, with the note that there are no additional entries in the newest edition. All three are from the entry for the word *Rome*, and are highlighted in red under that entry (this not an insignificant feature when the length of the OED entries is considered). The first use given for the familiar “All roads lead to Rome” is from 1872, but earlier variations are included, culminating in a quote from Chaucer as the earliest known use of the phrase:

“(d) C1380 CHAUCER *Troilus* (1894) II.  
36 For every wight which that to Rome  
went, Halt nat o path, or alwey o manere.”

It is important to note that the same outcome can be reached using the print OED. Each of the significant words in the phrase would need to be looked up in each available edition of the dictionary. Given the publication’s size, its several editions, and the necessity of searching for multiple words, this is a prodigious job. In this instance, researchers would need to look under *roads*, *Rome*, and *lead* in several editions of the print OED. Researchers are reminded to take provisions for this trip!

Searching the online OED was tried with numerous phrases (“hit the road,” “cook with gas,” “cut of his jib,” “cat’s pyjamas”), with good result. But some phrases proved resistant (“an apple a day keeps the doctor away,” “you can’t see the forest for the trees,” “an ounce of prevention is worth a pound of cure,” “knock on wood”). In these instances it helped to turn to another commercial online source, The Phrase Finder, at <[www.phrases.org.uk](http://www.phrases.org.uk)>. This free meanings and origins database originated at Sheffield Hallam

University, United Kingdom, as a computational linguistics project. The free database has meanings and origins of more than 2,000 English phrases and sayings. An additional 30,000 searchable postings, gleaned from the site-sponsored discussion forum, allows queries and answers as to phrase origin and meaning to be contributed by participating individuals. Often the postings cite from a variety of well-vetted hard copy references, and a search of this database can be fruitful. (A sister site offers a phrase thesaurus search engine as a subscription service at <[www.phrasefinder.co.uk](http://www.phrasefinder.co.uk)>.)

“An apple a day keeps the doctor away” was a phrase that was not discoverable in the OED online. However, searching for *apple doctor* in The Phrase Finder pulled up more than 20 postings from the discussion forum. The first posting quotes directly from the *Random House Dictionary of Popular Proverbs and Sayings*:

“An apple a day keeps the doctor away.  
Eating fruit regularly keeps one healthy.  
First found as a Welsh folk proverb  
(1866) ‘Eat an apple on going to bed,  
And you’ll keep the doctor from earning  
his bread.’ First attested in the United  
States in 1913. ...”

Information on “can’t see the forest for the trees,” another phrase difficult to trace via the OED online, was readily available through The Phrase Finder. The fourth of 35 postings referenced *Heavens to Betsy*, Funk (Harper & Row 1955), an older work that gives selective histories of popular phrases:

Too beset by petty things to appreciate the greatness or grandeur; too wrapped up in details to gain a view of the whole. In America we are likely to use the plural, ‘woods,’ or possibly to substitute ‘forest,’ but ‘wood’ is the old form and is preferable. Yes, the saying is at least five hundred years old, and probably a century or two could be added to that, for it must have been long

been in use to have been recorded in 1546 in John Heywood's 'A dialogue Conteynnyng the Nomber in Effect of all the Prouerbes in the Englishe Tongue.' He wrote 'Plentie is no deinte, ye see not your owne ease. I see, ye can not see the wood for trees.'

This entry points up a major difficulty in searching for the origin of a phrase: they change over time and across oceans. Heading back to the OED with the knowledge that the above expression at one time was "can't see the *wood* for the trees," we find the same reference to Heywood's 1546 reference under the entry for "wood." No matter what database or hard copy resource is used, it is wise to keep in mind that the form of a word (knocking—instead of knock—on wood) or actual word (touch—instead of knock—on wood) may be different than cited. It seems that patience, creativity, and plain old luck all factor into keeping the researcher on the right road to a phrase's origin.<sup>1</sup>

(As an aside, for those who might be intrigued by the whole concept of the OED, you are not alone. Its development is chronicled in the 1999 book, *The Professor and the Madman: A Tale of Murder, Insanity, and the Making of the Oxford English Dictionary*, by Simon Winchester.)

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<sup>1</sup> An example of good, plain luck is the discovery of the following source in a Google search. This scholarly paper includes brief background information on numerous well-known quotes from movies. *Popular Movie Quotes: Reflections of a People and a Culture*, by Stuart Fischhoff, Ph.D., Esmerelda Cardenas, Angela Hernandez, Corey Wyatt, Jarod Young, and Rachel Gordon, Executive Editor, *Journal of Media Psychology*. Based on a paper presented at the Annual Convention of the American Psychological Association, Washington, D.C., August 7, 2000 <[www.calstatela.edu/faculty/sfisco/moviequotes.htm](http://www.calstatela.edu/faculty/sfisco/moviequotes.htm)>.

"In the history of legal education, the study of legal bibliography and the use of law books is more ancient than formal teaching of the subject. Since the days when precedent was first firmly seated on the throne of English law, lawyers have bowed down to it, and wise men have admonished the tyro to seek knowledge in the books wherein are set down a multitude of isolated instances of authoritative rules of the courts. Less homage has been paid to those commands of governments which appear in the form of statutes; although their superiority over all but a few of the classical treatises is invariably pointed out."

—Frederick C. Hicks, *Materials and Methods of Legal Research: With Bibliographical Manual* 13 (1923).

“As a writing teacher, I was especially interested in any insight I could glean that might help me understand how to better teach writing to my students.”

## BOOK REVIEW ...

## A NEUROLOGIST SUGGESTS WHY MOST PEOPLE CAN'T WRITE—A REVIEW OF *THE MIDNIGHT DISEASE: THE DRIVE TO WRITE, WRITER'S BLOCK, AND THE CREATIVE BRAIN*

BY DR. ALICE W. FLAHERTY  
BOSTON, MA: HOUGHTON MIFFLIN, 2004

REVIEWED BY JAMES B. LEVY

*James B. Levy is Assistant Professor of Law at Nova Southeastern School of Law in Fort Lauderdale, Fla.*

Dr. Alice Flaherty, a neurologist by vocation and author by avocation, became interested in the physiology of writing after experiencing a bout of hypergraphia (a medical term for an overpowering desire to write) following a postpartum mood disorder. The result is *The Midnight Disease* in which Flaherty describes for us what science knows about the neurobiology of creativity, inspiration, and the desire to write, including some of the attendant problems like writer's "block" and hypergraphia. Given the complexity of the material, Flaherty provides an easy-to-follow explanation about the often mysterious relationship between mood, cognition, and the drive to communicate that is the source of all human creativity. Along the way, she weaves in helpful and interesting references from the world of literature and art to illustrate key points. In particular, Dr. Flaherty focuses on the neurobiology of creative writing, as opposed to the more routine writing most of us do in our daily lives, because that is where her interests lie. Nevertheless, there is a lot to learn from this book about the how's and why's of even the most mundane writing, which should be of interest to anyone who teaches writing for a living.

The jumping-off point for Flaherty's discussion of the neurobiological roots of how and why we write is the hypergraphia she suffered following a pregnancy and its opposite, "writer's block," which she also suffered. Both conditions are typically thought to be psychologically based problems resulting from everything from a fear of failure to an overly self-critical inner voice. But Flaherty was interested in exploring whether these conditions also have an observable biological footprint. And if writer's block, for example, is a brain state, does that mean it can be medically treated? This led Flaherty to raise some interesting and related questions about the neurobiology of creativity and inspiration. For instance, she asks: "why do we write, and more specifically, why do we write creatively?" Does it serve some evolutionary purpose? Is there a drive to communicate just as there is a drive to procreate? Can the drive to communicate be enhanced pharmacologically, suggesting one day we may have creativity or productivity "pills" that can make us more talented and prolific writers? The author suggests that the answers to at least some of these questions might be "yes."

Fortunately for me, other than suffering from a lack of ideas (which, according to Flaherty, is often mistaken for "block"), I have never suffered the kind of debilitating writer's block described in this book. The kind that makes sufferers climb the walls with frustration after months, or even years, of enduring a creative dry spell. Nor have I ever experienced anything even remotely like hypergraphia, since I consider writing such hard work I don't find it difficult to avoid. Instead what I found most interesting about *The Midnight Disease* was Flaherty's discussion of the neurobiology of the more routine writing most of us do in our everyday lives. As a writing teacher, I was especially interested in any insight I could glean that might help me understand how to better teach writing to my students.

By coincidence, at the same time I was reading *The Midnight Disease* I was also reading Susan Kosse's and David ButleRitchie's article *How*



*Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, found at 53 J. Legal Educ. 80 (2003), reporting the results of their research attempting to identify the reasons the writing skills of recent law grads are so poor. Flaherty suggests an alternative explanation to the ones in the Kosse and ButleRichie article that is so obvious it is easy for us to overlook. In *The Midnight Disease*, Flaherty suggests that the reason new law school grads, and just about everyone else, are such poor writers is because good writing is just plain hard to do. Flaherty lays out the neurobiological explanation for what many of us already feel intuitively: writing is a complex undertaking that requires a lot of practice to get right.

She also provides some interesting evolutionary background that helps explain why writing is such a difficult task for so many people. Unlike the relatively recent phenomenon of the written word, human beings have been able to engage in verbal communication for an estimated 100,000 years or so. In fact, we have been doing it for so long, we are now hardwired for verbal communication, including a discrete area of the brain devoted specifically to speech. Every healthy newborn child comes into the world possessing the genetic material enabling that child to learn any language provided he or she is exposed to it sometime before puberty.

On the other hand, we are not hardwired to write. That helps explain why all of the world's healthy adult population can communicate verbally but only a small fraction of that number is literate. In evolutionary terms, a widely accepted theory posits that human beings acquired the ability to write only within the last 5,000 years or so. We started writing, so the theory goes, out of a necessity to record economic transactions. Thus, the first writing may well have been a sales receipt. Unlike its discrete area for verbal communication, the human brain has developed no specific area designed to manage the task of writing. Rather, writing employs several different, coordinated brain functions including aspects of the limbic

system (which is associated with emotion and drive) and the cortex (which controls rational thought). Flaherty points out that casual speech—the polite chitchat that comprises most daily verbal exchanges—requires little conscious effort to produce, while writing is a far more cognitive heavy function.

Writing is also more difficult because we hold it to a higher standard than oral communication. By its nature, writing is a permanent record that is scrutinized and critiqued more thoroughly than is speech. To draw a very rough analogy, speaking is, in neurological terms, more like breathing—another hardwired activity—while writing is more like welding—a skill that is not innate but that the brain can learn by engaging several neurological functions to make it happen.

The neurobiology of learning also helps us understand why becoming a good writer is so difficult.<sup>1</sup> When a student learns a new skill, whether it be writing or welding, a nascent neurological pathway is formed among the areas of the brain used to perform that particular skill. Every time the task is repeated, the pathway becomes a bit more defined until it is sufficiently embedded in the brain to be considered as “learned.” Practice does indeed make perfect in neurobiological terms. Flaherty also tells us that the internal drive and motivation mechanisms of the limbic system are a critical aspect of learning to write well. In fact, Flaherty suggests that these may be the most critical components of writing, because only someone who has the internal drive necessary to write well will become proficient at the task.

Another area that Flaherty touches upon that the *Perspectives* audience may find especially interesting is her discussion of metaphors. She tells us that the ability to think metaphorically is a complex neurological process that engages both the emotional functions of the limbic system and the cognitive functions of the cortex. As an initial matter, this helps us understand why metaphors are such powerful learning tools: they engage more areas of the listener's brain (both emotions and

“The neurobiology of learning also helps us understand why becoming a good writer is so difficult.”

<sup>1</sup> The support for the points in this paragraph come from Michael Brearley, *Emotional Intelligence in the Classroom* 35–38 (2001).

“Because of the limitations of our own biology, our students’ writing will not get better until law schools do more than they are doing now.”

.....

cognition) and thus make the material more vivid and memorable to the audience. Next, it may help us understand why not all law students are good with analogies. Assuming Flaherty’s observations about metaphorical thinking have some application to the brain’s ability to use analogies, which may be a leap, she tells us that we are simply not hardwired to think in metaphorical terms. Metaphorical thinking, which is at the root of all human artistic activity, is a complex function involving several regions of the brain. Some people are better at it than others because of their particular brain “wiring.” This point helps confirm our classroom intuition that some students are indeed better at understanding and using analogies than others.

I began reading *The Midnight Disease* because I was interested in learning how the creative mind works. What I discovered, though, is that Flaherty provides us with perhaps the best explanation about why our students’ writing is generally so bad: it is because, from a neurological standpoint, writing is a really hard and complex skill to learn. Moreover, like welding, it takes tremendous motivation and practice to become a proficient writer. As a result, she suggests an argument more compelling than anything in the McCrate Report,<sup>2</sup> or more recent articles like the Kosse and ButleRichie piece, about why legal writing courses have to be taken more seriously in the law school curriculum. Because of the limitations of our own biology, our students’ writing will not get better until law schools do more than they are doing now.

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<sup>2</sup> American Bar Association Section of Legal Education and Admission to the Bar, Report of the Task Force on Law Schools and the Profession; Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum (1992).

## LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

*Donald J. Dunn is Dean and Professor of Law at the University of La Verne College of Law in Ontario, Calif. 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.*

*Annotated Legal Bibliography on Gender, 10 Cardozo Women's L.J. 227 (2003).*

An extensively annotated bibliography arranged by subject that identifies recent articles (2002–2003) related to numerous aspects of gender-related issues.

J. D. S. Armstrong & Christopher A. Knott, *Where the Law Is: An Introduction to Advanced Legal Research* (2004) [St. Paul, MN: Thomson-West, 221 p.]

Designed for students already familiar with legal research fundamentals. Discusses statutes, legislative history, law review articles, cases, treatises and other secondary sources, administrative law, looseleaf services, legal ethics, and foreign and international law.

Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473 (2003).

Shows that the rules banning the citation of an unpublished opinion are waning. Discusses the situation in the federal courts and the states, plus the rulemaking process of the federal judiciary. A chart shows the state court rules on citation of unpublished opinions as of 2003.

Carol D. Billings, *A Bibliographic Survey of Sources for a Study of the Law of Colonial and Territorial Louisiana*, 23 Legal Reference Services Q. 1 (No. 1, 2004).

A guide to Louisiana's pre-statehood legal materials. A chapter in the forthcoming title *Pre-Statehood Legal Research: A Guide to the 50 States*.

Timothy D. Blevins, *A Hallmark of Professional Writing: Citation Form*, 29 T. Marshall L. Rev. 89 (2003).

Discusses citations contained within the sentence versus citations at the end of the sentence and pinpoint citations. Warns writers to be sure to comply with local, state, and federal rules regarding citation form.

Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981–1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 Mo. L. Rev. 73 (2004).

Begins with a general discussion of dissenting opinions, followed by an analysis of the style of Judge Posner (including his use of rhetorical devices), and concluding with observations “on the implications ... for understanding the aesthetics of dissenting opinions.” *Id.* at 74.

Tracy Bowles, *Space Law Cases and Publications Since 2000*, 29 J. Space L. 213 (2003).

An unannotated listing of recent books, articles, notes and comments, and cases relating to space law.

Lauren Breen et al., *An Annotated Bibliography of Affordable Housing and Community Economic Development Law*, 13 J. Affordable Housing & Commun. Dev. L. 334 (2004).

An annotated bibliography that updates the original one published in 1998. Entries are divided into four sections: affordable housing development; community development; community development lawyering; and legal education.

Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part III (Mostly Miscellaneous: Articles VIII–XVIII)*, 40 Willamette L. Rev. 225 (2004).

Part of an ongoing discussion (this one more than 300 pages) detailing the development of the Oregon Constitution of

1857. A continuation of articles published in 37 *Willamette L. Rev.* 469 (2001) and 39 *Willamette L. Rev.* 245 (2003).

Kathleen Carrick & Sally Walters eds., *A Bibliography of United States Legal Education: From Litchfield to Lexis* (2003) [Buffalo, NY: William S. Hein & Co., 2 vols.]

An enormous and thorough undertaking consisting of approximately 35,000 entries and more than 850 subject headings, and spanning 170 years of coverage (1820–December 31, 1989). Includes a complimentary CD-ROM.

Therese A. Clarke, *Why Won't Someone Help Me?: The Unspeakable Epidemic of Domestic Violence: An Annotated Bibliography*, 23 *N. Ill. U. L. Rev.* 529 (2003).

“[F]ocus[es] primarily on the aspects of domestic violence dealing with the adult abuser and the adult victim.” *Id.* The annotations are lengthy and thoughtful, but are arranged by author and not grouped under subject headings.

Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 *Legal Writing* 1 (2003).

Discusses the advantages the author sees in having students critique one another’s written work, how this cooperative approach strengthens each student’s written product, and how this methodology goes beyond the traditional student-teacher editing cycle.

Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 *Iowa L. Rev.* 1159 (2004).

“[A]rgues that [the U.S.] ‘writing-centered’ legal process is unique among common law nations, most of which have adopted a ‘speech-centered’ legal process modeled after that of England, where oral argument is the dominant mode of advocacy.”

Abstract.

Will Geeslin, *Language and the Law: Selected Readings*, 23 *Legal Reference Services Q.* 37 (No. 1, 2004).

Covers only legal semiotics and critical legal theory, plain language, and legal dictionaries.

Joseph Gerken, *Elder Law Sources*, 23 *Legal Reference Services Q.* 67 (No. 1, 2004).

Compiled to assist lawyers, librarians, and the general public in locating elder law materials. Topics covered include Social Security, ERISA, age discrimination, guardianship, and veteran’s benefits.

Gibson’s *New York Legal Research Guide*, 3d ed. (2004), revised and updated by William H. Manz [Buffalo, NY: William S. Hein & Co., Inc., 727 p.]

Includes a rewritten chapter on legislative history, a significantly enlarged section dealing with Native Americans, including casino gambling in New York, and a greatly expanded index. Places substantially more emphasis on electronic resources than in prior editions.

William A. Hilyerd, *Using the Law Library: A Guide for Educators—Part I: Untangling the Legal System*, 33 *J.L. & Educ.* 213 (2004).

The first of six articles written to assist teachers and other educators in locating legal materials. This article discusses the legal system.

William A. Hilyerd, *Using the Law Library: A Guide for Educators—Part II: Deciphering Citations and Other Ways of Locating Court Opinions*, 33 *J.L. & Educ.* 365 (2004).

This article is the second in a six-part series. It discusses citation formats and describes how to find a case when the researcher knows only the name of the case or one of the parties.

Erik M. Jensen, *Death by Bluebook*, 9 Roger Williams U. L. Rev. 207 (2003) (reviewing *The Law Review*).

A humorous review of a novel recounting the experience of being on the law review at the University of Chicago. Don't forget to read the footnotes.

Jennifer Jolly-Ryan, *Coordinating a Legal Writing Program with the Help of a Course Webpage: Help for Reluctant Leaders and the Technologically-Challenged Professor*, 22 Quinnipiac L. Rev. 479 (2004).

Describes “how the use of technology, and particularly a course webpage, can open up a new world of teaching possibilities, and lighten the administrative burdens of coordinating a legal writing program.” *Id.*

Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 Legal Writing 71 (2003).

Argues that Justice Scalia is the only member of the current U.S. Supreme Court who has a “good” writing style combining metaphors with witty aphorisms and sharp turns of phrase. Discusses various excerpts from Scalia’s writings to illustrate his prose style.

Sally J. Kelley, *Agricultural Law: A Selected Bibliography, 2002*, 8 Drake J. Agric. L. 381 (2003).

An annual bibliography that continues to update the initial one started in 1985. Lists articles and books under 35 subjects related to agricultural law.

Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. Toledo L. Rev. 705 (2003).

Describes a contract drafting course where students read contract clauses and acquire skills in “(1) recognizing the meaning of coded language, (2) recognizing useless language, (3) connecting the clause to the pertinent topics in contract law, (4) reading

contract clauses in the context of mandatory rules of law that alter or invalidate the clauses, and (5) realizing that the parties’ subsequent behavior sometimes can waive or modify a well drafted clause.” *Id.* at 706–07.

Mary S. Lawrence, *An Interview with Marjorie Rombauer*, 9 Legal Writing 19 (2003).

A lengthy interview with the founder of legal writing as a professional discipline. Provides numerous insights into how legal writing programs have changed and expanded over the years.

Michael J. Madison, *The Lawyer as Legal Scholar*, 65 U. Pitt. L. Rev. 63 (2003) (reviewing Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers*).

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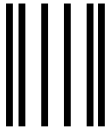


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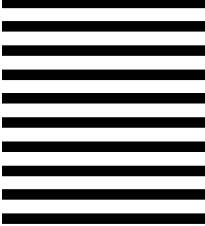


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