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SPECIAL ISSUE
In limine: Writing Assignments at the Transition from Undergraduate to Law School

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Editors' Note

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We are pleased to announce this special issue of *Prompt*, "*In limine*: Writing Assignments at the Transition from Undergraduate to Law School," edited by Lindsay Head, Antonio Elefano, and Brian Larson.

We can take little credit for this guest issue, and we owe a debt of gratitude to past editors Susanne Hall and Holly Ryan for setting this issue in motion. We are grateful, too, that guest editor Brian Larson is also a production editor for *Prompt*; his existing familiarity with many aspects of our editing process has undoubtedly made this a more enjoyable and straightforward experience for the contributors to this issue. Our involvement has been limited mostly to early comments on and approval of the articles selected for inclusion here.

Even at that early stage, we were impressed by the breadth of topics and the creativity of assignment designs the authors proposed. And, despite the focus here on the specific transition of undergraduates into law school, we are hopeful that many ideas here can translate well to other settings, serving to support a number of other threshold-crossing experiences students face into and through their post-secondary education. Given *Prompt's* commitment to disseminating writing assignments across a range of disciplines and professions, we think this special issue goes a long way in shedding light on the field of law and the challenges its practitioners face in enculturating students into their profession.

In other news, we are pleased to announce that several members of the *Prompt* editorial team have agreed to renew their terms: Continuing as editorial board members (through 2027) are Doug Downs, Douglas Eyman, and Rachel Riedner, and continuing as associate editors are Ethan Youngerman and Aimee Mapes. We are grateful to all of our editorial team for their engagement with *Prompt's* work.

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Guest Editors' Note

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Our Motivations

This special issue highlights assignments from both undergraduate and law school instructors who aim to support students in the transition to law school. Lawyers are familiar with the motion *in limine*, which advocates make to judges prior to trial. The Latin term *limen* refers to the threshold of a home, so the motion occurs on the threshold. Law students, too, must cross the threshold from undergraduate study to professional school, and that transition is not thoroughly studied. Among the many challenges students face while *in limine* are the requirements of a more formal type of writing in law school than that for which their undergraduate training has prepared them. But many students come to law school having taken some kind of undergraduate writing class focused on legal writing. Meanwhile, critical scholarship and current events counsel some skepticism regarding the conventions of legal communication and rhetoric.

Currently, there is limited scholarship on the transition from undergraduate education to law school. Enquist (2005) observes the fundamental differences between undergraduate writing and legal writing. Christensen (2006) observes that differences in first-semester law students' reading strategies often correlate to academic success. Flanagan (2015) argues through empirical research that many students entering law school "do not have the critical thinking and analytical reasoning skills that provide the foundation for 'thinking like a lawyer'" (p. 171). Graham (2018) concludes that "Gen Z students are weaker than students of prior generations in critical reading, thinking and writing" (p. 57). Cabrera (2001) asks whether a stronger foundation in communication skills from undergraduate education could aid in future law school retention. These concerns arise for all students, but some challenges may be greater for minoritized students. Graham (2018) points out how students in universities and law schools alike struggle to "navigate systems of institutionalized racism, sexism and heterosexism along with issues of marginalization, socioeconomic bias, and immigration" (p. 40). Fordyce and McCormick (2016) analyze the relationships of race, gender and undergraduate major to first-year law school performance. Minoritized students may face particular challenges in the transition, but they also bring unique resources to the classroom (Crichton, 2021).

Merely teaching undergraduates and law students to reproduce the rhetoric of the law is not, however, enough to train students for contemporary law, because, as McKinnon (2010) notes, "the rhetoric of the law [has been] deployed . . . to construct a story of the United States as always, in advance, white, European, middle class, heterosexual, able bodied, sound in mind, and male" (p. 325, reviewing Bumiller, 2008; Carlson, 2009; Lombardo, 2008; Ordover, 2003; Pascoe, 2009; Weiner, 2006). Consequently, recent scholarship has attended to the need to raise diversity, equity, and inclusion issues from the beginning of legal education (Dyszlewski et al., 2021; McMurtry-Chubb, 2022).

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This Issue's Contributions

We begin with a poem. Why not? The transition from undergraduate to law school writing is difficult and fraught, so we've tried to capture in this special issue many different angles of approach. It's important to acknowledge that prospective law students come from different majors and traditions and possess divergent skill sets, so while bridging the gap between familiar and unfamiliar might best be achieved with a poem for an English major, an engineering major might prefer a more logical, architectural approach, like the one employed by our second author, who uses V-charts to help students contextualize and define social problems. All three of us guest editing this issue are trained as lawyers and have also taught undergraduate legal writing. Two of us now teach legal writing in law schools. We've seen the transition from both sides. There is very little literature on the pedagogy of undergraduate legal writing but voluminous literature on legal writing in law school. There is robust scholarship on undergraduate writing broadly, and the approaches and philosophies of our authors showcase how exciting it can be when theories typically associated with undergraduate academic writing intersect on the threshold of the practical and professional considerations of the law school world.

The contributors to this special issue offer prompts to bridge this important gap. The essays here are presented roughly in the order that students might experience their prompts: two as undergraduates, two as students beginning their first year of law school, and two for students nearing the end of their first year. Any of these prompts, however, could be readily adapted to a different part of the liminal period between undergraduate and law school, and the skills in most are applicable in other fields.

In "A Promising Amalgamation: Law, Poetry and the Making of Legal Writers," Sara F. Cates shows how a critical reading of Gwendolyn Brooks's poem "Boy Breaking Glass" can help students issue-spot, delve into ambiguities and dissect complicated, purposeful language. Though Cates has situated this prompt as part of a first-year law school class, we can see using it in an undergraduate introduction to thinking about the law with and through the humanities. The close-reading skills and imaginative thinking on which the prompt depends can help undergraduate students envision themselves and their diverse skills within the humanities finding a home within the practice and profession of the law.

In "Setting the Argument: Authoring in the Law School Transition," Mark Hannah eschews the typical academic practice of presenting a pre-structured problem by having his students map and compose an explanatory narrative about a contested public issue and its complicated roots. As researchers in many fields know, asking the right questions, or setting the right problems, is an important first step to finding meaningful answers. Hannah models this practice in a way that is accessible to undergraduate students in various disciplines but that is also essential to the first-year law student.

Tracy Norton invites us to consider the application of a widely studied teaching technology in the undergraduate classroom to the first year of law school. In "Each One, Teach One: Engaging Students in Professional Identity Formation Across the Law School Curriculum with Fully Anonymous Peer Review," she explores the use of the Peerceptiv peer-review platform to aid students not just in improving their writing but also in forming their professional identities as consumers and critics of the writing of others. Though framed for use in the first-year law classroom (and in later parts of legal education), Norton's approach is readily applicable to undergraduate disciplines where writing and communication are a collective activity that requires critical evaluative skills and the social skills necessary to communicate such evaluations and criticisms constructively.

In "Crossing the Threshold with Apples, Potatoes, and Limes: Using the 'Grocer's Dilemma' to Introduce Law Students to Malleability in the Law," Kirsten Davis introduces students to the

malleability of legal rules without the complexity of a legal context, making the assignment ideal for students traversing the liminality of legal education. In the context of this assignment, rules are hard to identify, and students are forced to engage in a process of practical reasoning. This ability to take account of different kinds of reasons in the context of making a practical decision, and especially the ability to reason by example or reason analogically, are valuable in most areas of human endeavor. But in the law, they are the core skill of "thinking like a lawyer."

Tanner and Roderick's "The Legal Writing Manual: Self-regulated Learning for First-year Law Students," offers an assignment that encourages self-regulated learning by asking students to record their writing process and compile a manual for approaching unfamiliar writing situations in the future. This exercise in perspective taking, and imagining and remembering what it is like to be back at the threshold of some field of knowledge, is critical across disciplines. Not just technical communicators, who are often called on to distill the understanding of subject-matter experts into instructions for the uninitiated, but practitioners of many professions are called on not only to know their business but to be able to communicate the hows and whys to novices with whom they work.

Finally, in "Breaking the Rules," Rima Sirota presents a legal research and writing assignment crafted for students completing their first year of law school. It calls on students to exhibit their understanding of the rational conventions of the legal discourse community into which they have been initiated for the last year, but it also challenges students to think more deeply about this discourse community because some of its conventions perpetuate discrimination in the law. Law school calls on students to understand the status quo of settled legal rules, but the profession of law often calls on them to challenge discriminatory legal rules. Though this assignment imagines students who have been immersed in the law for most of a school year, it represents a structure suitable for an upper-division undergraduate course in legal writing, political science, rhetoric, or critical theory, because it forces students to think not only about what the rules and rhetorical performances are but the how and why of them.

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A Promising Amalgamation
Law, Poetry, and the Making of Legal Writers

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Abstract

First-year law students often struggle with the transition from writing as an undergraduate to writing as a lawyer. Incorporating poetry into the first-year legal writing curriculum may assist students in making that transition. The close, active reading poetry requires is a strong scaffold to the critical reading lawyers must undertake. In addition, poetry aptly models how language can create an emotional impact, which is akin to how effective lawyers use language to tell a compelling story on their client's behalf. This assignment has students read and analyze Gwendolyn Brooks's poem "Boy Breaking Glass," and then imagine the protagonist of the poem was being criminally prosecuted for his act of vandalism and write the story of the case from both the defense side and the prosecution side. The assignment enables students to appreciate how a text (or a set of facts giving rise to a legal dispute) can give rise to varied interpretations, and how language and storytelling techniques can be used persuasively.

Introduction

The Socratic Method. The Case Brief. The Interoffice Memo. IRAC. First-year students are presented with new terms like these immediately upon entering law school. Many students hope they are ready to tackle the challenges of my class, legal writing, at least because, after all, they already *know* how to write. But, alas, legal writing becomes the course many first-year law students struggle with the most. One strategy for assisting new law students in transitioning from undergraduate writing to legal writing is to draw upon their prior experience in other academic disciplines. I spent seven years teaching high school English before becoming a lawyer. In that time, I taught a number of English courses and incorporated poetry into all of them. Poetry challenges students in two significant ways: first, it demands critical reading. Second, it requires an awareness of and appreciation for how language operates to create images and themes, and to evoke emotional responses from the reader. Now that I am a law professor, I remain convinced that the challenges of reading poetry are valuable to all students, even (or perhaps especially) to law students. The question is, can using poetry in a legal writing course help students to transition successfully from undergraduate writing to legal writing?

I teach two sections of a year-long two-semester legal writing class to first-year law students. In the first semester, the course focuses on how to apply legal authority to a new issue to predict how a court would likely decide that issue. In the second semester, the course focuses on writing persuasively to the court to convince a judge to rule in the client's favor. In both semesters, I aim to help students bridge the gap between the writing they have done as students and the writing they will do as lawyers. Students must transition, and transition again: in the first semester, students move from undergraduate writing to communicating the rigorous objective analysis required to predict the outcome of a legal dispute. They must transition again in the second semester, moving from objective analysis to persuasive argument.

I teach students a range of persuasive writing techniques in an effort to ease that second transition. We discuss, among other techniques, how to explain the law in a way that favors the client's position and how to organize the arguments in a brief to maximize their impact. We also

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discuss strategies for presenting facts in a compelling narrative. Of course, effectively writing either objectively or persuasively requires students (and lawyers) to have first critically read the relevant legal authorities. Both kinds of writing also require a sure command of language: precision, concision, connotation, and denotation matter. Because students often struggle with composing a fact section of a brief, as well as with how to use language impactfully in making a legal argument, I wanted to explore how I might better teach strategies for building these skills. So, I went back to poetry, and it was there that the assignment that is the focus of this essay was born.

The assignment was twofold. First, students read, analyzed, and discussed Gwendolyn Brooks's poem "Boy Breaking Glass."[1] Second, students were instructed to imagine the protagonist of the poem, the boy, was being criminally prosecuted for his act of vandalism, and to write the story of the case from both the defense side and the prosecution side.

Creating the Assignment

It had been a while since I read "Boy Breaking Glass." Years ago, I taught it to my 11th grade English classes, in a unit on The American Dream. When I came across the poem more recently—and after becoming a lawyer—it occurred to me that it explores social justice issues also present in the law. As one critic observed, "'Boy Breaking Glass' centers on one boy breaking windows around his city, desperately trying to find his place in America" (Leaf, 2022, p. 65). Brooks dedicated the poem to Marc Crawford, who had asked her to write about racial inequality in America. Specifically, "Marc Crawford, to whom the poem is dedicated, asked Brooks to think about how Blacks interpret freedom in the United States, urging her to question how Black youth deals with inequality" (Leaf, 2022, p. 65).

The poem, which is written from the speaker's point of view and also incorporates dialogue from the boy, begins with the speaker saying this: "Whose broken window is a cry of art" (Brooks, 1987). The boy who has broken the window proclaims, "I shall create! If not a note, a hole. / If not an overture, a desecration" (Brooks, 1987). The boy "desperately tries to find a sense of belonging in his country but cannot find ears that will listen" (Leaf, 2022, p. 66). He says, "Nobody knew where I was and now I am no longer there," expressing ideas of isolation and erasure, from his community or from his country (Brooks, 1987). The boy goes on, "It was you, it was you who threw away my name! / And this is everything I have for me" (Brooks, 1987). These lines underscore the boy's feeling of being utterly disregarded and that his "cry of art" is all that he has left.

The poem's speaker then states, "Who has not Congress, lobster, love, luau, / the Regency Room, the Statute of Liberty, / runs. A sloppy amalgamation." The images in these lines "are symbolic of the American identity," but "the boy is deprived of them" (Leaf, 2022, p. 66). The speaker places the blame on America "as a whole" for creating "troubled youth" (Leaf, 2022, p. 66). The poem "presents a boy who desires to use art as an outlet for social justice, ultimately turning to violence, unwilling to be yet another voice left unheard" (Leaf, 2022, p. 67). If one imagines that the boy in the poem enters the justice system as a criminal defendant because of his "broken window," the idea that there is a story behind every legal case—sometimes an intensely compelling story—emerges.

Scholarly research supports incorporating poetry into the law school classroom, particularly into the first-year legal writing curriculum. Although teaching law, and legal writing, "through literature and literary techniques is generally useful, as supported by the law and literature movement—poetry, nevertheless, is the most useful for law students and law school training" (Vasiu, 2018, pp. 4-5). In part this is because "[a]nalyzing poetry gives law students the opportunity to issue-spot and delve into ambiguities, dissect language, and interpret with ease—the

'study of poetry and the study of law may at first seem strange bedfellows, but they actually lie most comfortably together; to understand the law is to understand the possibilities of texts, and that is precisely the province of the study of poetry' " (Vasiu, 2018, p. 6, as cited in Gopen, 1984, p. 347). The most salient connection between law and poetry is that both are dependent on the power of language: "law and poetry have language in common. Both disciplines communicate their meanings, aspirations, rules and import through language. The study of law and poetry is, in crucial ways, the study of language" (Eberle & Grossfeld, 2006, p. 356). Poetry, as distinct from other types of literature, has an "intensity or naked truth" that makes it especially instructive for lawyers (Madigan & Tartakoff, 2000, p. 44). Reading poems "sharpens a lawyer's eye and ear for the type of language that encourages critical reflection" (Madigan & Tartakoff, 2000, p. 44). Poetry also "teaches lawyers not to dilute their language" (Madigan & Tartakoff, 2000, p. 44). "A poem's intensity or naked truth—its wit, wisdom, or humor—should help lawyers insightfully question what they hear, see, or read. In turn, they can incorporate such potency into their own written and oral arguments" (Madigan & Tartakoff, 2000, p. 44).

For students to understand and interpret a text, whether it is a legal text or otherwise, they must be able to read it carefully. Thus, the assignment first aims to show students the importance of critical reading. Curtis and Karp's description of critical reading is instructive: critical reading is "creating meaning within a text" which involves "learning to evaluate, draw inferences, and arrive at conclusions based on evidence" (Curtis & Karp, 2005, p. 296). Critical reading is an active process. In this way, the act of reading a poem has much in common with the reading lawyers must do. In both disciplines, diction, connotation, denotation, tabulation, and punctuation must be noted, contemplated, and assessed. Both demand metacognition, rereading, and active meaning-making. Critically reading a poem necessitates delving into an entire text, word by word, line by line; it entails examining an entire text in its smaller syntactical parts and also considering how those parts come together to create meaning as a whole. A judicial opinion is not necessarily an ideal text for practicing this type of critical reading because of its length and structure. The length and structure of many poems, however, are conducive to such a reading, in part because "a poem's relative brevity allows for detailed analyses of nearly all of its words and how they achieve their effects" (M. Meyer, 2007, p. 648). Shorter poems also lend themselves to the rereading necessary for understanding a text. As M. Meyer (2007) observes, "[t]o read a text accurately and validly—neither ignoring nor distorting significant details—we must return to the work repeatedly to test our responses and interpretations" (p. 678). Reading as a lawyer requires the same kind of repeated, active reading.

Composition theory is also instructive in considering the connection between critical reading skills and writing skills. Composition theorists "have noted that the failure of a document to communicate ideas clearly often stems from the failure of the writer to understand the person or persons to whom the document is addressed" (Eichhorn, 1999, p. 152). Strong legal writing, therefore, requires the writer to "take into account the intended reader's background knowledge, sophistication level, and need for specific new information" (Eichhorn, 1999, p. 153). Law students, thus, should focus not so much on what "the writer should and should not do," but instead on "what readers actually do" (Gopen, 2011, p. 21). According to Gopen (2011), "[t]he interpretive process any reader uses is controlled by… structural location, grammatical construction, and context" (p. 22). Structural location means that "[*w*]*here* a word appears in a sentence will control much of *what* a reader is likely to do with it" (Gopen, 2011, p. 22). Grammatical construction is important, according to Gopen (2011), because "[r]eaders pay different amounts of attention to information depending on in what kind of 'unit of discourse' it appears" (p. 22). Finally, context delineates the idea that "[n]o single sentence 'means' by itself but only in combination with the other sentences that surround it" (Gopen, 2011, p. 22).

Although Gopen's theory—termed Reader Expectation Theory—applies best to reading prose (not poetry), its focus on the reader is instructive for the aims of the assignment. Discussing the poem required students to assess their own response to it as readers. In so doing, they evaluated how the language in the poem operated based on its placement in a sentence, unit, or relative to other lines of the poem. In short, they considered how the choices a writer makes in using words does impact the reader's interpretation of what those words mean.

The writing component of the assignment encouraged students to consider how narrative theory and storytelling techniques could enhance legal arguments. Good lawyers tell good stories. As P. Meyer (2014) notes, "[m]ake no mistake about it—lawyers are storytellers. It is how we make our livings. In law practice effective storytelling is often outcome-determinative; sometimes it is literally a matter of life or death" (p. 2). Narrative theory is the "the study of Story *construction,* which is different from--though clearly related to--story *telling*. Construction is the act of building: putting together the elements that comprise the story and then writing it down" (Grose, 2010, p. 39). Grose (2010) goes on to explain the questions one might ask in studying that process of construction: "What are the elements of this story? What choices must the author make about those elements? What process does the author go through to make those choices? By choosing what goes into the story, what has the author left out? How is the story different as a result of those choices? Have those choices been made intentionally or reflexively? What factors influence the author in making those choices?" (pp. 39-40). Putting narrative theory into action "is the practice of storytelling: the actual craft of constructing stories, based on choices made with intention and reflection by the lawyer and her client" (Grose, 2010, p. 40).

In fact, "[t]he most powerful tool for persuasion may be the *story*" (Foley & Robbins, 2001, p. 465). Using narrative theory and storytelling practice in the law school curriculum "both starts from the premise and leads to the realization that The Law is made up of a set of stories that have been adopted by decision makers and that those stories have been constructed by none other than lawyers. When students arrive at this conclusion, they begin to recognize the power and responsibility they hold as story constructors--makers of The Law" (Grose, 2010, pp. 40-41). Thus, "[u]nderstanding storytelling is a way to understand persuasion. We persuade by telling stories that decision makers believe and adopt" (Grose, 2010, p. 46). Incorporating narrative theory and storytelling practice into legal education "can help students understand that there is no such thing as the monolithic Law, rules that are simply discovered or found out there somewhere. Instead, law comprises a series of stories--ever changing--and those stories are constructed not by some objective external Decision Maker in the Sky, but by lawyers, lawyers who once were law students" (Grose, 2010, p. 48). Further, storytelling can "help students hear and incorporate the voices of 'outsiders' as they engage in and practice various lawyering skills, and to challenge them to think creatively and compassionately about their case strategy and practice" (Grose, 2010, p. 49). In sum, "as lawyers we have much to learn from studying the craft of storytelling and applying these lessons to our legal practice. As professional storytellers we can do our jobs better the more consciously we deploy the tools of the storyteller's craft" (P. Meyer, 2014, p. 2).

Implementing the Assignment

The assignment was given at approximately the mid-point of the second semester. Students had already completed their first writing assignment —a memorandum of law in support of a preliminary motion—and were writing a memorandum of law in support of a motion for summary judgment. Students had completed in-class exercises on developing a theory of the case. The theory of the case, a key tool of written and oral advocacy, is a "persuasive explanation of the events at issue in [the] case" (Johnson, 2021, p. 38). It is "the basic underlying idea that

explains the legal theory and factual background" which "ties the evidence into a coherent whole" (Johnson, 2021, p. 38). The theory of the case "begins with finding in the facts a story that moves the court to hold in your favor and provides the legal grounds for so doing" (Shapo et al., 2018, p. 386). An effective theory of the case will "resonate with [the lawyer's] and other people's experience and knowledge of the world" (Shapo et al., 2018, p. 386). Historically, students struggle with understanding and developing a theory of the case. This struggle is neither unexpected nor unreasonable, given the prodigious skill required in integrating law and fact to create a case theory. Nevertheless, since the ability to create a theory of the case is such a critical component of effective lawyering, it is important for students to gain experience with it during their legal education. Part of the inspiration for the assignment was to develop another method of teaching students how to create a compelling case theory.

I introduced the assignment by providing students with some background on narrative theory and storytelling techniques, connecting narrative and storytelling with the prior instruction on theory of the case. Before reading the poem, I asked students to put away their phones and computers. I wanted them to be fully engaged in reading without stopping to look up possible interpretations of the poem online. Additionally, I hoped students would realize that the thinking and meaning-making they were capable of on their own was all they needed to analyze the text. Lawyers, at times, must read and interpret texts for which there is no prior existing interpretation to look to for guidance. Law students, therefore, need to practice this important skill, and feel increasingly confident in it.

Students read "Boy Breaking Glass" three times. First, I read the poem aloud to the class. Next, students read the poem to themselves a second time, with no pen in hand. Finally, they read the poem to themselves a third time, this time making annotations as they read. I specifically asked students to note their questions about the poem, to circle words and phrases they found especially powerful, and to begin to analyze the poem's meaning. I developed this pedagogical method in the seven years I spent teaching high school English. M. Meyer (2007) suggests reading a poem aloud before reading it silently (p. 21). In addition, Mayes (2001) provides guidelines for reading poems, which suggest to "[r]ead a poem once silently, then once aloud, just listening to the sounds," and also to "consider what parts of the poem are effective, who the speaker is, what parts of the poem are difficult" (pp. 8–9).

It is a difficult poem. "Boy Breaking Glass" is powerful, but it is challenging to understand at the outset. After the first reading, the consensus was that no one had any idea what the poem was about. As students read it twice more on their own, their engagement was evident. They were actively annotating. Their focus was palpable. (It occurred to me that perhaps I was on to something by asking students to put their computers away, and I wonder if this is something I should incorporate into lessons more regularly.)

Before discussing the poem as a class, I provided students with a very brief explanation of reader response literary theory, emphasizing that—for the purposes of our discussion and the assignment—there was no singular, correct interpretation of the poem; rather, an interpretation is valid as long it can be supported by the text. According to reader response criticism, a literary work "is seen as an evolving creation of the reader's as he or she processes characters, plots, images, and other elements while reading" (M. Meyer, 2007, p. 662). As M. Meyer (2007) goes on to explain, "[t]here is no single definitive reading of a work, because the crucial assumption is that readers create rather than discover meanings in texts" (p. 662).

Next, I asked students what questions they had about the poem. I was hoping that the first question asked would be "Who is Marc Crawford?" It was. I told students that, at least according to one critic, Marc Crawford was another writer who asked Brooks to write a poem about inequality in America (Leaf, 2022, p. 65). I wanted students to have just this piece of

context regarding what the poem may be "about" to ensure they did not get too far off track. In retrospect, I do not think students needed any information beyond the poem. Based on their subsequent discussion of the poem, and the writing they produced in fulfilling the assignment, it was evident that students understood how the theme of inequality permeated the poem. In fact, when I asked them if they were surprised at Marc Crawford's request after answering their initial question, almost all of them shook their heads indicating they were not.

As the discussion continued, students actively participated, with more of them contributing than in other class sessions, including some who did not avidly participate in the more traditional legal discussions we had at other times. I wonder if this was, in part, because they had time in class to read the material and thus felt more comfortable talking about it. I also wonder if, because we were discussing something that was not *the law*, some students felt less intimidated by the subject matter and thus more able to contribute to the dialogue. Or maybe they simply enjoyed it? Several students commented after class that it was nice to read something other than law for a change.

I was impressed by the skill with which students discussed different interpretations of a single line of the poem, appreciating how either interpretation was supported by the text. For example, some students interpreted the line "the only music is in minors" (Brooks, 1987) to mean that only youth are capable of the creativity and joy that music-making entails. Other students interpreted that line to mean that the only music heard is in a minor key, indicating sadness or melancholy music in minor keys evokes. This is the kind of thinking lawyers do, especially as each side develops a different story of *what happened and why* from the same set of facts. Using the poem to practice this kind of strategic, imaginative thinking allowed students to see and understand how a set of undisputed facts can be told from various perspectives, all of which have validity.

Students also skillfully discussed the significance of diction. For instance, they addressed Brooks referring to the protagonist of the poem "boy" and how this word connoted childhood and innocence. Students were able to contemplate how the choice of the word "boy" gave the protagonist a kind of sympathy he may not have inspired if he were instead referred to by a proper name or as "male" or "teenager" or even "youth."

For the written component of the assignment, which they completed on their own over the next few days, students were asked to imagine the protagonist of the poem, the boy, was being criminally charged for his act of vandalism. They were asked to tell the story of the case as if they were the boy's defense attorney, and then to tell the story of the case as if they were the prosecutor. Students were also told that, in preparing their stories, they might also write about what additional information each side might seek in developing the story. I provided students with a list of questions to consider as they prepared their stories, which included the following: What happened, and why? What should the fair outcome be? What is the human element to what happened? How can you tell your client's story to achieve justice? Students were not allowed to do any research or consult any outside source to complete the assignment. Rather, their stories were to be rooted in and supported by only the text of the poem.

In assessing the written component, I was looking for two things. First, did the story demonstrate critical reading by going beyond an initial emotional response to the poem? During class discussion, it was evident that the students—at the very least—understood that the boy felt disenfranchised by society, felt frustrated, felt desperate. I wanted the stories to go beyond an initial empathetic response to the boy and draw on larger thematic ideas. I wanted students' stories to show an awareness of the themes at the poem's core—inequality, isolation, disenfranchisement—and how those themes can impact an individual in America.

Second, did the story demonstrate an awareness of how language can be used to tell a

compelling story—here, one that has an emotional impact on the reader? One way to create an emotional impact is by carefully considering word choice. Here, I wanted students to incorporate language from the poem to enhance their own writing. Students had been working on how to integrate language from legal authority into their legal writing, and I was eager to see how these skills would transfer to a storytelling context. Further, if we accept the premise that the poem is about, broadly speaking, inequality, that theme is one about which students can feel passionate. I hoped students could channel that passion into deliberately chosen words and phrases, along with other narrative techniques, to create an impactful story.

In telling the boy's story, it is possible to center it around—as the speaker of the poem does—the idea that the boy is brimming with potential and turned to breaking windows only out of frustration with the world around him that refused to let him make his place in it. He is worthy of compassion and should be provided with opportunity instead of punishment. He is an artist whose creativity has been thwarted. He "must create," and his creation was "a work of art" and also "everything [he has] for [himself]" (Brooks, 1987).

The boy's story lends itself to creating emotional impact far more than the prosecution's story. The prosecution's story would likely be centered on the importance of the rule of law. Although the boy may be worthy of sympathy, he still broke the law, and there must be consequences for such action. The boys' feelings of frustration, while understandable, do not give him the right to destroy property of others. He appears well aware of that, as he is determined to "create," and acknowledges that this creation comes from a "fidgety revenge" (Brooks, 1987). He admits that if he cannot create a "note" or "overture," he will destroy and "desecrate[e]" (Brooks, 1987).

Reflecting on the Assignment

Overall, the assignment was a success, and I will use it again when I teach this course in the future. As students told the story of the case as the boy's defense counsel, almost all of them effectively incorporated a man (boy) versus society conflict, emphasizing that great societal change was necessary as opposed to severe punishment for one individual caught up in a society desperately needing that change. As students told the story of the case as the prosecutor, they did so sensitively, with a focus on the simple facts of the case: a crime was committed, and breaking the law is inexcusable.

Their stories overall were quite compelling. Some students used language quite vividly to bring to life the story of the boy and his broken window. Many students' writing was poetic in its own right. Students used imagery, metaphor, and rhetorical questions skillfully. It was clear that students based their stories on a critical reading of the poem based on the themes their stories centered around, and they were overall successful in integrating powerful words and phrases from the poem to enhance their stories.

I had students provide anonymous reflections on the assignment after they had submitted it. Almost all students (apart from a couple who stated they did not care for poetry) found value in the assignment. Specifically, many students found the exercise helpful in understanding why it is important to read critically, and how critically reading can lead to a deeper understanding of a text and its various meanings. Further, several students reflected that the assignment aided them in appreciating how to consider and articulate different perspectives on one set of facts. Finally, several students stated that they enjoyed the freedom the assignment allowed to structure their writing creatively and make rhetorical choices in telling their stories.

After my own reflection on the assignment, several things stand out regarding how I might reexamine some of the ways in which I teach legal writing. First, although most students effectively incorporated language from the poem into their stories, not all of them did. Those who did so were able to weave words and phrases from the poem into their stories to augment

their power. This aligns with what I see in students' traditional legal writing; by the middle of the second semester, many students can effectively integrate quotations from legal authority into their own writing. Some students, however, still struggle with skillfully integrating quoted material, or how to effectively cite to specific language from legal authority at all. After this assignment, I suspect the issue is not one of substance so much as it is one of skill. I think students recognize the importance of supporting their analysis with legal authority, but not all of them feel comfortable selecting the best quotation and determining where and how to place it in their own text. Thus, I would like to consider new ways to introduce students to the skills involved in effectively incorporating authority and to allow them to practice these skills. In particular, I would like to really break down the mechanics of the process of selecting key language and then figuring out where and how to incorporate it. For example, I might provide students with an example of a strong paragraph explaining legal rules and have them examine, sentence by sentence, how the writer carefully selected and incorporated language from legal authority. I might also revise the case charts my students complete in their pre-writing phase. These charts have students delineate the important facts, holding, and reasoning of the precedent cases, and also record how the precedent case may be analogized to or distinguished from their case. It would be beneficial to add a "key language" column to this chart to prompt students to recognize and pull key phrases from the case that may be useful to incorporate into their own document.

Further, few students addressed the need for additional information. This could be, in part, due to the lack of time they felt they had to devote to the assignment. Perhaps they also felt that thinking about information that was not there was less important than analyzing the information that was there. Either way, this indicates to me that students need to practice analyzing facts in such a way that they consider what facts are missing. In traditional legal writing assignments, students are provided with the facts of the case, either in a case record or in an assignment memo. Their job is to cull the relevant facts from an existing universe of documents. In actual law practice, however, lawyers must uncover the facts from all possible sources. In order to discover facts, lawyers must know what questions to ask and what information to seek. That knowledge comes from understanding what information is known, recognizing the gaps in that information, and considering all of this in the context of the relevant legal framework.

Although reading a poem is not, of course, the same as interviewing a client, it is closer to the process of uncovering facts than a traditional law school assignment where facts are provided; it requires students to look beyond what is being said to what is not said, and to discover the emotional components hidden within the client's story. In that way, it simulates the skills needed to conduct a client interview and craft discovery requests.

In the discovery process, trial lawyers must gather "tangible pieces of evidence and witnesses" in order to "[s]et the right scene" for the story they wish to tell at trial (Bodiford, 2014, p. *1). The story that will be told at trial begins to take shape at the very beginning of the case: "Trial lawyers have to prepare a case with the ultimate presentation of the client's story in mind" (Bodiford, 2014, p. *1). While lawyers often begin with "a preliminary legal theory that puts the client's version of facts into existing structures of legal claims and defenses," this "preliminary analysis is only the beginning of the process" (Kruse, 2013, p. 18). In the factual investigation that follows, "lawyers are likely to confront the factual ambiguity and conflict caused by imperfect recollection, omission, and conscious or unconscious shaping of reality to align with self-interests" (Kruse, 2013, p. 19). Then, "[t]o be effective advocates, lawyers also need to know how to weave facts and inferences into persuasive stories" (Kruse, 2013, p. 19). Although a first-year legal writing classroom necessarily has limitations regarding students' ability to uncover facts, this assignment is an effective way to have students begin to consider

how to "make[] decisions… as to what the relevant facts are which support the contentions" the lawyer will make (Ordover, 1991, p. 818).

Further, the next time I use this assignment I will add another component to the writing portion, asking students to consider how a jury might respond to the stories each side tells about the case. This next step—asking students to think about the impact their writing has on the audience—may be a powerful tool in having students contemplate how the choices they make in constructing their stories will be received by the reader or listener. It would also provide a concrete link to introducing or affirming Gopen's reader expectation theory.

The most significant observation I made occurred while I was reading the students' stories and noting how, overall, their writing style was different from the writing I had seen all year. Their writing was universally clearer and more fluid than in the legal writing assignments they had completed thus far. The writing sounded like it was written by a competent writer with a command of language as opposed to a novice lawyer (or perplexed law student) grappling with form and substance. When I told my classes this as I returned their stories, they were not at all surprised. The consensus was that it was freeing to write in this way because they did not feel as though their writing had to fit into a specific structure.

I teach students the general pattern for legal analysis, which has many acronyms including IRAC and CREAC, to name a few. Regardless of what it is called, "a useful pattern for analyzing a simple legal issue often has the following structure: (1) Identify and explain the applicable rule of law; (2) Examine how the rule is applied in the relevant precedents; (3) Apply the law to the facts of your case and compare the precedents; (4) Present counterarguments; (5) Evaluate the parties' arguments and conclude on the issue" (Shapo et al., 2018, p. 121). I teach students this analytical structure, but attempt to do so in as loose a framework as possible, emphasizing how each component of the analysis is malleable depending on audience, purpose, and the applicable law rather than providing students with a formula to follow unfailingly. Now, I wonder if I can introduce the pattern for legal analysis in an even less rigid way, perhaps by emphasizing how *any* good piece of analytical writing would have the components the pattern contains.

This assignment can be adapted to be used in classrooms beyond the legal writing one. It would be well-placed in a Law and Literature type of class, in either an undergraduate setting or in a law school context. Baron (1999), in discussing the "three strands" of the law and literature movement, characterizes the first strand as "humanist," meaning that "[l]iterature is needed to humanize lawyers" (p. 1064). There are several arguments in support of this facet of the law and literature movement. First, "lawyers need to know more about human nature--especially about people different from themselves-- than they can learn on their own" (Baron, 1999, p. 1064). Next, reading literature can rectify the imbalance many lawyers have "rely[ing] excessively on abstract reason over forms of understanding that are emotional, intuitive, and concrete" (Baron, 1999, p. 1064). Finally, literature can assist lawyers in learning to "make[] moral judgments" (Baron, 1999, p. 1064). The assignment falls squarely within this theory of law and literature.

Further, the assignment could be adapted to other literary genres and texts. For example, students could tell both sides of the story of Mrs. Wright from Susan Glaspell's play *Trifles*, of Sherman McCoy from Tom Wolfe's novel *The Bonfire of the Vanities*, or of the Misfit from Flannery O'Connor's short story "A Good Man is Hard to Find."

In addition, this assignment would be valuable to incorporate in a criminal law class, in either the undergraduate or law school context. The instructor could provide students with a vandalism statute under which the boy is being charged, and thus connect the exercise more closely with criminal law and legal advocacy. If a statute were to be provided, the assignment could also ask students to consider how telling the story one way or another could persuade a decision-maker that the statutory elements are or are not satisfied.

Conclusion

Learning to write like a lawyer is no simple undertaking. Giving students the opportunity to think about how language and stories transcend genres is valuable because—at some level—good writing is good writing, regardless of its audience and purpose. As lawyers, students will have to operate within customary analytical structures. But they can take the features of the good writing they produced for this assignment and bring them back to the more structured contexts in which lawyers usually have to write.

ASSIGNMENT
Narrative Exercise

What is a story?

A story is an account of a character running into a conflict and the conflict being resolved.[2] Broadly speaking, "[a]ll storytelling from the beginning of recorded time is based on somebody wanting something, facing obstacles, not getting it, trying to get it, trying to overcome obstacles, and finally getting or not getting what he wanted."[3]

What are the elements of a story?

- Characters
- Conflict
- Resolution
- Organization / Plot
- Point of view[4]

What is narrative theory?

Narrative theory is the study of how stories are constructed.[5] It considers the following: "What are the elements of this story? What choices must the author make about these elements? What process does the author go through to make these choices? By choosing what goes into the story, what has the author left out? How is the story different as a result of those choices? Have those choices been made intentionally or reflexively? What factors influence the author in making those choices?"[6]

What is storytelling?

Storytelling is the art of telling a story. It is the "craft of constructing stories" with "intention and reflection."[7]

What does this all have to do with being a lawyer?

Good lawyers are good storytellers. Lawyers "are not only hearers and tellers of stories, but also, and perhaps most important, constructors of stories."[8] Consider the following:

> Lawyers are particular kinds of storytellers, influenced by variables unique to their role as tellers of their clients' stories. In that role, as makers of legal arguments, we decide what story to tell and how to tell it "guided by some vision of what matters." Put another way, to figure out what story to tell and how to tell it, the lawyer must weigh three substantive factors, the same factors that make up the theory of the case: the law, the facts, and the client's goals. In addition, of course, the lawyer

> must consider contextual factors, *e.g.*, the audience, the forum, the availability of resources, and the personalities of the client and other potential supporting or detracting characters in the story. The lawyer must also consider particular cultural norms and values in deciding among different stories and ways of telling them. And finally, the lawyer must consider factors personal to himself in determining what story to tell and how to tell it: is he comfortable in a courtroom, can he pull off a humorous narrative, does he do better in a more formal or less formal setting, does the client's situation raise personal moral or ethical concerns?
>
> Storytelling is pervasive. When a lawyer drafts a statement of facts, for example, she does not simply record the known universe of "relevant" facts in an interesting and persuasive way. Indeed, there is no such thing as an absolutely neutral description of the facts. As lawyers, we engage in fact-gathering repeatedly—at initial client interviews, after we've done some legal research, in anticipation of the other side's argument—and then we "pick and choose from available facts to present a picture of what happened" that most accurately reflects our sense of what matters. And the other lawyers involved do exactly the same thing, with exactly the same pool of facts, but emphasizing different details, drawing different inferences, and thus drawing quite a different picture.[9]

Therefore, "[u]nderstanding storytelling is a way to understand persuasion. We persuade by telling stories that decision makers believe and adopt. Narrative theory is so compelling partly because stories are elemental to human interaction—we recognize and react to them instinctively."[10] In sum, thinking about narrative theory and storytelling "can help students understand that there is no such things as the monolithic Law, rules that are simply discovered or found out there somewhere. Instead, law comprises a series of stories—ever changing—and those stories are constructed not by some objective external Decision Maker in the Sky," but by lawyers, lawyers who were once law students."[11]

The Exercise

Read and analyze Gwendolyn Brooks' poem "Boy Breaking Glass." We will discuss the poem in class today.

Then, assume that the Boy in "Boy Breaking Glass" is being prosecuted for his vandalism. **First, how would you tell the story of the case if you were the Boy's defense attorney? Second, how would you tell the story of the case if you were the Prosecution?** In responding to these two questions, you may also write about what additional information each side might seek in developing the story.

Your responses to the above two questions will not be long (you will likely write only one paragraph per side). Be sure, however, that your stories are rooted in / supported by the text of the poem. You do not need to—and may not—do any research or consult any outside sources to complete this exercise. As you think about the story you will tell for each side—the Boy and the Prosecution—consider the following from each side's perspective:

- What happened and why?
- What should the fair outcome be?
- What is the human element to what happened?
- How can you tell your client's story to achieve justice?

Notes

[1] A copy of Brooks's poem is available on the Poetry Foundation website.

[2] *See* Foley, Brian J. and Robbins, Ruth Ann, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Section*, 32 RUTGERS L. REV. 459, 466 (2001).

[3] *Id.* (quoting Stein, Sol, *Stein on Writing: A Master Editor of Some of the Most Successful Writers of Our Century Shares his Craft Techniques and Strategies*, 224 (1995)).

[4] *See id.*

[5] *See* Grose, Carolyn, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ALWD 37, 39 (2010).

[6] *Id.* at 39-40.

[7] *Id.* at 40.

[8] *Id.* at 40.

[9] *Id.* at 44.

[10] *See id.* at 46.

[11] *See id.* at 48.

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.191.

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Setting the Argument
Authoring in the Law School Transition

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Abstract

This article details an assignment that provides students opportunities to develop critical thinking skills native to what it means to "think like a lawyer." By asking students to map and write a narrative about a contested public issue that describes the issue's various dimensions (legal, social, cultural, political, economic) and how they interact to shape the issue as a public concern, the assignment invites students to reimagine their roles as writers and see themselves as having the capacity to assemble and set a problem for analysis and deliberation, i.e., author, rather than accept a problem as pre-structured. Through the assignment, students witness the constitutive nature of the structure of legal discourse and the intra-operations of the facets of legal critical thinking. Through explaining the assignment's design and rationale, this article demonstrates how writing assignments that emphasize problem setting prepare students well to navigate the transition to law school and ultimately begin laying the grounds for successful professional careers.

Introduction

The undergraduate study to law school transition is complex and involves many challenges ranging from learning how to read opinions in casebooks and navigating the Socratic method in classroom discussion to acquiring a new professional language and learning how to apply it in speech and writing. At play in each of these challenges is students' quest to develop the critical thinking practices associated with what it means to "think like a lawyer" (e.g., Mertz, 2007; Schauer, 2009). Law school curriculum is explicitly designed to inculcate this critical thinking ability, but undergraduates often lack the fundamental thinking and reasoning skills necessary to master the curriculum and ultimately bridge the transition (Flanagan, 2015).

This article introduces the Problem Setting Narrative (PSN), a combined mapping and writing assignment designed to initiate undergraduates in the reasoning skills involved in thinking like a lawyer. I teach the PSN in *Writing in Context*, which is a required class for the Writing, Rhetorics, and Literacies major at Arizona State University. The course is designed to familiarize students with rhetorical practices that position them to read, assess, and respond in writing to the rhetorical demands of varying public and professional work environments where they may work, like law, medicine, business, government, and non-profits. The PSN's pedagogical innovation is its invitation to students to reimagine their writing roles as authors, namely as individuals who have the capacity to assemble and set a problem for analysis and deliberation rather than accept a problem as pre-structured (e.g., Hannah, 2015; Slack et al., 1993). It is in cultivating this conception of authoring that undergraduates can begin to fit themselves with the reasoning skills necessary to successfully navigate the law school transition.

Assignment Description

The PSN involves students mapping and writing a narrative about a contested public issue that describes the issue's various dimensions (social, cultural, political, legal, economic) and how their intersections shape the issue as a public concern. Through pairing mapping and writing

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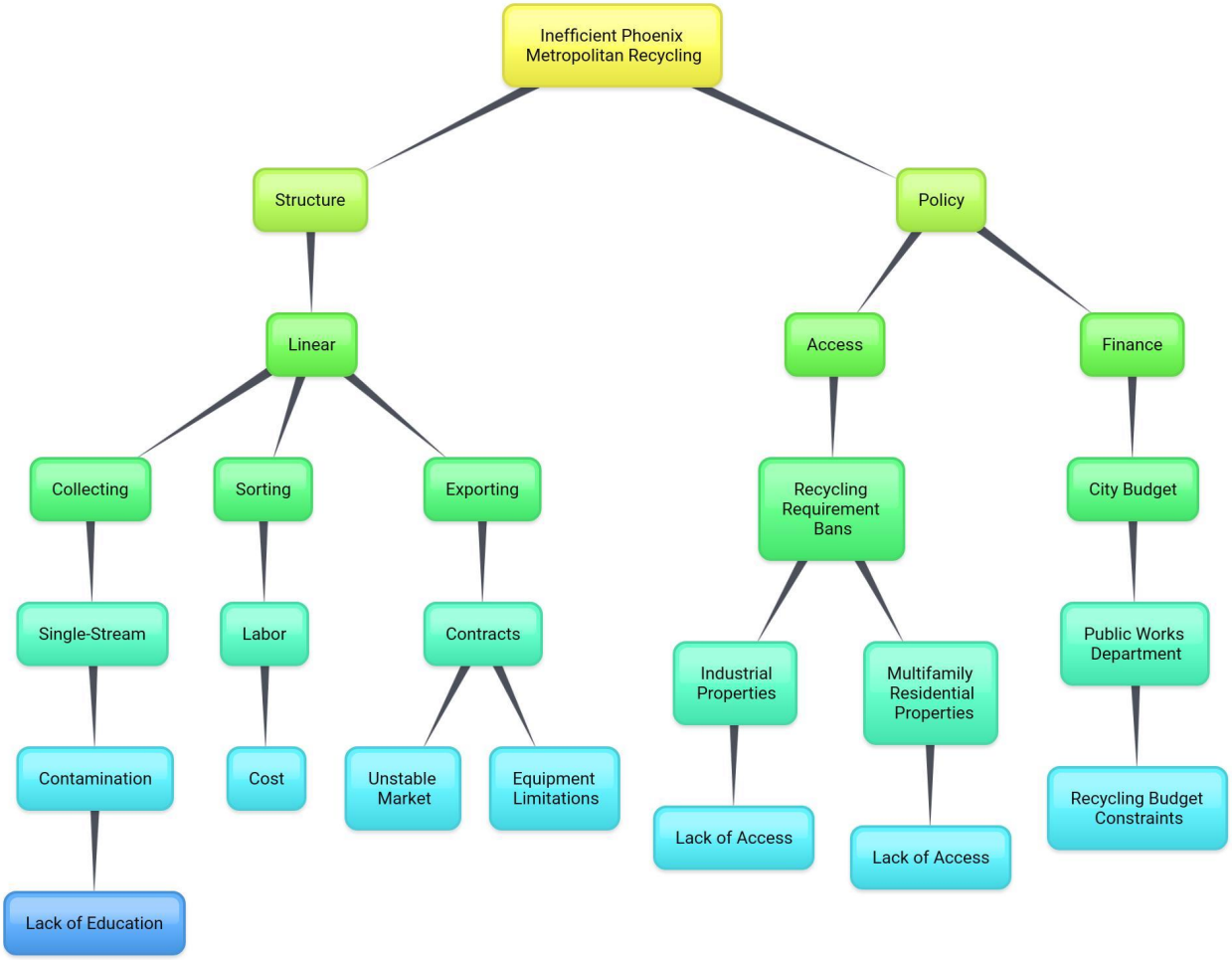

Figure 1. Student V-Chart Example of Inefficient Recycling in Phoenix Metropolitan Area

(see Sullivan and Porter, 1997), the assignment prompts students to think carefully about how they frame public issues as addressable. As the PSN's organizing feature, addressability, i.e., the ability to be identified, defined, located, and accessed (Dhaliwal, 2022), eschews ultimate problem resolution in favor of situating an issue in broader rhetorical contexts and creating multiple pathways for responding to its exigencies. In centering addressability, the PSN requires students to *identify* and *define* new ways to represent an issue and ultimately *locate* them in relationships that provide *access* to disparate audiences. When activated, addressability's critical acts coalesce in ways akin to the reasoning processes found in the practice of law.

V-Chart Mapping

To begin, I ask students to identify a public issue connected to their majors and create a v-chart that visualizes a macro to micro logic for how a problem develops. V-charting is a pedagogical activity I developed based on my formal legal training, and its goal is helping students develop spatial thinking skills (see Sullivan and Porter, 1997) for identifying relationships between potential causes. For example, if recycling inefficiency was a student's interest (see Figure 1), they might identify, through their everyday experiences with recycling, as causes materials, government oversight, and education.

Because visualizing macro to micro thinking is unfamiliar and requires abstract thinking, I

use a Russian nesting doll as a metaphor to illustrate how smaller and larger concepts are nested, i.e., how in recycling, collecting is an activity among the linear processes involved in Phoenix recycling (see Figure 1). I explain students' task in v-charting as being about connection and describing how the outermost doll is conceptually related to inner dolls. How, for example, is a lack of education about recycling (the innermost doll) an inefficient recycling issue (outermost doll)? Articulating this relationship requires students to think outside of their experiential knowledge and express connections that are not immediately obvious. In particular, they play with everyday language that can accommodate multiple concepts and principles and ultimately symbolize the new connections they are drawing. In Figure 1, structure is an overly general, yet capacious, word that can embody a number of unrelated sub-topics. The student's task in v-charting was articulating potential connections between sub-topics and authoring, or naming, the grounds for making the case about what structure specifically looks like in the greater Phoenix area and ultimately how that structure leads to inefficiencies. The following paragraphs explain how the student author of the v-chart shown in Figure 1 visually represented those argument grounds.

To represent the potential causes or influences on recycling as a public problem, the student developed macro to micro, i.e., general to specific, relationships through labels that move readers vertically on pathways that begin with a broad generalization and then move through related influences that narrow the generalization. Labels operate as macro and micro topics in that they take their meaning (as a micro) from the preceding label (as a macro) on the pathway and then give meaning (as a macro) to the following label (as a micro). In Figure 1, collecting takes, from linear, its meaning as an initiating act of recycling, one that precedes sorting and exporting. Collecting then gives meaning to single-stream, as a type of collecting. This process continues until the student named an influence she could not specify further and thereby suggested it as a potential cause. As the student worked her way towards this point, she witnessed the creative power of hierarchy in reasoning in that what leads defines what follows. To explore this creative power, the student was encouraged to experiment with label naming and then place such naming in new relations. For example, the student contemplated the word "pick-up" as a replacement for collecting. However, she explained during in-class workshops that the phrase was too narrow in that it conjured the idea of a city recycling trash truck yet ignored other kinds of collecting like an individual gathering trash at a party. Through experimenting with words, the student witnessed how naming and defining creates different opportunities for argumentation by making visible the operation of oppositional logic, i.e., A/not A, (Andrus, 2015) that excludes that which was not selected or named. In the student example, the alternative term "pick-up" and its municipal connotation potentially excluded considerations of the kinds of human interaction that are involved in collecting recyclable materials. Armed with this knowledge of potential exclusions, the student anticipated critiques, i.e., counterarguments, about the appropriateness of using "pick-up" as a defining label for the initial phase of the linear structure of recycling and ultimately chose to use collecting for its ability to capture a wide range of activities that initiate recycling.

Horizontally, v-charts require students to develop labels that establish apples-to-apples relationships between topics so they can be compared. In articulating these relationships, students develop themes (A) through which to translate two unrelated topics (B & C) as being intelligible to one another and thus able to speak back to the organizing theme. In Figure 1, we see under the exporting label the student develop intelligibility between the concepts unstable market and equipment limitations through the theme of contracts. She explained during in-class workshops that exporting or transferring recycled material that had been sorted was extremely resource sensitive and needed to be controlled in some way. The question for

her was how to equate unstable market and equipment limitations as an issue of control, and she identified contracts as a control measure. While there may be some disagreement amongst readers of this article as to whether control is implicated in the concepts, what is important to recognize here is the student grappling with questions of relevancy. More specifically, only certain themes can do the work of representing subordinate, micro concepts as equivalent to one another, and the student must select a theme that can both represent the micros and connect back to preceding macro theme labels. A key part of determining a relevant theme for horizontal intelligibility is selecting one for which there is available secondary research. Without this research, the theme label will be meaningless as it cannot sustain a student's argument. In Figure 1, the student located secondary sources about the effects of shaky market conditions and outdated recycling equipment on recycling programs in general. With this information, she believed she could develop arguments about how contracts might stabilize the challenges posed by volatile markets by establishing contract terms in advance or provide flexibility for procuring access to newer, updated equipment via shorter lease renewal periods. Again, while there may be some debate about the merits of the student's claims regarding the potential power of contracts to improve the exporting of recycled materials, the important thing here was the student thinking through how evidence can activate different argument pathways that share an organizing theme. Using the idea of authoring to describe this process, the student used contracts as a macro theme to author two lines of argument around which she later could use one line to argue in a policy proposal that recycling exporting contracts are a significant contributor to recycling inefficiencies.

In light of the preceding two paragraphs, let's now take a closer look at the movement in the student example in Figure 1, which focuses on recycling inefficiencies in the metro Phoenix area and the lack of education about recycling that contributes to the problem of inefficiency. Arriving at the specificity of this naming was not easy for the student. In the initial v-chart, the student framed/named the issue as recycling (macro) and directly linked it to contamination (micro). Though this pairing represents a reasonable argument about why recycling is done poorly, it oversimplifies the causal influences acting on the issue by jumping over other contributing factors. The challenge for the student then was to revise and build in intervening micros that elaborated on potential influences that link recycling with contamination. In this example, the student identified and named, i.e., authored, four intervening inputs as well as a further specification of contamination. In doing this work, the student transformed her understanding of recycling in three important ways: (1) she added a qualitative feature (inefficiency), (2) she located recycling (Phoenix), and (3) she constrained that location (metropolitan). Furthermore, she developed a sophistication with recycling-related language that is necessary for translating the issue's discipline-specific language into everyday language accessible to lay audiences.

Regarding horizontal relationships, the student successfully visualized groups of intelligible concepts. For example, looking at the collecting/sorting/exporting level, the v-chart represents the student's awareness of the different features of a linear recycling approach that could lead to inefficiencies. What is important to recognize at this level is that the student makes no claim about which of the features leads to greater inefficiencies—that assessment comes lower on the vertical pathway. Rather, the level operating at this point induced a pause in the student's thinking, a pause that thwarted her impulse to claim a solution and spurred her to survey other available options for addressing the larger issue of recycling inefficiency. Through identifying these other options, the student simulated the operations of oppositional logic by making visible the not-A examples that compete for the student's framing attention when revising the v-chart. For example, if the student later decided in a policy proposal to focus her arguments on the collecting challenges of recycling, the v-chart reminds her that sorting and exporting are still

relevant as potential influences and thus prepares her to better anticipate counterarguments to any collecting claims she develops.

To close this section, I want to remind readers of the unfamiliar, messy, and sometimes misguided nature of v-chart mapping. Students will continue to oversimplify concepts, draw tenuous connections, and miss opportunities for developing nuance between macro/micro relationships, such as in the gap between single-stream and contamination in Figure 1, where the student failed to identify intervening micros that would provide much needed specificity to that relationship. Regardless of the success or failure of this student's mapping, through composing and revising the v-chart, her thinking developed in three important ways. First, the student's orientation to the issue shifted from solution to addressability. That is, in authoring new micros, the student *identifies* and *defines* new problem spaces for stakeholders to *locate* their work and develop arguments to *access* the problem and grapple with its exigencies. Second, through authoring the new problem spaces, the student experienced the phenomenon of writing with constraint. Writing with constraint is a key feature of composing in professional environments as rules and norms take on special meaning and set parameters for what counts as actionable discourse, namely something that can be recognized and acted on by peers within the professional community. Third, and most important, the student wrestled with the complexity inherent to reasoning with specificity, namely how the relationality, oppositional logic, and anticipation of naming gives shape to an idea's form. At play in each of these advances to the student's thinking is the quest to render the issue as intelligible, i.e., make it actionable for public and private stakeholders. V-charting provides students the opportunity to author the conditions of intelligibility that will set the grounds for what it means for someone to access and communicate well in a specified professional community.

Narrative Composing

To articulate their understanding of the public issue's addressability, students compose a narrative that tells the story of their v-chart, i.e., describes the different critical reasoning processes through which they can develop arguments to address the issue. Students' goal in composing the narrative is not to rely on descriptive, play-by-play expressions of the decisions they made. Rather, their goal is to explain the rationale for their decision-making, namely why they developed specific macro/micro relationships over others that were available to them.

In their narratives, students pay special attention to the relationality, oppositional logic, and anticipation that operates in their v-chart and note how those phenomena create conditions for argumentation. Looking at Figure 1, the student would explain the vertical and horizontal relationships that flowed from the initial framing between the macro inefficient recycling and the two second level micros, structure and policy. She would describe how inefficient recycling is a complex issue that involves many factors like economics, politics, environment, infrastructure, and law, and that in this instance, she believes the infrastructure and policy routes offer the most efficient way to have some initial impact. In describing these relational choices—inefficient recycling and infrastructure and inefficient recycling and policy—the student would demonstrate three things. First, she would demonstrate awareness of the broad rhetorical context in which the issue exists, i.e., here's the world of the issue. Second, she would demonstrate her capacities as a strategic thinker, i.e., here are two ways to narrow that world and make the issue actionable. Third, she would demonstrate how different dimensions of a problem are in conversation, i.e., here's how those dimensions influence each other. For example, in this student's narrative, she commented on how the v-chart helped her see the ways policy operated uniquely at each horizontal level, namely how finance was a contractual, procurement matter with exporting processes whereas for sorting processes it was a labor/human resources issue.

Armed with the understanding of these nuances, the student now has criteria for evaluating the different information needs of procurement and human resources specialists and can constrain her writing to those competing needs.

To extend their thinking about an issue's relationality, students are asked to describe how oppositional logic and anticipation are implicated within it. Regarding the former, students would describe how they surveyed available themes for a label and selected one that was: (1) capacious enough as a macro to house or hold various micro examples that sufficiently defined the theme, and (2) distinct enough from other themes on the same horizontal level such that the A/not-A relationship would hold. That is, students describe how their naming practices created themes with rigid boundaries that imposed distinct intelligibility requirements that required stakeholders to develop data and information to speak in the name of the theme. As part of this discussion, students also would describe the clearing-out effect of choosing their theme (A) over other options (not A). More specifically, students would try to attend to those aspects of the not-A that circulated behind the scenes of the framed A issue and laid ready to animate potential counterarguments to A. In the student's narrative to the v-chart in Figure 1, she commented on the merits of a non-linear recycling structure but noted that the broad diversity of those structures made it difficult to explain those merits in an accessible way to lay audiences. Using robustness as an example of merit, the student noted the positive connotations of robust processes but then quickly noted the difficulty in specifying how robustness could lead to tangible results. She then explained how the challenge of tangibility is exacerbated when compared to a linear approach and its implicit benefits of efficiency and predictability. Ultimately, through this back-and-forth discussion of A/not A, the student experienced the oppositional/adversarial nature of argumentation by exploring the discursive grounds, i.e., vocabulary/terminology, of disagreement. Importantly, this anticipatory pedagogical work is different than simply imagining the counter claims an adversary or opponent might make. Instead, this work involves interaction with a structural component of argumentation, namely the vocabulary/terminology that will create distinct pathways for developing arguments.

Regarding the style or genre of the narrative, students are encouraged to draw from the early mapping work they did in the v-chart and use its structure to organize their writing. As noted earlier, the v-chart has a natural hierarchical macro/micro structure that lends itself well to identifying levels of information within a document. Thinking about these levels in terms of information design, the different theme levels offer model language for developing header and sub-header sections in the narrative. Similar to how headers and sub-headers signal informational content in a report, students learn how to signal the informational content of their own authored problem, and in doing so, they identify the terms of engagement (Hannah & Saidy, 2014) for intelligibility. That is, they provide the rule book, if you will, for communicating about their set problem. When done well, a narrative represents the dynamic nature of the set issue and describes distinct pathways for addressing the issue in a constrained, yet strategic, manner.

Anticipating the Transition

I will use the remainder of this article to discuss three of the PSN's intended outcomes and how they will help students imagine and work through the undergraduate to law school transition, specifically, awareness of: (1) problem authoring, (2) the structure of legal discourse, and (3) the facets of legal critical thinking.

Problem Authoring

As noted in the opening of this article, my principal motivation for developing the PSN was to disrupt students' understanding of what it means to use writing to address problems. Often, when we ask students to think about a problem to write about, they will name topics in an overly broad manner—"I want to write about mitigating climate change," "I want to write about developing gun control laws," "I want to write about abolishing the death penalty," etc. Across these examples, we see recognition of an important and timely issue (A) and an associated action verb (B), e.g., mitigating, developing, abolishing, that projects a desired end. In fairness to my students, I know they do not believe that the argument they lay out will ultimately achieve the desired end, but what strikes me each time I hear an "I want to write about…" statement is the student's acceptance of the problem as a given, as something that cannot be understood or expressed as different. In the practice of law, problems do not show up in this way. Granted, there are typical patterns with some legal problems, but at its core, a problem is unique to the facts and circumstances of the specific context in which the problem arose. The opportunity for a lawyer is to define that problem, i.e., author it, and give it meaning.

Take your standard self-defense case, where the prosecutor identifies the legal issue as battery and the defense attorney qualifies it as self-defense. Each frame calls on the facts and circumstances to define the parameters of the frame that give shape to the problem. For example, in arguing self-defense, the defense attorney is saying the parameters of the problem are that the defendant acted reasonably in the face of an imminent threat, i.e., the person could not avoid a perceived harm and responded in a way that was proportional to the harm posed. The specific parameters that set the problem in this instance—reasonableness, imminence, threat, avoidance—provide the grounds for intelligibility by signaling what evidence from the problem context will be deemed relevant for crafting a legal argument. Translating this example in terms of a v-chart map, the terminology defining the parameters of self-defense will operate as labels, and students would identify behavioral features and examples from the fact pattern that illustrated the labels, e.g., threat—the attacker raised a bat to strike your client.

Ultimately, in naming the labels, students create the constraints within which they will write, i.e., they author the conditions of possibility for argumentation. Enquist (2005) argues there are fundamental differences between undergraduate and legal writing. I see knowing how to write within constraints as an example of one of these fundamental differences, and v-chart mapping offers students, as authors, the opportunity to develop some facility with navigating this important transition hurdle.

Structure of Legal Discourse

Working again with Enquist's (2005) recognition of the fundamental differences between undergraduate and legal writing, the PSN invites students to negotiate another of these differences—writing in formal discourse structures. Legal genres like memos, briefs, and motions involve unique genre features that engender a particular, professional discourse style, one that generally moves from the identification of general principles and rules to the specification of arguments that represent a persuasive application of those principles and rules. The PSN's v-chart map mirrors this hierarchical, general-to-specific argument structure, as it includes hallmarks of good organization in legal writing like the division of complex material into sections/subsections and the development of language for headers/sub-headers (Tiersma, 1999). In directing students' attention to how label naming fosters conditions for the division, or partitioning, of concepts, the v-chart demonstrates the constitutive nature of arrangement. That is, rather than seeing arrangement merely as an outlining matter, a document's arrangement scheme, via its headers/sub-headers, is content that communicates to readers what matters, i.e., has value, has

priority, and has authority. I see disrupting students' understanding of arrangement away from outlining as offering them, as authors, the opportunity to develop some facility in navigating the discourse structure hurdle that illustrates another of the fundamental differences between undergraduate and legal writing.

Legal Critical Thinking

As noted in this article's introduction, an organizing feature of law school curriculum is helping students inculcate the habit of mind underlying what it means to "think like a lawyer" (Mertz, 2007; Schauer, 2009). At play in this professional thinking practice are notions of relationality, hierarchy, simultaneity (i.e., oppositional logic), anticipation, and intelligibility (Hannah, 2024) that represent facets of legal critical thinking. The PSN's v-charting work requires students to negotiate these facets in their invention practices as they compose the narrative story of their set problem. Beginning with the initial framing choice students make regarding their public issue, they encounter the relationality that inheres in that framing choice and will explore the range of available macro/micro relationships that can speak to and give meaning to the problem as it is framed. Through establishing the macro/micro relationships, students witness the hierarchy of legal critical thinking and also gain insights into the simultaneity of legal issues, the A/not A nature of legal issues that emerges through issue spotting and naming. Lastly, in structuring the macro-micro relationships, students lay out a visual field that prompts them to ask both what is next and what counter arguments circulate as non-A claims in the background of the v-chart's argumentative structure. Ultimately, the intra workings of these critical thinking facets shape lawyers' translational work that is involved in fitting their arguments with the required intelligibility for participating in law's discourse system. I see introducing students to these distinct analytical workings as offering them, as authors, the opportunity to develop and leverage some facility in "thinking like a lawyer," which in many respects, I believe, is the most durable influence operating in the undergraduate to law school transition.

Opportunities and Challenges

Teaching this assignment is a wonderful opportunity to situate students in contexts tied to their course of study and offer the chance to think about what it might mean to work in the professional world. In particular, they learn to see themselves in such work and imagine the relevancy of the expertise and skills they are developing in their course work. The biggest challenge to teaching the PSN is working against students' instincts or beliefs that complex problems are ultimately solvable. Resisting the impulse towards resolution, the assignment invites students to think of complex social issues as addressable, as primed for engagement through nuanced issue framing. A related challenge is students having sufficient knowledge of rhetorical concepts implicated in the assignment. For example, questions about rhetorical issues like exigencies, the rhetorical situation, kairos, audience, identification, *ethos*, *pathos*, and *logos*, animate this assignment, and I believe they offer students useful vocabulary for talking about their mapping and composing decisions. Equipping students with knowledge of such concepts thus stands as a simultaneous opportunity and challenge for instructors to navigate. Lastly, a persistent challenge in teaching the assignment is providing students the space to fail. Because I know I am inviting a rupturing (Mertz, 2007) of students' reasoning processes, I am overly attentive at times and handhold too much early on—I ask too many leading questions and offer too many labeling suggestions for building their v-charts. In those moments, I have to remind myself to let them be and provide the space to think and revise, to allow them to center their own thinking in their mapping and writing work. Ultimately, in allowing students to work in this way, we can create conditions for learning how to "think like a lawyer" and thus begin to

smooth the path of the undergraduate to law school transition.

Moving Toward a Professional Life

Using the PSN to prepare students for professional careers encourages them to newly imagine writing's role in their work. No longer is writing simply a way to respond to and address problems. Instead, writing is a way to craft a call to action, to set a problem in its larger rhetorical context and draw connections between its various legal, social, cultural, political, and economic dimensions to make it addressable by a wide array of stakeholders. Learning to do this work is especially important in contemporary professional work environments that are characterized by workers collaborating across different specialties with competing notions of time, space, language, values, and knowledge. Failing to accommodate these competing phenomena can dampen writers' calls to action by creating cognitive dissonance rooted in disparate framing and language-use practices. In the practice of law, such dissonance can be especially poignant as law's specialized language, distinct discourse structure, and diverse reasoning practices (see Conti et al., 2024, pp. 20-26) introduce unique barriers to newcomers' transition towards learning to "think like a lawyer." While the goal for students is not complete mastery of law's communication and reasoning practices, the PSN's initiation of students in those practices through combined mapping and writing primes them to negotiate the transition's discursive complexity in meaningful ways.

ASSIGNMENT
Problem Setting Narrative (PSN)

This project involves students visually mapping and composing a written narrative that describes the various inputs and/or pathways that "feed" a problem of public concern. You will produce two deliverables and also deliver an informal presentation to a group of your classmates to receive revision feedback.

Deliverable 1—V-Chart Mapping

You will complete a v-chart map that frames your selected problem and visualizes argumentative pathways for addressing the problem (see attached student example). To begin your map, you will need to develop keywords and keyword phrases to populate the macro/micro labels that you will use to signal the argument structure of your proposed reasoning pathways. When creating these labels, you will need to be mindful of the relationships between the macro/micro sections to ensure that the labels offer meaningful distinctions both vertically and horizontally on the map and also create comparable, apples-to-apples relationships on the vertical and horizontal pathways.

In Week 1 of this assignment, you will complete a draft of the v-chart map for peer review. You will revise the v-chart during Week 2 of the assignment while you compose your narrative.

Deliverable 2—Narrative Composing

To describe your reasoning processes in developing the v-chart map, you will compose a narrative that tells the story of your v-chart, i.e., describes how and why you framed the public issue in the manner you did as well as how and why you developed and named your macro/micro labels to establish the vertical and horizontal relationships on each reasoning pathway. As part of this

discussion, you will comment on the range of names you considered for your labels and note how the labels, though related, offer different argument pathways for addressing the narrative. To limit the scope of your narrative, you will select 2 of the pathways to describe in detail and note how they relate to the other pathways on the v-chart map.

When composing the narrative, your goal is not to provide a play-by-play breakdown of what you did—your goal is to describe your reasoning process so that I can see your mind at work. Doing so will enable me to provide more targeted feedback to guide your revision process. To structure your narrative, I encourage you to model the layout of your v-chart map and use the language from your labels as your headers and sub-headers.

In Week 2 of this assignment, you will compose a draft of your narrative for peer review. You will revise the narrative during Week 3 of the assignment.

Informal Presentation

During our Week 3 class sessions, I will create groups of 4-5 students for informal presentations of your problem setting work. You will have 5 minutes to describe your v-chart mapping and composing, and your group members will have the opportunity to ask questions and offer feedback for revision.

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.188.

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Each One, Teach One

Engaging Students in Professional Identity Formation Across the Law School Curriculum with Fully Anonymous Peer Review

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Abstract

Fully anonymous peer review enhances students' writing and feedback abilities, encourages professionalism and kindness, and transforms the teaching dynamic. This essay describes the use of the Peerceptiv platform for fully anonymous peer review assignments in law school courses. This platform is uniquely helpful in fostering professional identity formation while helping students improve their analytical writing skills. However, implementing this peer review platform comes with challenges such as student reluctance and discomfort. With strategic communication and investment of time, these challenges can be overcome to realize the potential of this innovative approach and provide formative assessment, regardless of class size. Ultimately, scalable peer review helps students strengthen skills while developing collaborative professional identities throughout the law school curriculum.

Introduction

"Each one, teach one" is attributed as an African proverb describing the responsibility of an enslaved person who had learned to read to teach another enslaved person to read. It is a powerful statement about the responsibility to pursue excellence not just for yourself but for those in your community.

Law professors—particularly those who teach skills—are perpetually concerned about whether the law school curriculum does enough to ensure that students have practice-ready analysis and writing skills by the time they graduate. We continually restructure curriculum, try to close the divide between skills and doctrine, reconsider class size, and wait for the changes to make an impact. However, the simplest answer to the question of how to improve students' writing and "hard" legal skills across the entire curriculum may be "each one, teach one."

This reflective essay first describes the educational context in which fully anonymous peer review assignments are offered, then briefly discusses professional identity formation as a goal in legal education, and describes the impetus for developing peer review assignments using the Peerceptiv platform and how it can promote professional identity formation. Finally, it reflects on the benefits this peer review process had for not only students' skills improvement but also for their professional identity formation. The basic legal analysis assignment for the Peerceptiv peer-review platform appears after this essay.

Course Context

Law school courses are generally broken down informally into two types: skills and doctrine. Skills courses are further broken down into instruction, simulation, and clinics. Doctrinal courses are broken down into required courses, elective courses, and seminars. Skills courses are labor-intensive courses to teach because they require one-on-one and small-group feedback

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as students attempt to learn and master skills necessary for law practice. Doctrinal courses, particularly required courses, tend to be large-section courses. The size of required doctrinal courses varies, depending primarily on the size of law school's first-year (1L) cohort. It's not unusual for a first-year law school required course to have 75 or more students. The large class size assumes that the professor will not be giving regular formative assessments requiring individual evaluation of practice skills like written analysis or oral advocacy.

At the behest of law schools' primary accreditor, the American Bar Association (ABA), American law schools have introduced increasingly more skills education over the past forty years, much of it siloed in courses dedicated to legal analysis, legal communication, advocacy, and clinical skills. Professors who teach casebook courses know all too well that students have difficulty on exams communicating a clear, thorough analysis of legal issues. Yet skills education remains largely siloed in skills courses and clinics. The primary reason lies in the enrollment sizes of various courses.

With the ABA's new standards requiring that law schools explicitly help students form their professional identity, skills professors can be seen as the natural educators for these soft skills, too. However, there again, professional identity formation across the curriculum would benefit students more than having it siloed in skills courses.

The assignments I'll describe in this essay can be used in courses that focus primarily on legal doctrine (also referred to as "casebook" courses because of the widespread use of the casebook in the Socratic method), legal skills including oral advocacy, and even bar exam preparation. These assignments can be deployed in courses with enrollment below 20 and large sections with enrollment over 75. Once each assignment is drafted, the rubric created, and the Peerceptiv framework completed, a peer review assignment can be assigned to 5 students, 50, or 500, and it can be completed within the same time frame, regardless of class size, with very little difference in time spent on administration or feedback.

Professional Identity Formation

The ABA began requiring law schools to provide instruction in professional identity formation in 2022 when it added "professional identity" to Standard 303(b):

> ***(b) A law school shall provide substantial opportunities to students for:*** [emphasis added]
>
> (1) law clinics or field placement(s);
>
> (2) student participation in pro bono legal services, including law-related public service activities; and
>
> (3) ***the development of a professional identity.*** [emphasis added] (American Bar Association Section of Legal Education and Admissions to the Bar, 2022)

The ABA elaborates in Interpretation 303-5 of the new standard:

> Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.

The National Association of Law Placement has synthesized the ABA's standards and interpretations with the legal scholarship around professional identity formation to suggest that professional identity has four components:

> 1. a deep responsibility and care orientation to others, especially the client,
> 2. ***ownership of continuous professional development toward excellence at the major competencies that clients, employers, and the legal system need,*** [emphasis added]
> 3. well-being practices, and
> 4. client-centered relational skills, problem-solving, and good judgment that ground each student's responsibility to and care for the client. (Hamilton & Bilionis, 2022)

The client-centered aspects of professional identity are often modeled and discussed directly in skills, simulation, and clinical courses in which students first simulate live-client representation and then take on live clients. Well-being practices are also being handled directly, often through the offices of student services and academic support programs. While students would benefit from having client-centered and well-being aspects of professional identity woven throughout the law school curriculum, those skills do at least receive some attention.

The less concrete second skill—"ownership of continuing professional development toward excellence at the major competencies that clients, employers, and the legal system need"—does not have a natural silo within a law school. Students are often left to their own devices in forming their professional identity as lawyers who strive for excellence in ways that serve clients, employers, and the legal system. Some students arrive at law school already oriented toward personal responsibility for their learning and a desire to excel at the skills and doctrines they learn in law school. However, others do not. And even the students who do have the inner drive to excel and take responsibility for their learning may have used that drive for only their own benefit. They may not yet know how to help a colleague excel, thereby more fully serving their co-workers and employers. Indeed, too many students experience grading curves as a disincentive to help classmates excel.

Peer review can encourage students to pursue excellence in three ways. First, peer review gives students an opportunity to see the quality of work their peers are producing, helping them gauge their performance. This is particularly helpful for students of a generation that has been led to believe they are all excellent. Second, peer review gives students an opportunity to move their understanding of doctrine and skills into long-term memory through repeated storage and retrieval of the material they've begun to learn through reading and class participation. Third, giving feedback to another requires students to deeply consider what a thorough legal analysis entails so they can give feedback to peers on whether a submission does or does not meet the standard articulated by the assignment.

Using Peerceptiv for Peer Review

According to its website, Peerceptiv is a "research-validated, data-driven peer learning tool, actively engages learners and improves instructional efficiency… that supports a wide range of assignment types including writing, presentations, video uploads, computer code, and more. Students receive more formative feedback while generating grades that correlate highly with how an expert would assess those same artifacts" (Li, 2023). Peerceptiv was designed by a team at University of Pittsburgh to attempt to solve the problem that engineering students often graduated without adequate writing skills as a result of having taken many of their courses in large sections of hundreds of students with a single instructor, who did not have the capacity to

provide writing feedback on multiple written assignments. Therefore, most students graduated without ever having communicated their complex knowledge in formal writing. Since its inception, Peerceptiv has been used by high school, undergraduate, graduate, and professional students across a wide range of subject areas.

I was introduced to Peerceptiv by a colleague teaching Contracts who had learned of it through a Contracts professor at another school who was experiencing the very problem that Peerceptiv was designed to remedy: law students needed more practice with communicating analysis but professors with large-enrollment courses—particularly in the first year—were unable to give writing assignments with individualized feedback. My colleague assembled a small group of seven law professors to learn about Peerceptiv, most of whom taught large sections, and we tested it over the summer to determine whether it might work in law schools. We taught different types of courses at different law schools, yet we had all observed that students had difficulty thoroughly analyzing a legal issue and communicating the analysis clearly in writing. We believed that their writing would be better if their analysis were better, and conversely that their analysis would be better if their writing were better. In short, we knew the problems with writing and analysis were related.

Another concern we all shared was students' transactional relationship to the work they submitted. They would produce writing or take exams as assigned, expect individualized feedback, receive a grade, and then move on to the next thing, never quite putting together that the assignments and feedback were scaffolded to move the student toward a progressively deeper understanding of the subject matter. Given that students seemed to move on without incorporating feedback, the professors with large sections were reluctant to invest the time required to give individualized feedback. Although I teach skills and, therefore, have smaller sections (usually fewer than 20 students in each class), I also struggled with how valuable the individualized feedback was if students did not seem to learn from it. My experience over nearly three decades as a law professor was that maybe 20% of students made the effort to learn from feedback before attempting the next assignment. More often, I observed that students saw feedback as a justification for the grade rather than part of the education itself. Of course, some students do strive for excellence naturally. They seemed to come to law school wired that way. While those students were eager to incorporate what they learned from feedback, even they saw excellence as a largely individual pursuit, an attitude that would not serve them in the highly collaborative profession of law. With Peerceptiv, we were hoping to offer students a way to deepen and strengthen their own skills through learning to give feedback to their peers and to do it all without exhausting ourselves.

Peerceptiv was intriguing because its platform purports to deliver assignments that are scalable. They would work for my sections of 17–18 students, of course, but the assignments would work equally well for my colleagues' sections of 75 students or more. This seemed to be a solution to students engaging with an assignment only for the purpose of a grade since they would have to engage well enough to review another's work, and it would also help students improve their writing and analysis without requiring individualized feedback from the professor. Even better, it would help students understand that excellence in legal work requires the ability to help others excel.

Of course, peer review is not new, and many peer-review platforms are available. The difference between Peerceptiv and other online peer-review systems is its algorithm, which has been validated with more than a decade of peer-reviewed research (Peerceptiv, n.d.-b). The algorithm determines the reliability of each reviewer within an assignment and weighs that reviewer's feedback accordingly. The result is feedback for students that is even more reliable than that of a single expert instructor. Peerceptiv also provides analytics that help professors

determine the efficacy of the rubrics they use (Peerceptiv, n.d.-a).

Peerceptiv deploys assignments in three phases: (1) submission, (2) review, and (3) feedback. Professors determine the timeline for the assignment, how much each step will be valued in the final assessment, and whether or not the professor provides feedback in the assignment. While the platform assigns a score for the quality of the submission, the quality of the review, and the timely completion of all phases, professors can override that score and, of course, choose not to use it at all for grading purposes. The professor assigns the weight for each component of the score (writing, review, completion).

While each assignment has three phases and three components to the score, the phases do not line up exactly with the score components. To understand the phases and the scores, it helps to have some basic vocabulary established as we walk through the assignment phases. Let's assume Submissions A, B, and C, and Students 1, 2, and 3.

In the submission phase, Students 1, 2, and 3 submit submissions A, B, and C, respectively, based on instructions from the professor. Next, the assignment enters the review phase. During the review phase, each student author turns into a student reviewer.

In the review phase, the professor pre-assigns the number of reviews to complete for each reviewer, usually three to five. The professor can allow students to complete additional reviews for extra credit. The student reviews each submission with a rubric provided by the professor. Students may also be required to provide comments that explain the rating on each rubric criterion.

Next, the assignment enters the feedback phase, in which the authors give their reviewers feedback on how helpful their reviews were. Students usually need "helpfulness" defined. It is not whether the author agrees with or likes the feedback but whether, if the author were going to take action based on the review, the reviewer provided detailed enough feedback for the author to take action.

At the end of the feedback phase, Peerceptiv calculates and assigns the three different scores. The writing score is based on the ratings given to a particular submission by the reviewers. Here, Submission A was reviewed by Students 2 and 3. Those ratings will be weighted to arrive at Student 1's writing score. The weight of each reviewer's ratings is determined by their reviewing score.

The reviewing score is based on based on (1) the reliability of the reviews completed and (2) the helpfulness of the reviews. The reliability of the reviews of a particular reviewer, let's say Student 2, is determined by Peerceptiv's algorithm, which determines whether the reviews Student 2 completed are in line with the others or outliers. The algorithm discourages students from uncritically reviewing a submission because unwarranted high or low ratings will lower the reviewer's own reviewing score. The helpfulness of the review is calculated from a combination of the feedback ratings given to the reviewer by the authors whose work was reviewed. In our example, Student 1 would give feedback to Students 2 and 3 on how helpful their feedback was. Thus, Student 2's reviewing score would be determined by how consistent Student 2's ratings were with other ratings on the submission Student 2 reviewed and by how helpful Students 1 and 3 found Student 2's feedback.

The completion score is not related to a particular phase but instead gives credit to students simply for completing the three phases—submission, review, feedback—by the deadlines.

Students benefit most from Peerceptiv when they are trained how to use it before it is required for an assignment. Students also need training in how to use the rubric for peer review, particularly if they have never participated in peer review before (Cote, 2018). The training for the platform can be accomplished by assigning the videos available on Peerceptiv's website or by staging an in-class run-through of the phases of an assignment so students can experience how

the platform works. To train students to use the rubric, the professor should provide students with a sample submission and the rubric that will be used for the assignment. Walk students through reviewing the submission with the rubric so they can understand what they are looking for in the submission and how to use the rubric. Students will be particularly interested in how to differentiate between different numbers on the assessment scale ("What's the difference between a 3 and a 4 for this criterion?") and what they should write as comments. Comments should be specific, constructive, and actionable. Students appreciate the rubric training even beyond the Peerceptiv assignment because it provides more insight from the professor into how to successfully complete an assignment or exam question.

While this training does take some class time, it lays the foundation for assignments that will strengthen students' skills and knowledge while also introducing them to some of the aspects of professional identity that are most difficult to teach: collegiality, diligence, and mentorship. These "soft" skills are an integral part of professional school education. Because Peerceptiv is scalable, the advantages are not confined to skills courses with small enrollment; once a professor designs and begins the assignment, the professor makes individualized writing feedback available to students, whether they are in a class of 15 or 115. Further, when Peerceptiv is used across many courses, the student training at the beginning of a semester benefits them and their professors across all courses.

Peer Review and Professional Identity Formation

Peer review adds a dimension to legal education that few students experience in undergraduate education. Having reached law school primarily through strength in individual academic performance, the collaborative nature of law practice can be surprising. Students may initially be unaware that developing as a team leader and team player is necessary for their success in law practice. They could certainly be forgiven for believing that law school success is going to be like all their other academic success: wholly dependent on their performance in their own work, judged only by an expert in the subject.

While individual excellence is a component of success for a lawyer, very few lawyers work exclusively alone. They rely on one another for feedback on ideas, from the early stages of a project through to the final document or oral argument. Indeed, one of the ways in which lawyers improve their skills is to become adept at assessing others' work. Many lawyers—and certainly legal skills professors—have honed their own craft through assessing and giving feedback on student work. My experience as a young lawyer was that I was a perfectly serviceable writer. Any recognition I received for my writing as a lawyer seemed to be more a function of comparison to other lawyers rather than of meeting some ideal of good legal writing. Only when I was required as a professor to give feedback on student writing did I begin to understand why I had been considered a good writer and what to tell students to help them progress.

When students are placed in the position of assessing another's work and determining how to clearly communicate suggestions for improvement, students consider writing and analysis more deeply than when they are only responsible for producing a submission of their own. Peer review, done well, can require that a student elevate their understanding of the difference between successful and unsuccessful demonstrations of skill.

Reflections & Observations

I have used Peerceptiv for approximately six years. I began using it in the 1L required Legal Research & Writing course and have used it continuously in that course. I have also used it once for 1L Criminal Law and an upper-level skills course called Advanced Persuasion. I've also

used it on occasion to help students struggling with Multistate Essay Exam questions in bar exam preparation.[1] While Peerceptiv provides a valuable experience for students, I have found that it makes the most sense to use it for a course that is part of my regular rotation. Using it for a rarely taught course, particularly when the students are not familiar with it, is labor intensive. Nevertheless, for courses I teach regularly, I have found it to be an excellent way to help students improve their analysis and writing while fostering a collaborative professional identity. Participating in the exercises enhances students' writing and reviewing skills and fosters professionalism and respect.

Enhanced Writing and Reviewing Skills

The primary goal of using Peerceptiv was to give students an opportunity to enhance their writing and analytical skills. Along the way, we observed some unexpected challenges and benefits. Among the challenges observed, gifted writers, despite their high undergraduate GPAs and LSAT scores, encountered difficulties when tasked with providing constructive feedback to their peers. These students, while naturally adept at writing and analysis, often struggled to articulate specific reasons behind the ineffectiveness of another's writing or to suggest concrete improvements. The use of Peerceptiv presented an invaluable opportunity for these individuals to deepen their understanding of their own skills, pushing beyond innate talent towards a more refined grasp of the mechanics behind their abilities and pathways for further enhancement.

The platform also served as a significant motivator for students who, despite their hard work, found themselves lagging behind their peers academically. The visibility into the work of others spurred these students to elevate their own performance, embodying the adage of 'raising their game.' This dynamic underscored the value of peer exposure in driving personal academic growth.

A revelation from the early implementation of Peerceptiv was the discovery that students in the bottom 20% of the class, in terms of performance, did not uniformly struggle with both writing and analytical skills. Interestingly, some students who appeared to face significant learning challenges based on their work products were adept at providing insightful feedback to their peers. This proficiency in feedback delivery allowed these students to demonstrate a solid understanding of the material, helping to distinguish between their writing and analytical capabilities and enabling them to receive more targeted support.

The initiative further highlighted the critical role of explanatory skills in the feedback process. Students learned that merely pointing out issues in their peers' work was not enough; the ability to articulate their observations and suggestions clearly was crucial for the feedback to be truly constructive.

Lastly, the engagement with Peerceptiv had a tangible positive impact on student outcomes. By necessitating a deeper interaction with the course material, the platform facilitated improvements in students' analytical writing capabilities. This engagement translated into notable advancements in writing proficiency and, subsequently, a significant uplift in course grades. Previously common grades of C and the occasional F were replaced with a minimum achievement of at least a B- for every student who fully engaged with the platform, marking a substantial improvement in academic performance.

Fostering Professionalism and Kindness

In addition to the tangible benefits with students' writing and reviewing skills, students also benefited from practicing professional peer-to-peer communication. As students navigated the peer review assignments, they began to realize the dual nature of legal education: providing an education in skills and doctrine needed to practice a profession while also developing a

professional identity. The process of reviewing a peer's work, they discovered, was often as challenging and demanding as producing their own submissions. This insight fostered a deep appreciation for the importance of collegiality and respect, underscoring the necessity of approaching the review process with the same level of serious consideration and diligence they would expect for their work.

Moreover, the practice of exchanging feedback within a framework of respect and understanding had a particularly profound impact on students from diverse backgrounds, including first-generation law students and first-generation Americans. For these students, engaging in a peer review process that was characterized by a respectful tone was more than an academic exercise; it was a vital step toward feeling a sense of belonging within the law school community. This inclusive approach not only validated their contributions but also bolstered their self-confidence, demonstrating that their perspectives were valued and respected. Through this nuanced understanding of collegiality and the empowering potential of peer feedback, students learned that respect and consideration for one another were indispensable components of their professional and personal development in the legal field.

Positive Changes to the Dynamic of Teaching

The transformation within the educational landscape, particularly in the context of legal education, ushered in a significant paradigm shift regarding the role of the educator. This evolution saw instructors transitioning from being the focal point of assignments—shepherding each process from inception to conclusion—to adopting a more architectural stance. By delegating the feedback responsibilities to students, the dynamic of the classroom shifted. The mantle of providing feedback and addressing queries was no longer borne solely by the professor but became a shared responsibility amongst the students themselves. This change not only democratized the learning process but also fostered a more collaborative and engaged educational environment.

Parallel to this shift in the educator's role was a notable increase in student engagement. The process of receiving feedback, while always valued, was somewhat expected. However, the opportunity to give feedback emerged as an unexpectedly engaging experience for the students. This aspect of peer review—consistent with research on the impact of peer review—resonated particularly with those who might otherwise display a lack of motivation (Eskreis-Winkler et al., 2018). The act of providing feedback significantly elevated a student's engagement levels. This engagement through peer-to-peer interaction not only enhanced the learning experience but also cultivated a more participatory and invested classroom culture, demonstrating the multifaceted benefits of shifting traditional educational roles and responsibilities.

Challenges and Reservations

While Peerceptiv's peer review platform promises a collaborative and innovative approach to formative assessment, it also presents certain challenges and reservations among students and educators. Following are the issues I encountered and some suggestions for ameliorating or avoiding them.

First, students may be hesitant to be assessed by their peers, fearing a lack of expertise or objectivity. Addressing this concern requires emphasizing that the assignment is expertly designed and monitored, allowing peer feedback only on aspects students are qualified to comment on. Making the assignment ungraded or optional may further alleviate these concerns.

In addition, some students prefer the familiarity of the traditional process of receiving assignments and grades without further engagement. They might be uneasy with Peerceptiv's approach, which requires them to actively participate in giving feedback after submission.

Educating students about professional identity formation and the legal profession's pursuit of excellence can help them recognize the value of the assignment, emphasizing that the experience of giving feedback benefits each student even more than receiving it.

Another challenge came from students unaccustomed to receiving and processing constructive criticism, particularly from peers, may react poorly during the feedback phase of the Peerceptiv cycle. The platform's reporting feature allows inappropriate or unprofessional comments to be flagged. This feature empowers the professor to address the issue individually, often leading to significant teachable moments. It may also highlight underlying distress in a student that may not have been apparent otherwise.

Implementing Peerceptiv challenges instructors as well. Creating initial assignments and rubrics is labor-intensive. Though Peerceptiv provides data to help refine rubrics, the initial investment can be demanding. The time and effort spent in the design phase are generally worthwhile, as once effective Peerceptiv assignments are crafted, they can be reused, optimizing the time investment in the long run.

Peerceptiv provides feedback to instructors as to how reliable their rubrics are in differentiating between different levels of student performance. Many instructors develop and evaluate their rubrics in isolation, so this feedback can be uncomfortable. Generally, an unreliable rubric can be attributed to either (1) not adequately training students on how to complete the assignment and/or use the rubric or (2) not articulating clear standards students should use to review submissions. Although it seems counterintuitive, a less specific rubric yields more reliable results.

The use of Peerceptiv in legal education introduces novel and unconventional methods that may elicit resistance and apprehension from students and even instructors using it for the first time at someone else's suggestion or insistence. However, with strategic communication, careful monitoring, and a willingness to invest time initially, these challenges can be overcome. Emphasizing the collaborative ethos of the legal profession and providing ongoing support can help students and educators alike maximize the potential benefits of this innovative platform, while mitigating its drawbacks.

Peerceptiv's website provides a robust catalogue of how-to resources. The site also provides a catalogue of white papers describing ways of using Peerceptiv and results of studies conducted on the efficacy of Peerceptiv in improving students' skills (Peerceptiv, n.d.-c).

ASSIGNMENT

A Simple Analytical Peerceptiv Assignment

The assignment below calls for students to draft and review a simple IRAC (issue, rule, application, conclusion) legal analysis. I have also used Peerceptiv for assignments calling for students to draft an evaluative rule explanation paragraph, an evaluative rule application section, and a statement of facts, either evaluative or persuasive. This assignment can be adjusted for any of those purposes and for many, many more.

Instructions

Draft a simple IRAC analysis of the legal issue presented by the following hypothetical (Dressler & Garvey, 2022). A good answer will start with a clear statement of the issue followed by a statement of all applicable legal rules. Next, the essay will apply the rules to the facts, pointing out where the facts do AND DO NOT meet the legal standard. A good answer will end with a

clear answer to the question posed by the assignment.

Your submission should be submitted no later than 11:59 p.m. on Day 0. All reviews must be completed no later than 11:59 p.m. on Day 4. All feedback on reviews must be completed no later than 11:59 p.m. on Day 6. The writing score will constitute 30% of the assignment score. The reviewing score will constitute 50% of the assignment score. The feedback score will constitute 20% of the assignment score. This is an ungraded assignment. Scores are solely for your information.

Hypothetical

Howard and Wilma, husband and wife, were sitting at their kitchen table late one evening, arguing angrily with one another about their family finances. Wilma had recently lost her job and she was still looking for a new one. As a result, she wanted to economize dramatically in all family spending, at least until she was back at work again and bringing home a regular paycheck. Howard, on the other hand, thought that Wilma would get another job soon and he argued that, until she did, their family's continuing quality of life was more important than keeping their savings account intact. More specifically, Howard wanted to dip into their savings to pay for a trip for them to take their two kids to Disney World for a few days.

Wilma thought that it was absolutely ridiculous to take a vacation like that when it would so heavily deplete their savings at a time when she was unemployed. Their argument raged on and on. Each of them got really carried away arguing with one another. And each of them got progressively angrier and angrier. As their arguments got more heated, they each began screaming at one another as well. Eventually, still screaming, Howard bolted upright and walked over to the kitchen counter, picked up the toaster oven, and heaved it in Wilma's direction. It missed her by two feet, sailing over head, and smashing against the back wall.

Wilma then jumped up and picked up a dinner plate that had been sitting on the counter and threw it at Howard, missing him by a good foot and smashing it against the wall. After another five minutes of exchanging heated epithets back and forth, Wilma simply stomped out the kitchen door and went into the backyard, fuming about what was happening and muttering loudly about Howard. After another five minutes had passed, Wilma stomped back into the kitchen, slamming the kitchen door behind her. She began yelling once again at Howard, who was still sitting at the kitchen table at that point, his head in his hands.

Wilma headed toward the knife rack on the kitchen wall. "Look," Howard began to say to Wilma, head still in hands, not looking up, "I'm sorry I overreacted just a little bit there. I shouldn't have thrown anything at you, I know, but you're being so irrational that—…" Before Howard could finish this sentence, however, Wilma screamed at him, "I'm irrational? I'm irrational? You son of a bitch! Is this irrational?" And saying that, she quickly grabbed a long, serrated kitchen knife from the rack and lunged right at him, stabbing him in his back three times.

The family did not go to Disney World. Howard subsequently died as a result of these stab wounds. Wilma has now been charged with first degree murder in the killing of Howard. Is she likely to be found guilty of this offense? Why or why not?

Rubric & Comments

For each criterion listed, please rate the submission on a scale of 1 to 5:

1 This submission meets this criterion as well as any of the samples we reviewed in class.

2 This submission falls between a 1 and a 3.

3 This submission meets this criterion pretty well but leaves some room for improvement.

4 This submission falls between a 3 and a 5.

5 This submission does not clearly meet this criterion.

Criteria

Rate each criterion on the above scale from 1 to 5. Unless you use a 1 rating, please explain specifically why you gave the rating you did and constructively how the submission could be improved to warrant a higher rating.

- Does the answer begin with a clear issue statement that includes the legal standard and the most critical legally relevant facts?
- Does answer accurately state the portions of any rules and exceptions needed to analyze and decide the issue?
- Does answer fully and accurately apply the stated rule to relevant facts, identifying any nuanced distinctions, counterarguments and uncertainties?
- Does answer accurately state the portions of any rules and exceptions needed to analyze and decide the issue?
- Does answer state and justify correct conclusion or, if debatable, provide a principled basis for the conclusion chosen?
- Is submission written and organized so that it is easy to understand?

Feedback

For each review you receive, please rate the feedback for helpfulness on a scale of 1 to 5, with 1 being the most helpful and 5 being the least helpful. If you choose any rating but 1, please explain how the feedback could have been more helpful to you. Remember that you are not evaluating whether you liked or agreed with the feedback but rather, if you were going to take the reviewer's suggestion, you would have enough information to do so.

Notes

[1]Each state's licensing exam for lawyers—except for Louisiana—includes "multistate" questions meant to test general legal concepts applicable in most jurisdictions. The multistate questions are in three forms: multiple choice, essay, and performance (in which takers draft a legal document under timed conditions).

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.184.

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Crossing the Threshold with Apples, Potatoes, and Limes

Using the "Grocer's Dilemma" to Introduce Law Students to Malleability in the Law

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Abstract

The Grocer's Dilemma is a well-known legal writing (and thinking) assignment that can help undergraduate students interested in law school as well as first-year law students beginning their legal study better understand many aspects of legal reasoning, including issue spotting, rule synthesis, case explanation, and analogical reasoning. Notably, it can also demonstrate how legal rules are not fixed but are instead malleable—uncertain, flexible, and somewhat indeterminate. The exercise asks students to consider, based on a grocer's preference, where to place produce inside a grocery store. In this process, students must consider "precedents"—other produce—that contribute to the rule. Those precedents, however, do not have a fixed "legal meaning." Instead, their meaning is malleable.

Malleability is a threshold concept in the law. As such, when students become aware of and more comfortable with the concept of malleability, they can begin moving through the liminality of legal education and begin their journey across the threshold between legal novice and lawyer-expert. The Grocer's Dilemma assignment focuses students on a nonlegal context for examining malleability, making it easier for students to focus on the complexities of reasoning about a malleable rule rather than the legal rules themselves.

Although the Grocer's Dilemma is an exercise for the legal writing classroom that is fairly well-known, the exercise has not been well-grounded in writing theory. This essay grounds the exercise in both the theory of malleability as a legal concept and in the theory of threshold concepts from composition theory by demonstrating how the threshold concept of malleability is taught through the exercise.

The Problem for 1Ls: Getting Past THE Law and Learning to Think Like a Lawyer

When students transition from undergraduate education to law school, law faculty often observe that new law students think that law school's purpose is to teach them THE law: a fixed body of knowledge that will give them clear and directly applicable answers to every legal problem (Donson & O'Sullivan, 2016). That is, students think that law school is meant to teach them the *substance* of the law; knowing that substance, they think, makes them become lawyers. Faculty, however, know that this is not true. Learning the principles of the law is not a straightforward endeavor of gathering official answers to every possible legal question. Instead, learning the law involves learning a perspective for *thinking about legal problems.* It requires understanding how lawyers reason (Schauer, 2009, p. 1). We might call this perspective "thinking like a lawyer."

What faculty witness in law school classrooms, particularly in the legal writing classroom, is that learning to think, and thus to write, like a lawyer is not easy. Students struggle to spot legal issues, identify and synthesize legal rules, explain those rules fully and clearly, apply those rules to the facts by giving good reasons to support that application and draw legally relevant analogies and distinctions, and identify and fully describe points of counteranalysis. In

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particular, they struggle with the idea that the legal authority from which a lawyer's reason is not treated necessarily as having a fixed meaning. Instead, legal rules have a good amount of malleability (Weresh, 2014), indeterminacy, and uncertainty (Donson & O'Sullivan, 2016). Stated another way, students struggle with the troublesome idea that legal documents cannot be taken at their word (Fajans & Falk, 1993, p. 163), and this struggle can be a sticking point in their development as legal thinkers and writers.

Threshold Concepts and the Struggle to Understand How to Work with Legal Rules

This struggle to learn a way of discipline-specific thinking is not unique to law school students. Novices in all disciplines struggle to learn the domain's specific analytical and rhetorical commitments and to communicate in the ways that disciplinary experts will recognize. That is, they struggle to integrate and internalize the conceptual structure of their discipline that will enable them to take on the worldview of experts in the subject matter (Meyer & Land, 2003, 2005).

This worldview is reflected in the discipline's "threshold concepts." Threshold concepts are those discipline-specific understandings that reflect the foundational concepts one must integrate to perform as an expert in a particular discipline (Meyer & Land, 2003, 2005). Adler-Kassner and Wardle (2015), who are writing scholars, describe threshold concepts as "ways of seeing, ways of understanding that change a learner's stance" (p. x). Threshold concepts function as a "portal" into the discipline (Meyer & Land, 2005). They open up new ways of thinking about subjects that are both troublesome and also transformative for learners in understanding themselves and performing as disciplinary experts (Meyer & Land, 2005).

In the law, threshold concepts are those discipline-specific concepts that reflect the foundational understandings that one must understand to think and write like a lawyer, to deploy the law's discipline-specific way of defining problems and identifying solutions (Weresh, 2014). Malleability has been identified as a threshold concept in the law (Weresh, 2014).[1] Weresh (2014, p. 710) describes malleability as the "latitude" in the law that gives a lawyer flexibility in "articulating legal principles." Understanding malleability, then, results in students traveling from the "lay" side of the threshold to the expert or "disciplinary" side via a "cognitive shift" (p. 689). As such, Weresh suggests that students would be "well-served if they got started as early as possible to grapple" (p. 719) with the threshold concept of malleability.

Legal Writing as a Liminal Space for Learning Malleability

When students struggle with the concept of malleability, they can be thought of as occupying a space of liminality. Liminality is the condition of being in a kind of mental "flux" (Field & Meyer, 2020, p. 149) where a "transitioning person may experience disconnection, having 'lost' their previously settled state but not having achieved a new one to replace it" (Field & Meyer, 2020, p. 149). Law students (including aspiring ones) may be thought of experiencing liminality when they encounter new concepts, like malleability, that are foreign to them (Field & Meyer, 2020, p. 150). Weresh notes that "[t]he state of liminality is 'within the threshold,' and signifies an attempt to engage with the material" (Weresh, 2014, p. 689).

Legal writing courses can be thought of as liminal spaces associated with learning threshold concepts, "a space of transformation in which the transition from an earlier understanding (or practice) to that which is required is effected" (Land et al., 2014, p. 200). In that classroom, the goal of professors is to help students traverse the liminal space, to transition from undergraduate school to law school, and to learn and internalize the threshold concepts that enable them to think like a lawyer. Encouraging students to work with the language of the law through

discussion and writing can foster that transition because, as Meyer and Land (2005) note, the acquisition of threshold concepts necessarily is "accompanied by (or occasioned through) an extension of the student's use of language" (p. 374). Discourse brings new thinking into being (Meyer & Land, 2005). This is where the Grocer's Dilemma comes in; it can be used as an assignment to help students grapple, in the liminal space created by legal writing, with the malleability of the law.

The Grocer's Dilemma and Why It Works to Teach Malleability as a Threshold Concept

The "Grocer's Dilemma" assignment is an assignment that can ease students across the threshold for understanding malleability by starting them with a writing assignment in a nonlegal context. In other words, the Grocer's Dilemma assignment eliminates the complexity *of the law* so that novices can focus on the complexities *of legal thinking*, including the concept of malleability. The assignment asks students to think about a non-legal writing context and to consider how the framework for legal analysis, which includes malleability, will apply in that context.

The Grocer's Dilemma assignment concept has been around for a while in legal writing. The assignment was first mentioned in the legal writing context in a 1997 article in *The Second Draft* and was described as a way to teach reasoning by analogy (Gionfriddo, 1997).[2] Others, including myself, followed up on that initial article noting its advantages and offering extensions of the exercise (Calleros, 1999; Davis, 2005; Rowe & Varn, 2000) to learn rule synthesis, implicit reasoning, case explanation, the structure of court systems, and comfort with situations of uncertainty and ambiguity.

While the Grocer's Dilemma can be used to teach a variety of legal reasoning and writing skills, it does several good things concerning teaching malleability. First, it takes a complicated idea—the idea that legal rules have some indeterminacy and are flexible in both their content and application—and presents that indeterminacy in an everyday context, the grocery store. To do this, the exercise draws upon what Calleros (1999) calls students' "pre-existing schemata" and "focus[es] their attention… on the concepts… of legal method… [in] a completely nonlegal context" (p. 7). This can help students transition from novice to expert because, as Calleros notes, "by first addressing these principles of legal method in a simple, concrete, familiar, nonlegal context, students may be better prepared to apply them later to legal problems" (p. 10).

Second, the assignment is helpful for understanding malleability because it is a "familiar and concrete" way of demonstrating how lawyers apply precedent cases, how competing values shape precedent, how the implicit rationales of precedent influence our understanding of general rules, and how analogy and distinction are used to determine how the precedent cases apply in a given context (Calleros, 1999, pp. 7–8). This process allows students to appreciate how "legal rules often are malleable and indeterminate, so that the choice between legal conclusions is uncertain and dependent on discretionary choices among competing values or policies" (Calleros, 1999, p. 8).

Third, the Grocer's Dilemma helps teach malleability because it teaches students to be more open to embracing ambiguity in the law itself and how that ambiguity is directly connected to how that relates to the facts of a client's case. I have written about the Grocer's Dilemma and its value in helping students embrace ambiguities, analyze the possibilities for acceptable outcomes within those ambiguities, and make arguments in rhetorical situations fraught with uncertainty (Davis, 2005). I argued that the value of the Grocer's Dilemma was that it could help students focus on the "transformative potential of… ambiguities and arguments" (Davis, 2005, p. 13). I identified that my best class was, in fact, the one that taught the Grocer's Dilemma

because it "represent[ed] a transformation of my students' orientation to law school—from 'answer seekers' to 'legal problem solvers'" (p. 13). In retrospect, I see this transformation as related to the threshold concept of malleability.

The Grocer's Dilemma Assignment

The Grocer's Dilemma is particularly effective in the first few weeks of law school and could likely be used in an undergraduate legal writing class to introduce malleability.

The assignment, which I have adapted from others, consists of this prompt, which can be given to students in writing or orally:

> *You work for a grocer who is about to leave on a long vacation to a remote island. Before leaving, the grocer makes you, a trusted but new store employee, Manager of Produce, in the small, urban grocery store with a big front window. The grocer says that the point of putting produce in that window is to attract customers. On the day before the grocer leaves, you watch the grocer put red apples in the front window and brown potatoes in a bin near the back of the store. The next day, a shipment of limes arrives. The grocer is gone, and you are now in charge.*

While malleability is a central idea of the assignment, students also learn about the process of legal analysis and how to follow those steps in a non-legal context, which helps help them focus on the process aspects of legal analysis and writing rather than its substance.[3] Students begin to understand that the law provides a framework for and a source of arguments for reasoning through legal problems.

A precursor to the writing assignment is the classroom discussion. Working through the assignment as a class helps students better understand what is expected in their writing and is good for demonstrating to students the challenges of legal reasoning that they may not have expected. (It also helps them see that everyone is in that liminal space, learning new skills that seem counterintuitive to what they thought they would be doing in law school.)

The prompt can be given to students before class, handed out in writing at the beginning of class, or shown on a PowerPoint slide at the beginning of the exercise. In addition, having an image of (or actual!) apple, potato, and lime during the class session facilitates the discussion, giving students a visual reference for each "case."

The professor leads students through a discussion in which they play the role of the grocery store clerk interpreting the directions of the grocer.[4] Students will need to move deliberately through all the steps of legal reasoning. Students will identify the issue ("Do the limes belong in the window with the apples?"), tease out the possible meanings of the grocer's rule for "attractiveness," and then apply that rule to make arguments about where the limes should be placed. Based on this discussion, students can complete a writing assignment that allows them to take what they've learned about the structure for legal analysis and the malleability of legal rules and attempt that analysis themselves.

A useful discussion of the Grocer's Dilemma begins with asking students, "Where do we start"? Notice that the prompt given to students does not include a specific question for them to consider in the context of the problem. This allows a professor to tease out the concepts of "issue identification" and how to properly phrase an issue. In my classes, once they identify the basic issue, I then help them think about how to frame that question in a way that lawyers frame issues: (1) ask as a yes/no question; (2) include reference to the relevant law; and (3) include "legally relevant" facts (although the relevant facts may not yet be clear). For example, as a class, we might come up with the following: *Using what I know about where the grocer puts apples and potatoes based on his idea of "attractiveness," do I put limes in the window when they arrive at the store?*

Now the class moves to the intellectual lawyering work, attempting to determine the meaning of authority and how it will be applied in a given circumstance. This is where the Grocer's Dilemma introduces malleability.

In my class, I start by asking students how we might answer the question we posed as the issue. Students will often—and correctly—begin with what the grocer said: *Attractive produce goes in the window.* Students should recognize that this rule does not determine, on its face, the location for the shipment of limes (Calleros, 1999). Instead, the stated rule opens a range of possibilities for what "attractive" might mean. Students will be able to see that the meaning of "attractiveness" will be based on some amount of "professional judgment" that can vary from person to person (Calleros, 1999, p. 10). It is here that idea of malleability—the idea that legal rules can be flexible—begins to emerge.

The malleability in the attractiveness rule introduces a concept essential to the ability to think flexibly like lawyers do: the ability to draw reasonable inferences. At this point, students must consider what legal rules can be inferred based on the attractiveness rule coupled with the two precedent cases, the apples and the potatoes.

To begin, one possible inferred rule, for example, is that if attractive produce goes in the front of the store, then *unattractive produce goes in the bin in the back of the store.* Here students get their first interaction with malleability. Is this a correct inference? Are there others? Could it be that the rule is that *less attractive* (rather than unattractive) produce goes in the back of the store? Could that produce go somewhere else, or must it be only in the back? In considering these rules, students will have to think just how flexible the inferred rule can be; perhaps the attractiveness rule is an either/or rule, but it could also be something else. This exploration can show students that some rules, particularly ones that are inferred, are malleable.

After this discussion, students can be led to consider the impact of the cases, the apple and the potato, on the meaning of the "attractiveness" rule. Here, students learn that the apple and the potato represent precedent; they are instances where the grocer has applied the "attractiveness" rule in the past, and we can infer from those instances the meaning of "attractiveness." Because in this non-legal example we do not have a written description of what makes the apple "attractive" and the potato (inferentially) "unattractive," students are faced with the problem of interpreting precedent and determining what it means. This brings them directly to the threshold concept of malleability and the need to confront the idea that "the" law is not just learning a set of fixed rules.

Now the students can be focused on an essential aspect of understanding how malleability works in the context of legal rules—lawyers care less about what a court has *said* and more about what it has *done*. In the case of the Grocer, for example, nothing was *said* about the apples or the potatoes. Instead, the Grocer *did* something—he placed the produce in certain places in the store based on his "attractiveness" rule. It's the placement from which students must infer the meaning of the attractiveness rule.

To determine what the precedent produce adds to the attractiveness rule, students will need to look at the policy derived, in this case, from their common sense (Calleros, 1999) about the Grocer's values that underlie his decisions in placing the produce. That is, students must ask, "Why did the Grocer find the apples attractive?" or "What policies or values guided the Grocer to place those apples in the window?" Here is where the students can see malleability at work. As Calleros (1999) notes, students need to try to identify "possible implicit rationales [for] the precedent" (p. 10).

In my class, I lead a discussion of what the apples might represent regarding the Grocer's values underlying attractiveness. Perhaps the Grocer valued the visual appeal of the apple because it catches the eye of people walking by and brings them into the store. For example, the

apple's characteristics that influence that visual appeal might be color and shape. Alternatively, or in addition, perhaps the Grocer valued the health qualities of the apple because the Grocer believes healthy eating is important to customers. Perhaps the Grocer thought that produce that is easy to eat "on the go" is more attractive to customers walking by the store and put the apples in the window because a grab-and-go snack would attract customers. Even further, the Grocer might have valued the cultural associations related to apples in the decision, including apple pie, fall festivals, and family. All of these might evoke emotions in customers that attract them to the apples.[5]

Each rationale shows that the meaning the apple adds to the rule is partly in the eye of the beholder, which results in a flexible and thus malleable attractiveness rule. Depending on the "beholder," the meaning of the rule can change. Pointing these things out to students is important. This result, of course, is much different from what most new law students think legal rules are, fixed and determinate. As Calleros (1999) notes, "[w]ith such an exercise, maybe students will be more likely to believe us when we assert that we cannot identify a single correct answer to a legal question" (p. 12).

Students can then go through the same analysis of the possible policy/value rationales for not placing a potato in the window. Why is it not "attractive"? Is it because of its lack of visual appeal, that it is dull, misshapen, and brown? Is it because it is not ready to eat? What about its health and cultural associations?

By thinking about the values underlying the choices made about the apples and potatoes, students also learn that the threshold concept of malleability requires them to carefully explain the reasoning behind the rule. In other words, it is not only the application of legal rules to client facts that involve argument; legal rules themselves require that lawyers advance arguments to justify the soundness of legal rules (Calleros, 1999). It is not enough to simply say that produce that attracts customers goes in the front window; instead, rules must be explained, be justified, and make sense to the legal reader. This is a consequence of malleability.

But malleability does have its limits, and students get to see that while rules are flexible in their meaning, there are limits on the range of interpretability of a legal rule. That is, while legal rules are malleable, they are not infinitely so. For example, it is not reasonable to infer that the apples are in the window because the Grocer values produce with names that start with "A." Nothing in the grocer's actions or in a common sense interpretation of the produce placement would support such an inference. In this way, the rule of attractiveness, at least on the facts in the prompt, limits its possible meaning.

Once the class has discussed what the rule of attractiveness might mean, I divide the students into small groups to consider how that rule will apply to the newly arrived shipment of limes. At this stage, students begin to experiment with arguments for and against the attractiveness of the limes. In this part of the discussion, students are invited to draw analogies about the limes to the facts of precedent, the characteristics of the apples and the potatoes that make a difference to the attractiveness rule. Students should discover here that the relevant analogies and distinctions relevant to the attractiveness rule will differ depending on what values the students have identified as underlying the rule. Students who think the visual appeal of the apple is important to what the Grocer values will focus on the visual attributes of the limes, likely resulting in the limes joining the apples in the window. Students who focus on the apple's grab-and-go snack will distinguish the limes (no one grabs a lime and takes a bite!) and will not put the limes in the window. Students learn that while the Grocer's attractiveness rule serves as a source for *determining* where the limes will go, the meaning of the rule, even when coupled with the precedent, is *not determinative*.

Here, the students can learn that the malleability of legal rules creates a situation where there

is no "one right answer" for the placement of the limes. That is, the lime can be transformed depending on how students interpret the attractiveness rule in light of precedent. Wow. Even facts are indeterminate when filtered through the malleability of legal rules! Students can now begin to integrate into their worldview that the practice of law is not only about learning the rules but, even more importantly, about making arguments about what both the law and the facts mean.

Finally, students can learn that new facts might change the rule if the material conditions prioritize a different policy or value. Take, for example, holidays. Suppose the limes arrive near Cinco De Mayo, when limes might be popular for making margaritas. In that case, the rule might need to be flexible, even if the existing cases (the apples and the potatoes) don't account for that new situation. The new situation changes the potential meaning of the attractiveness rule. Customers might come in the store because the limes are attractive in relation to the holiday; the new conditions might influence how the Grocer values the limes, perhaps, and thus alter what attractiveness means. So, now the attractiveness rule's boundaries must change; the rule of attractiveness might now account for produce appeal during holidays. For example, butternut squash that is not easy to eat and not necessarily visually attractive might *become* attractive at Thanksgiving. The changing of the rule's boundaries is malleability on display.

ASSIGNMENT
The Grocer's Dilemma

The basic assignment for discussion and writing

You work for a grocer who is about to leave on a long vacation to a remote island. Before leaving, the grocer makes you, a trusted but new store employee, Manager of Produce, in the small, urban grocery store with a big front window. The grocer says that the point of putting produce in that window is to attract customers. On the day before the grocer leaves, you watch the grocer put red apples in the front window and brown potatoes in a bin near the back of the store. The next day, a shipment of limes arrives. The grocer is gone, and you are now in charge.

The writing assignment

After the in-class discussion, ask students to draft a written analysis of the Grocer's Dilemma. Writing out their interpretation of the class discussion is not only good for working on internalizing the concept of malleability but it also helps them apply all of the skills of legal reasoning including analysis and counteranalysis, rule-based reasoning, and analogy and distinction.

Concerning malleability, students will need to wrestle further with the challenges that rule malleability presents—how, exactly, should they describe the "attractiveness" rule? What features of apples and potatoes are important to the rules? What values matter in considering what is attractive? If different interpretations are possible, how should those be expressed and applied?

Faculty may give individual feedback on the assignment or provide students with an annotated sample. Have them compare the annotated sample to their own assignment and write a paragraph or two about their similarities and differences. Collect and review the reflections.

Other ways to build on the assignment

Professors can introduce students to persuasive authority and binding authority by suggesting that a large grocery chain in the area puts the limes in the back next to the margarita mix. Ask

students: *What kind of authority does the placement of the limes represent? How does it impact how you construct your rule for placing the limes?* Discuss with students the differences between binding and persuasive authorities and how they impact legal rules.

Professors can also introduce new facts that require both applying and rethinking the rules. Suggest that a shipment of bananas has arrived. Ask students: *Where do we place them? Now that we've placed the bananas, what do we do with a shipment of red peppers? How does the analysis change for a shipment of juicing apples of second quality (spots and bruises)? Does this change our rule or our analysis?*

Here are instructions to give the students for the writing assignment:

Now that we have discussed The Grocer's Dilemma in class, your assignment is to write the "legal" analysis of where the Grocer's assistant should put the shipment of limes. You will write the analysis in CREAC format. You may use your notes from the class discussion to help you. Remember that because this is a new method of thinking and writing, this assignment is likely to feel effortful and perhaps confusing. These feelings are part of the process of moving from novice to expert and acquiring a new ways of approaching problems. Here is a step-by-step approach for writing the analysis.

> Step 1: (C) Start with your conclusion. Do the limes belong in the window?
>
> Step 2: (R/E) Explain the "Grocer's Rule" to your reader. Tell the reader the boundaries that limit where we can put the limes. Start with the general rule that you learned from the Grocer. Then add more detail to that rule by including what you learned from the "case of the apple" and the "case of the potato." You will want to include in this part a description of the apple and potato cases. Remember, rules can be malleable; that is, they may not be easy to determine and could, depending on the context and the interpreter, be slightly different. Accordingly, while you may realize that the rules that govern this situation could be described in more that one way, you will need to choose one in order to move to the next step. If you would like, drop a footnote to explain to me why you chose to formulate the rule like you did. You may also include in that footnote any alternative formulations of the rule you considered.
>
> Step 3: (A) Analyze the limes using the Grocer's Rule you developed in Step 2. Explain to the reader why the Rule requires the limes to go where you concluded they should be placed. Remember to not only explain your reasoning but also to draw analogies and distinctions to the apple and potato cases as necessary. Note that some features of the limes will be more important or less important depending on how you crafted your Rule. Facts, too, are malleable in light of the rules that we use to analyze them.
>
> Step 4: (C/A) Repeat Step 3 except this time support a conclusion opposite to your original conclusion. This is your counteranalysis and is necessary to ensure your overall analysis is well-balanced. End this step by explaining why you think the counteranalysis is weaker than the analysis in Step 3.
>
> Step 5: (C) Repeat your conclusion.

Notes

[1]Little work has been done to identify threshold concepts in the law (Field & Meyer, 2020), and that identification is somewhat contested. In addition to Weresh's identification of malleability, Steel (2019) catalogs "legal reasoning," "legal consciousness," "tolerance for uncertainty," and "thinking like a lawyer" as threshold concepts in the law that other

legal scholars have identified. There is some contestability of the proper scope of threshold concepts. Weresh (2014) posits thinking like a lawyer is "too broad"; Donson & O'Sullivan (2016) critique malleability as insufficiently expressive of the principle of uncertainty. From my perspective, malleability, which includes the idea of mental flexibility, is sufficient to embrace the uncertainty and indeterminacy of the law for the purposes of this exercise. While law is indeterminate and uncertain, it also has some boundedness in terms of the range of meaning it can express.

[2]The origins of this exercise are attributed to Elizabeth Keller, a Boston College Law School Professor (Gionfriddo, 1997).

[3]Perhaps every component of the Grocer's Dilemma is worthy of theoretical grounding. The overall framework of legal analysis can be grounded in theory. Analogy and distinction, the same. Legal reasoning as a whole and the process of composing a document that contains legal reasoning can be theoretically grounded. This essay is focused on grounding the exercise in the threshold concept of malleability only.

[4]The discussion described in this section does not necessarily include specific discussion about the theory of threshold concepts. An instructor could, however, include that discussion to help students understand how and why the assignment helps them move from legal novice to expert and why that process may feel confusing or unsettling.

[5]Calleros (1999) provides another set of policies in his discussion of apples, carrots, and tomatoes (pp. 10-11).

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The Legal Writing Manual
Self-regulated Learning for First-year Law Students

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Abstract

In an effort to teach law students to "think like a lawyer" and develop their professional identities, attention has turned to helping students self-regulate their learning. To encourage self-regulated learning among her first-year law students, one of us (Tanner) adapted a self-regulated learning prompt developed by the other (Roderick) to assign The Legal Writing Manual—a capstone project in her first-year legal writing course, which tasks students with instructing others in processes and practices for composing legal memoranda and appellate briefs. Each student's manual is built upon previous analytical and self-reflective work carried out in a first-year legal writing course. The experience of articulating instructions for legal writing encourages students to self-regulate their learning by re-thinking knowledge and practices for legal writing.

Introduction

First-year legal writing courses equip law students with strategies for adapting to the demands of law school (Bloom, 2013) and legal practice. A common approach introduces students to forms, styles, and conventions associated with some common legal genres. For instance, texts like *Legal Writing in Plain English* (Garner, 2023), *Thinking Like a Lawyer* (Vandervelde, 2011), *Legal Writing and Analysis* (Edwards & Moppett, 2023), and *Clear and Effective Legal Writing* (Charrow et al., 2013) offer models of legal genres and reasoning principles designed to demystify legal discourse. To extend these practical approaches, the assignment presented here—The Legal Writing Manual—asks students to attend not only to features but also to practices used for composing common legal genres. Incorporating writing manuals into the curriculum bridges the gap between theoretical knowledge and practical application, fostering an environment where students can engage in self-regulated learning.

This approach aligns with the findings of Christopher (2020) and Schwartz (2003), who emphasize the importance of adapting academic knowledge in real-world contexts. Consequently, this pedagogical strategy empowers students to become self-regulated learners, as described by Nilson (2013) and Zimmerman and Kitsantas (2007), by encouraging them to continuously reflect on and adjust their understanding and methodologies in response to varying tasks and to tie their coping mechanisms to different phases of writing. For instance, students may self-regulate when they find themselves stuck or uncertain about a problem, and then decide to seek help or change tactics, only to revise their understanding of the problem and develop a new way forward (Roderick, 2019). When faced with challenging problems and uncertainties, self-regulated learning strategies can help students problem-solve by using challenging moments as opportunities for reflection and growth (Roderick, 2019).

Building on this foundation of self-regulated learning, the legal writing manual serves as a pivotal tool in a first-year legal writing course, guiding students to actively manage their learning process. This article will detail the specific legal writing manual assignment first implemented by Tanner in her Legal Writing course during the Fall 2022 and Spring 2023

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semesters. The ensuing sections will explore the structure of this assignment, highlighting the integral roles of metacognition and self-regulation in fostering reflective practices and resilience. Additionally, the article will guide readers through the intricacies of assigning and composing a legal writing manual, illustrating how this tool can be effectively utilized to enhance students' problem-solving skills and adaptability in the face of writing challenges.

Encouraging Self-Regulated Learning in Law School

The Legal Writing Manual prompts self-regulation through a "bottom-up" approach where each student recognizes and develops the strategies they value for legal writing. In order to help this bottom-up thinking bear fruit, we also wanted to provide students a conceptual framework for self-regulated learning. Taking up Zimmerman and Schunk (2011) we frame self-regulated learning as three intertwined phases of self-regulation, which include forethought (developing a sense of goals and motives), performance monitoring practices, and self-reflection (evaluating accomplishments and orienting reactions).

Forethought focuses on the goals, motives, and future-oriented thinking that guide a learner's practices. For example, a student writing an appellate brief may set out to analyze how the court interpreted or misapplied a statute in search of errors made by the trial court. Whether conscious or subconscious, a student may regulate their writing practices in accordance with the outcomes they see themselves pursuing, thus adaptable learners may constantly revise their forethought throughout their writing process. One way we encourage students to recognize and reflect on goals and motives associated with writing is by teaching, either a fictionalized "other" or their future selves, through the Instruction Manual assignment.

Performance: Self-regulation also occurs as one governs their work in the present. For instance, some writers may set an alarm to create focused writing time. Or, they may choose to compose in certain environments that encourage productivity. In essence, these strategies determine how the work gets done. For instance, the "process logs" that are a part of the Instruction Manual assignment ask students to track the time they spend writing during a session and then assess how successful that session was.

Self-reflection: Self-regulated learners reflect on their own learning and progress, which can be an effective self-regulation strategy. For instance, Tanner encourages her law students to regularly assess their own progress, recognize emerging challenges, and react negatively to reassess forethought and performance strategies. The process of writing the Instruction Manual is itself an exercise in self-reflection as each student draws on their experiences composing legal genres in order to rethink how they would explain the goals, motives and practices associated with a particular type of legal writing.

Arguments for teaching self-regulation in law school are not new. Schwartz (2003) argued for the advantages of teaching law students to develop self-regulated learning strategies through curriculum revision, and others have advocated for modeling learning strategies to help with time management and studying (e.g. Bloom, 2013; Schulze, 2019). Their approach can help students develop self-regulated learning practices, such as note taking and study habits, and they can help students situate their own aspirations as legal professionals.

As writing teachers, we see an opportunity to extend the benefits of self-regulated learning in the context of legal writing. An ability to understand and participate in legal discourse is an essential gateway to law students' professional development, and learning this discourse involves rhetorical problem solving where students draw on rhetorical knowledge—genre, audiences, context, purposes—to set goals for writing, compose written text, and self-evaluate progress. Since this rhetorically focused self-regulation extends beyond the learning strategies Bloom (2013) and Schulze (2019) offer, we believe it deserves a more specialized instruction. The

Legal Writing Manual offers a way to guide students to articulate their self-regulation strategies for composing legal genres.

Course Context & the Legal Writing Manual

The Legal Writing Manual assignment is an innovative pedagogical tool, designed to engage first-year law students in an in-depth exploration of the genre characteristics and writing processes specific to legal memos and briefs. This assignment requires students to compile a comprehensive guide, one that not only instructs but also demystifies the complexities inherent in legal writing for themselves and their peers. To construct this manual, students are not merely passive recipients of information; instead, they actively draw upon a rich array of artifacts and experiences they have accumulated over the course of their studies. These artifacts include, but are not limited to, drafts, outlines, and research materials, all of which are integral to writing in legal genres. In this sense, it serves as an informal portfolio project, and hence, Tanner often refers to it as the "capstone" assignment for the fall and spring semesters.

A key component of these artifacts is a "process log," a reflective tool that plays a crucial role in fostering self-regulation among students. This log serves as a record of their journey through the various stages of legal writing, prompting them to actively engage in self-assessment and adjustment of their learning strategies. By maintaining this log, students are encouraged to critically analyze their writing process, identify areas for improvement, and develop strategies to overcome challenges. The act of synthesizing these diverse artifacts into a cohesive "manual" further enhances students' metacognitive understanding. It allows them to reflect on the challenges they faced, the goals they set, and the practices that either facilitated or impeded their progress in legal writing. This synthesis not only aids in their personal development as legal writers but also contributes to a resource that can guide and inform the practice of their peers, thereby fostering a collaborative learning environment.

The Legal Writing Manual was originally conceived of as a capstone project for Tanner's course "Legal Writing and Research," which is the first-year legal writing course at Louisiana State University's Hebert Law Center.[1] Legal Writing and Research takes place over two academic semesters during which a cohort of first-year law students worked toward the following course outcomes:

1. Demonstrate basics of persuasive writing and legal analysis using code articles, statutes, and cases.
2. Demonstrate effective persuasive legal writing skills by drafting an appellate brief.
3. Demonstrate effective & efficient legal research skills by using secondary and primary sources of law to find relevant legal authorities that will govern a particular issue in Louisiana.
4. Demonstrate effective oral argument skills by preparing and performing an appellate oral argument before a judge.

The Legal Writing Manual reflects the culmination of three phases of work. In phase 1, students develop analytical knowledge about legal writing genres. In phase 2, students apply record self-regulated learning practices in a "process log." In phase 3, students synthesize their self-regulated learning and analytical knowledge by creating their own Legal Writing Manual.

Phase 1: Analyze legal genres

To help students build awareness of legal writing genres, the students first examine examples of legal writing to discern the genre characteristics and conventions at play. To examine legal

genres, students engage in comparative genre analysis, in which a student compares examples of genres in order to identify salient features and interpret their significance within a rhetorical situation (Wolfe et al., 2014). Students' Comparative Genre Analysis (CGA) starts by introducing students to variations of legal memos, and tasks them with creating a chart that illustrates their rhetorical characteristics (Tanner, 2022, p. 3). To expand their analysis, students then repeat the process with variations of other legal genres, charting their rhetorical features and drawing comparisons between their purposes, formal features, and uses within the legal system.

The CGA is a form of genre analysis that, as Devitt et al. (2003) state, associates the use of a text "to the smaller bits of language that alert analysts to underlying ideas, values, and beliefs" (p. 543). Through CGA, students explore the purposes, audiences, and stylistic elements that shape the way information may be presented and arguments structured in legal contexts. To enhance their analysis, students are encouraged to consider the context in which each genre is used and identify features of the rhetorical situation. They examine the purpose of the document, the intended audience, and the broader legal framework within which it operates. By understanding the specific role and function of each genre, students can better grasp the underlying rhetorical strategies employed by legal writers to achieve their objectives. Additionally, students are prompted to critically evaluate the effectiveness of the examples they analyze. They learn to identify strengths and weaknesses of multiple examples of legal writing in different genres, assessing how well they fulfill their intended purpose and communicate legal arguments persuasively. This evaluative process encourages students to develop a discerning eye for effective legal writing and empowers them to apply these insights to their own work.

These explorations show up in students' legal writing manuals when they describe the "functions" and "anatomy" of a legal memo. For instance, one student's manual documented functions when they wrote:

> **Function of Legal Memos:**
>
> The role of legal memos in law firms, court settings, or in-house legal departments: Memos are reviewed by lawyers because not every lawyer can work on every aspect of every case. So, they use their associates to go to some events (depos, statements, etc.) or do research on a specific part of a case, and to log their findings in a memo so that the attorney knows exactly what happened without any unnecessary details.

Following this statement of function, this student goes on to outline a series of moves they associate with legal memos, which include:

> **Anatomy of a Legal Memo**
>
> 1. Issue/Question Presented
> 2. Brief Answer/Short Answer
> 3. Facts
> 4. Discussion/Analysis
> 5. Conclusion

In addition to listing the moves, the student includes a one-sentence description that summarizes the move. For instance, they describe "Brief Answer/Short Answer" as "A concise, but detailed answer to the issue/question presented. (If you are not 100% certain about the outcomes of the case, then do not use words that assume you are, such as 'will be held liable' or straight 'yes' and 'no' answers…)." This memo illustrates how a student's analysis involves scrutiny of the language, tone, organization, and formatting within these examples. Students are encouraged to identify recurring patterns, such as the use of specific legal terminology, the presence of formal tone or persuasive language, and the consistent inclusion of certain sections

Table 1. The process log protocol used to prompt students' self-regulation throughout the appellate brief project.

Process Log
Before you begin, please answer the following question: 1. What are your goals for this session? **After you've finished working, respond to the questions below:** 2. What did you accomplish during this session? 3. What problems did you encounter? 4. What did you do that helped or hindered you? 5. What are your next steps?

or headings. Through this analysis, students begin to recognize the building blocks that define each genre and start to comprehend the underlying principles that guide effective legal writing.

By engaging in this analysis, students can develop a deeper understanding of the unique features and expectations associated with different legal genres.[2] Students not only become familiar with the various forms of legal writing but also gain the ability to adapt their writing to suit different genres and contexts. This foundational understanding equips them with the necessary skills to effectively communicate in a legal setting and navigate the complexities of legal discourse.

Phase 2: Compose an appellate brief and "process log"

In phase 2 of this assignment, students apply their analytical knowledge of legal writing to compose an appellate brief in an authentic scenario, while simultaneously maintaining a "process log" to document their decision-making and reflect on their writing choices. Before this assignment, one of us (Roderick) developed a process log protocol as a tool to help students self-regulate their writing on tasks ranging from first-year undergraduate essays to graduate-level research proposals. Students composed their process logs by responding periodically to a series of five prompts designed to guide them through a form of self-regulated learning, either through writing or audio recording their answers. The sequence of questions prompts students to self-regulate their writing process by asking them to set goals (forethought), self-evaluate accomplishments (self-reflection), and identify strategies (performance) that can help them carry through with their work (Table 1).

Examples from students' process log show how the five prompts gave students space to self-regulate their memo writing process. For instance, one student's log shows 13 separate entries composed over approximately two weeks. Each entry reproduced the log questions and provided a 1-2 line response, such as in the following excerpt where the student establishes a goal, self-reflects on a problem, and re-establishes a next step to carry their work forward:

> **Date/Time: [Anonymous]**
>
> 1. **What are my goals for this session?**
>
> To finish writing the facts section, reorganize the general layout, expand on element explanations of Closed Memo Assignment.
>
> 2. **On a scale of 1-5, how successfully accomplish my goals for this session? Explain.**

2, I only reorganized the general layout and somewhat expanded the explanations.

3. **What problems did I encounter?**

- Personal problems [worrying about plant problem and family stuff]
- Feeling overwhelmed while trying to do too much at once.

4. **What helped or hindered me in addressing the problems faced?**

Reviewing structure of an analysis, writing the roadmap paragraph to organize what I will talk about in order.

5. **What will I do next?**

Sit down just to write the facts section using the checklist. Then use Black's to give some definitions to the words in the elements. Trying to only set 1-2 goals per writing session.

This excerpt shows the process log questions provided a structure within which this student could name and work through specific challenges for developing their memo's content and organization. The student's goals are typical of other students insofar as they aim to develop content and structure within the context of the assignment. The prompts also encourage self-reflection by giving space to rate accomplishments, to recognize troublesome areas of writing as well as affective challenges ("feeling overwhelmed"), and to reframe goals and practices to navigate challenges. Interestingly, this student also adjusts how they self-regulate when they set a next step to "only set 1-2 goals per writing session."

Students also adapted their responses to deviate from the form represented above. Some responded with general "Before" and "After" paragraphs to summarize their aspirations and then self-reflect on what happened, such as in the following excerpt.

Before:

> My goal for this writing session is to understand more about creating a template and outlining a memo. I understand the basis from the memos that we have written in previous assignments, such as the dog owner's liability for the cat.

After:

> The outlining template online was very helpful in figuring out where to put specific explanations and topics that I want to address in the memo. I think it's helpful to create an overall template and then make it a bit buffer and keep building off of the specific template.

This student also honed in on how she went about process logging by ditching the "before" and "after" structure in favor of a more streamlined reflection. She notes this shift in the following entry.

1. I have given up on before and after because I do not find it helpful. However, I do find writing from examples to be very helpful
2. The other memos are insanely helpful for learning how to organize them and figure out where I can put the analysis so that it makes sense to the person which helps a lot.

Other students' log entries deviated even further from the prompts by moving away from the goal, accomplishment, problem, next step sequence to instead focus on text-type, successes, and challenges. The following entry illustrates this altered approach to process logging.

> **Date: [Anonymous] Type of Memo/Activity**: Final Memo Research Exercise—Annotated Bibliography
>
> **What Worked**: Looking at the statute and commenting on what I see and my questions.
>
> **Challenges Faced**: There are many statutes, and I am not sure if they all apply. Nevertheless, a start is better than no start.

These excerpts illustrate variations in the ways students chose to respond to the process log prompts, and each variation takes a unique approach to self-regulation. We want to encourage these variations and align ourselves with the assumption that self-regulation can and should take many forms. Further, Tanner chose not to grade the process logs for content, which gives students more flexibility and autonomy over how they choose to complete them. It also means that some students put more effort into their submissions than other students. One way Tanner has encouraged students to buy into the process is by having discussions in class about the process and documentation of the process through the logs. In addition, she often asked students to reference their process log during individual conferences as a way to probe into any of the challenges they may have encountered with their writing. The students who have been completing them regularly share how helpful they have found them with the class, which encourages students to complete them.

Phase 3: Students reflect on their process log and compose an "Instruction Manual"

The experiences from phases 1 and 2 culminate in students synthesizing their understanding of the genre and composing processes into a comprehensive legal writing instruction manual. For their final project, Tanner asks her students to "review your process log and arrange it in a way that will be helpful to your future self as a writing manual for the memo" (Legal Writing Manual Prompt). To complete this project, students write an instructional manual for their future selves on the genres of writing that they are learning in the classroom. The assignment asks students to reflect on the process prompted in their process logs in order to create a set of instructions to their future selves on how best to write (1) a memo in the fall and (2) an appellate brief in the spring.

The instruction manual has two goals: a process goal and a product goal. The product they are creating, an instruction manual, is there to help students remember what they learned the first time they are asked to write within each genre we have discussed when they later must reproduce that knowledge for their internships and jobs. For this reason, students are asked to describe several sub-genres of memos: full memos, and various complexities of e-memos. By identifying commonalities and differences among common sub-genres, students will be better poised to recognize key features when they are asked to write within a new sub-genre.

Additionally, for the second iteration of this assignment sequence, students were able to bring printouts of their manual to a final exam, where they were asked to write a memo on an area of law that was new for the students. In response to the shifted focus on metacognition allowed by the reflection documents and manual assignment, Tanner made a change to the course: she included a timed final exam. The final exam was meant to respond to two important exigencies: first, students were focusing more on learning techniques to transfer their knowledge to unfamiliar contexts, but they were not given opportunities to do so within the confines of the class. Two, advances in generative AI meant that out-of-class assignments faced the risk of

being generated by ChatGPT rather than the students. So, Tanner added an hour-and-a-half in-class exam modeled on the Multistate Performance Test to the course content. For the exam, students are able to refer to the notes they have made for themselves in their manuals about what goes into a memo. In this sense, the manual serves as a legal writing "outline" much like they would prepare for their casebook classes.

The second goal—the process goal—of the manual is to foster metacognition. Asking students to explain to their future selves how to write key legal genres forces their attention to what they are doing and how they are doing it. Having consciously articulated knowledge about process and product (metacognition) will, ideally, help them transfer that knowledge to the legal genres they will be responsible for writing in practice.

Students are also asked to reflect on the process and narrate that process to their future selves and to articulate their own self-regulation strategies. What decisions did they make in the research phase? How did they start the writing process: with an outline, notes, or free write? What did they do when they got stuck? Articulating their processes helps them create goals and plans now and have a record for the future to remind them that they will be able to work through the rough spots. Preliminary findings indicate that students successfully adapt their knowledge and practices to align with the expectations of legal writing, thus facilitating their transition from undergraduate to law school writing. The development of the legal writing guide and the accompanying process logs demonstrate students' increased metacognitive awareness of their writing practices and their ability to verbalize and regulate those processes effectively.

In some cases, students chose to draw from their process log work to develop self-regulatory strategies for writing a memo. Such strategies are represented in the student reflection excerpted below, which describes a sequence of goals followed by a strategy to cope with problems.

> **Memo Writing Process**
>
> Start with the discussion section. [...] Starting with the discussion section also allows you to think through the rules, explanations, and analyses to reach a conclusion, which allows you to write the brief answer and conclusion sections. After writing the discussion and facts sections, write the issue section, and make sure to frame the issue around the conclusion that you reached in your discussion section. Next, write the brief answer section, then the conclusion and recommendations section.
>
> If you're feeling stuck, ChatGPT can generate an example memo for your issue that can give you ideas of how to format your memo or what issues to address. However, the memo you submit should still be written on your own. If ChatGPT cites cases that you have not read, that could be a good starting point for researching case law. However, if the memo is closed, obtain prior permission before using a case in your memo that is not on the list provided to you. Also, always check any statutes or cases that ChatGPT cites because they may not actually be relevant to your case, or they might not be real cases at all. ChatGPT is a tool to help you; it is not meant to do your work for you.

In this excerpt, the student describes a self-regulation strategy for writing memos, which include a sequence of goals ("Start with the discussion section…") and a tactic to address problems ("If you're feeling stuck…"). While students could have reflected on these strategies without the process log prompts, we believe that keeping a process log better equipped students to define these practices, because the questions primed them to pay attention to what they were *doing* in addition to what they were producing.

Reflections and Discussion—What evidence is there that students are self-regulating?

The legal writing manual and process log reflections offer a way to carry out common advice that legal writing faculty should "recognize and understand" students' struggles in their first year of law school (Donahoe & Ross, 2013). By prompting students to self-regulate, and then compile a manual, students articulate self-regulated learning practices in a variety of ways, including adapting ways of approaching legal writing, self-reflecting on emotional work involved in legal writing, and strategizing processes for overcoming challenges. While we acknowledge these adaptive practices may occur for some students regardless of whether they are prompted to self-regulate their learning, we also believe that prompting increases an opportunity to self-regulate while also making visible important information about the approaches, emotional work, and strategies students bring to the assignment. We elaborate on these three areas of SRL below.

The process logs and writing manual made visible the unique and varied ways that students approached legal writing. While there was a considerable variation in their methods, several discernible trends emerged that shed light on the self-directed learning process within the class. One notable pattern was that some students heavily relied on the handouts provided by the professor. In their reflections, students copied and pasted notes from handouts, or paraphrased language from handouts ("learning to use genres," and "using what you've learned to write."), to guide their self-assessment. These resources were specifically designed to assist them in navigating the intricacies of writing a memo and a brief. However, these students went beyond the given instructions and used them to articulate how they adapted the advice given in the handout to meet their own purposes. For instance, students often mentioned drawing on models to refine their goals for content and organization, such as in the following log excerpt.

> The outlining template online was very helpful in figuring out where to put specific explanations and topics that I want to address in the memo. I think it's helpful to create an overall template and then make it a bit buffer and keep building off of the specific template.

This student explicitly acknowledges using handouts to self-regulate in their reference to "the outlining template," a resource that draws on sample memos to explicitly model a structure for students. Other references to this resource include students that mentioned using "the [provided sample] memo to structure sentences, paragraphs, and citations." These references suggest students supplemented the handouts with personal notes taken during class discussions or incorporated reflections on how to effectively implement the directions provided.

The manual and logs also helped bring to light the range of *emotions* students experienced throughout the course. Frustration was a common theme, as some students encountered obstacles and difficulties along the way.

> I have absolutely no clue what a rule synthesis is. I am insanely confused about the homework and have no clue how to go forward with the assignment. I have done my hardest and I am moving forward with the hope that class will explain what the heck is going on.

This excerpt shows students sometimes use the process log as a place to vent frustrations, and in doing so makes visible an opportunity for the instructor to intervene with support. In fact, the next entry points to a somewhat successful intervention when the student notes, "I am slightly more understanding of what a rule synthesis actually is. It makes a good bit more sense than it did before. It basically uses other cases to explain the statute in a way that is easier to understand than the actual statute itself."

While frustrations sometimes stood alone, more often they coincided with positive exclamations as students recognized solutions to the writing challenges they struggled with, such as in the following log excerpt.

1. Its peer review time!!!!!.
2. I think that the peer review process is super fun. I find it very rewarding to see what other people have said about their own paper and compare it to my own.
3. The closed memo was a really difficult assignment to conceptualize but I think that reading some from other people made it much, much easier.

The entry articulates a positive emotional response to the prospect of peer review, indicated by abundant exclamation marks, an explicit reference to "super fun" and an acknowledgement that reading other's work helps a "difficult assignment" become "much easier." Entries like this one suggest the challenges and frustrations inherent in learning a new genre served as opportunities for growth and learning, as they prompted students to critically evaluate their strategies, seek assistance, and find alternative solutions. By narrating their frustration, students showcased their resilience and determination to overcome obstacles, an essential aspect of the self-directed learning process. Some students focused more on their successes than their failures, highlighting moments of accomplishment and breakthroughs in their writing journey. These accounts showcased their ability to apply the knowledge and skills acquired during the course effectively.

One limitation to this practice is that the process log requires additional time and effort from both the students and the professor in a course already tightly packed with reading and writing activities. While keeping a process log encourages students to work on their assignments more frequently, it also means that they need to allocate time regularly to revise and submit their work. Allocating this time can be challenging, especially when students have other academic commitments or face time constraints due to external factors, and these constraints discourage some students from keeping a log, or they limit the amount of self-reflection students might take up. Additionally, the professor needs to allocate time to review and provide feedback on each iteration, which can be resource-intensive. Consequently, the iterative collection of assignments may pose practical challenges and potentially increase the workload for both students and instructors.

One way to mitigate these challenges is to encourage legal classrooms to adjust traditional expectations for end-of-semester assessment. While traditional assessments often focus solely on the final product (e.g. getting students to write a "good" legal brief or memorandum), legal writing professors could promote self-regulated learning by factoring reflection and metacognition into the grade. While there is a longstanding tradition of assessing student reflective work in first-year composition classrooms, we advocate for bringing this tradition into the mainstream for legal writing classrooms. Through this reflective practice, students develop a deeper awareness of their strengths and weaknesses as legal writers and gain valuable insights into their own learning process.

ASSIGNMENT
Instruction Manual for Writing a Brief

Background & Context

Last semester, in addition to learning the genre of the Legal Office Memorandum, you also learned processes for teaching yourself how to write. You got practice reading, understanding and synthesizing new areas of law. And you developed skills and processes to help you be able to write, even as you were refining your knowledge of the genre. The "learning how to write" part should come a lot easier to you this semester. But it is nonetheless important that you continue to practice it. After you graduate, you will have to draft all sorts of documents that are unfamiliar to you. One of the goals of this semester is that you have a place to start if you're asked to write a document you've never heard of. For instance, where would you start if you were asked to draft a contract between two roommates? A motion to compel discovery? A law review note or article? Legislation about education finance?[3]

Purpose

This assignment will build on the practice you've had in using example writing samples (models) to understand what the genre of the brief looks like.[4]

Your assignment is to keep track of what you learn and what you teach yourself about writing appellate briefs so that you will have a resource to take with after this class. You will probably use what you learn to write your Tullis brief next year. This will be an ungraded assignment, but I will collect it at the end of the semester. Additionally, I'll ask you to bring the document with you each time you meet with me (for office hours or for conferences) so that you can update it.

Procedure

1. Use these activities about learning a new genre & using what you've learned to write (and what we learn in class) to train yourself how to use Model writing samples like an expert writer would.
2. Every time you sit down to work on the Appellate Brief, open up this template and jot down a few notes about your process. If you'd like, you can use this process log, or you can just freewrite. Alternatively, you can create a special section in PowerNotes to jot down notes for yourself and then export those notes to your Capstone.
3. At the end of the semester, review your process log and arrange it in a way that will be helpful to your future self as a writing manual for the memo.

FAQs

Will this assignment be graded?

No. You will get credit just for turning in whatever you come up with. Remember, this is meant to be a tool for you to learn, not a way for me to assess your learning. Make this useful for you. (It is also useful for me in diagnosing where students are "getting it" and where they need more help. But that is a secondary goal.)

When is it due?

At the end of the semester. After you've taken all your exams. But that's just when you need to turn it in. You should work on it throughout the whole semester.

What if I'm too busy to work on it?

You'd be amazed at how much you're able to put down on paper if you just use this to help you organize your thoughts. And being intentional about your writing process now could even help you save time at the end of the semester, when you'll be really glad you're efficient.

But what if I'm still too busy to work on it?

Try using a voice-to-text feature and just dictate your thoughts. I won't be grading for grammar or style (in fact, I won't be grading it at all).

Notes

[1]Tanner has since adapted it for her course at the University of Louisville.

[2]See, Alexa Z. Chew & Craig T. Smith (2016) for more about the concept of "genre discovery" and Tanner (2022) for descriptive genre analysis in legal writing.

[3]The good news is that you won't be expected, for this class, to master every type of writing you'll be asked to do after you graduate. But you are expected to build the skills that will allow you to teach yourself these types of writing when you need to learn them.

[4]Remember what you learned last semester: *The skill of learning to write in a new genre will be one you will employ often in your future careers. Every law practice is different, but you may be asked to write: contracts, motions for summary judgment, initial public offering prospectuses, trial briefs, bench briefs or even legal opinions. You don't have enough time to devote to learning every single genre you'll need to know eventually while in law school. But you can develop the skills and processes to make learning those new genres easier once you're in a job or internship.*

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.189.

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Breaking the Rules

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Abstract

"Breaking the Rules" is a legal research and writing (LRW) assignment that I crafted for students completing their first year of law school. LRW classes usher students into the legal "discourse community," where the communication conventions of our field become internalized. This assignment challenges students to question those conventions, particularly as regards reliance on settled legal rules that may perpetuate discrimination. The first part of this article is an essay that contextualizes and explains the assignment; the second part provides the assignment itself.

Introduction

The required full-year legal research and writing (LRW) class introduces new law students to communication skills involved in client representation—how to analyze and express the law on a client's behalf.[1] Consequently, LRW professors, myself included, feel a particular responsibility to usher students into the legal "discourse community," where the communication conventions of our field become internalized (Williams, 1995).

A growing body of scholarship challenges us to think more deeply about this discourse community because some of our conventions may perpetuate discrimination in the law (e.g., Berenguer et al., 2020; Culver, 2021). Our students arrive wanting to meaningfully impact the inequities they see reflected in the media and in their own lives (Atkins, 2020; Crichton, 2021). Taught to stay within traditional communication models, students may become frustrated and unmotivated to learn (Crichton, 2019; Wilensky, 2022)—the antithesis of the mindset necessary to flourish in the transition to law school.

This essay focuses on one particularly problematic LRW convention: uncritical acceptance of settled legal rules. The first part addresses the central place of settled rules in LRW instruction and describes a brief-writing problem that nudges students to begin considering the discriminatory impact of the "*Terry* stop" rule. The second part describes my "Breaking the Rules" assignment, which is the primary focus of this piece. This assignment takes students a step beyond the brief-writing problem and introduces skills aimed at fundamentally challenging and breaking the grip of settled rules that are long overdue for an overhaul.

Working Within the Rules: *Terry* Stops

My first LRW homework assignment always highlights a basic principle: "[T]he practice of law is, at its core, understanding and using rules" (Bonneau & McMahon, 2017, p. 35). This focus on rules continues throughout the year. Through scaffolded research and writing assignments, my students learn to discern a rule from authority, explain the rule by reference to past opinions, and apply the rule to a hypothetical client's circumstances to objectively predict the likely outcome (Fall semester) or persuasively argue for a favorable outcome (Spring semester).[2]

Historically, LRW professors have taught these skills through hypotheticals that accept the primacy of settled legal rules (Berenguer et al., 2020; Tully, 2022). For example, I sometimes assigned students in the Spring to draft briefs for a hypothetical *Terry* stop appeal. The *Terry*

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stop rule allows an officer with "reasonable suspicion" of ongoing criminal conduct to briefly stop the suspect for further investigation (*Terry v. Ohio*, 1968). Although the rule sounds neutral, its application has resulted in persons of color being stopped in vastly disproportionate numbers (e.g., Lee, 2016). Notwithstanding this context, my past hypotheticals involved only white defendants and officers because I was concerned about my ability to handle potentially unplanned classroom discussions about racism and also concerned about revealing my own unconscious biases in the process (Bishop, 2017; Dalton & Nejdl, 2019; Samuel-Siegel, 2022).

My students, however, deserved the opportunity to grapple with the *Terry* rule's real-world impacts (Keene & McMahon, 2022; Tully, 2022). While I was not an expert on the racism endemic to *Terry* stops, I was certainly capable of educating myself and being open to student insights and concerns that might arise. Accordingly, in Spring 2022, I created a new *Terry* stop hypothetical in which a Black officer stopped a Black defendant based on an anonymous tip from a person who was likely white.

I started the Spring 2022 semester with statistics bearing out many students' gut impressions regarding *Terry* stop discrimination. Throughout the semester, the hypothetical provided moments for reflection on this theme and opportunities for students to incorporate related context into their arguments. For example, students representing the defendant could highlight how the white anonymous tipster seemed unable to tell one Black person from another; student attorneys for the government could make the point that the Black officer acknowledged this fact and included it in his assessment of the tipster's information.

This hypothetical did not, however, provide an effective opportunity for students to fundamentally argue against the *Terry* rule itself (Keene, 2021; Wilensky, 2022). Principles of *stare decisis* dictate that prior decisions govern pending controversies, and both sides had potentially winning arguments under the current rule. Some students representing the defendant tried arguing disproportionate impact, but that argument was ineffective as the appellate record contained no specific evidence that racism had anything to do with the stop of this Black defendant. I made this design choice intentionally as my primary goal for the Spring was for students to research and write a persuasive argument under the established legal rule. But it wasn't where my students or I wanted to end the semester.

Breaking the Rules: The "High Crime Area" Factor

Law professors across the first-year curriculum increasingly incorporate materials illuminating the context in which problematic rules arise and how they are applied in ways that disparately impact historically disadvantaged groups (e.g., McMurtry-Chubb, 2022). LRW, usually the only first-year skills-based class, provides a unique opportunity to go beyond the academic discussion and introduce students to skills for challenging the discriminatory status quo (Han et al., 2023; Stanchi, 2021; Wilensky, 2022).

My "Breaking the Rules" assignment took on this challenge, focusing on the particularly problematic "high crime area" (HCA) factor that is part of the *Terry* stop calculus. The assignment came after the students had submitted their final briefs in the *Terry* stop problem described above. The steps of the assignment included: (1) understanding the HCA rule; (2) considering real-world context informing the rule's fundamentally unjust application; (3) learning from the work of past advocates who successfully challenged settled rules; and (4) drafting a report that stated a new HCA rule and supported that rule with carefully chosen authorities.

Parts (1), (2), and (3) involved several hours of assigned homework and a single two-hour class session. Part (4) was started in class and continued in small groups outside of class, with a group report due several days later. The Supplementary Material section provides a link to my teaching slides.

The HCA Rule

The HCA rule derives from *Illinois v. Wardlow* (2000). Reading the majority *Wardlow* opinion, students discerned a seemingly neutral rule: an officer's determination that an individual was in an HCA supports the officer's decision to make a *Terry* stop.

Students also read Justice Stevens's dissent from the majority's HCA rule. In LRW classes, dissents generally take a distant back seat to majority opinions because students are learning to formulate winning arguments supported by binding law (Keene & McMahon, 2022). However, by reading Justice Stevens's opinion, students discovered two fundamental flaws in the majority's HCA rule. First, the rule takes at face value an officer's opinion that the stop occurred in an HCA. Second, many reasons besides criminal activity explain why an individual in an HCA might act "suspiciously" in the presence of law enforcement, including a person of color's negative experiences with law enforcement in the HCA in the past.

Real-World Context

To highlight the HCA rule's disparate impact on communities of color, the assignment included real-world context from several sources (Keene, 2021; Kline, 2021). One such source was the much-publicized *Terry* stop of Elijah McClain (Smith et al., 2021). Mr. McClain was stopped because the police thought he "looked sketchy" and was in what they described as an HCA. The officers' violence against Mr. McClain resulted in his death. Because of the resulting publicity, an independent panel was appointed to examine the circumstances; the panel's report demonstrated Mr. McClain's stop did not occur in an HCA (Smith et al., 2021).

Of course, most *Terry* stops do not receive the scrutiny that Mr. McClain's did. With that in mind, we considered additional context—a study examining two million stops in New York City. The study found that the "HCA" designation was almost entirely uncorrelated with actual crime data and that race was at least as likely a predictor of the HCA designation as crime statistics (Grunwald & Fagan, 2019).

Incorporating this context from outside the confines of established HCA doctrine laid the groundwork for students to share their own real-world experiences in an in-class conversation (Culver, 2021; Keene, 2021; Rankin, 2022). Given the sensitive subject matter, this part of the exercise was definitely not a moment for mandated participation. In particular, I was careful to welcome voluntary contributions by students of color without imparting any expectation, even implicitly, that they do so (Bishop, 2017).

The conversation that followed was extraordinary. Students related both the general tenor of police interactions in their communities and specific interactions they had experienced or witnessed. The stories included students of color stopped for no reason other than that they were hanging out with a large group of friends. The stories also included white students describing similar scenarios but with very different endings—police looking the other way or helping an inebriated student get home. These stories, and many others, were offered and received respectfully by the entire class.

Learning from Advocates on Both Sides of the Abortion Debate

By this point, most students were fired up to fundamentally challenge the HCA rule, and we turned to legal skills they might employ in this work. This was a good moment to remind students that they wouldn't be writing on a blank slate, that they could situate themselves as part of a long tradition of lawyers who have used LRW skills to successfully challenge seemingly fixed rules of law (Berenguer et al., 2020).

To learn from this tradition, students reviewed the winning Supreme Court briefs in *Roe v. Wade* (1973) and *Dobbs v. Jackson Women's Health Org.* (2022), each of which fundamentally changed

the rule of law on abortion rights. Assigning briefs from both sides of the debate underscored students' change-making abilities regardless of their views.

I asked students to focus on the types of authority relied upon in each brief. In our class session, students reported finding many sources beyond the usual majority appellate decisions. These included dissents, legal scholarship, scholarship from other disciplines, advocacy pieces, and government reports. As we dug deeper into these sources, students observed how the authoring lawyers had chosen authorities that would catch the reader's attention and some that imparted a bipartisan legitimacy to the argument, such as *Dobbs*'s citation to writings by Ruth Bader Ginsburg and Dahlia Lithwick, both prominent but seemingly unlikely (i.e., liberal, pro-choice) sources.

Crafting and Supporting a New HCA Rule: Student Reports

For the final product of the assignment, students were presented with a new hypothetical where they represented a Black woman subjected to a *Terry* stop in a parked car. The circumstances supporting reasonable suspicion would not on their own have justified the stop without the added boost of the officer's determination that the suspect's car was parked in an HCA.

Situating the assignment as a client representation accommodated students who might not personally agree that the HCA rule should be changed. After spending the whole semester honing advocacy skills in a fictional *Terry* stop case, they could appreciate that attacking the HCA rule head-on was the best strategy for this client.

I divided the class into groups of five people, with each group assigned to produce a report that expressed the group's consensus on a new, fairer HCA rule and that succinctly described the relevance of three authorities that supported their new rule. The students had worked in small groups of varying sizes and compositions throughout the year; they were comfortable working with each other, and by this point they well understood the benefits of learning from colleagues in a structured way. Groups reflected the racial makeup of the class as best I could discern it, with no student being the only person of color in their group (Nowka, 1999).

Although I allowed for the possibility that groups might have a difficult time building consensus for a new rule, that proved not to be the case. Half the groups took an incremental approach (Bonneau & McMahon, 2021), maintaining the basics of the *Wardlow* HCA rule but adding a new requirement: courts must disregard officers' claims that the stop occurred in an HCA unless crime statistics legitimized the HCA designation. The other half took a more radical approach: HCA designations should never be part of a *Terry* stop determination because the HCA standard has proven discriminatory time and again.

Picking up on the types of authority we observed in the *Roe* and *Dobbs* briefs, we discussed effective research strategies for this project. We brainstormed search terms and databases beyond Westlaw and Lexis, such as Google Scholar and the Bureau of Justice Statistics. We also talked about choosing wisely among the many available authorities, as the *Roe* and *Dobbs* lawyers did, including considerations of recency, authorship, and specific relevance.

Finally, I used the assignment as one more opportunity for students to consider the needs and expectations of the target audience. The assignment was set up as a report for senior attorneys who had not yet done any research and needed a report that would help them quickly understand the proposed new HCA rule and assess the strength of authorities supporting that rule. Considering students' need to continue working on conciseness in their writing, the instructions specified that each of their three sources should be described in no more than seven sentences.

The reports blew me away. The proposed rules included useful context, and the descriptions made clear how the well-chosen authorities supported the rule.

Reflections

I taught this assignment in a single week, including just two hours of classroom time. Although the one-week setup worked well, I am contemplating increasing the timeframe, either by freeing up an extra hour of class time at the end of the semester or by working some of these skills into lessons throughout the semester. With more time, I would add depth to both the research and writing aspects.

For research, the lesson could take a more creative approach to search strategies. For example, Dalton and Nejdl (2019) propose brainstorming synonyms for historically disadvantaged groups as an opportunity to discuss how those terms develop and change over time and also to address the possibility of using terms that students would not use themselves, especially if they are looking for historical materials.

For writing, the assignment could provide further focused practice on persuasive rhetorical choices. For example, we could explore how the wording of the proposed new rules in the *Roe* and *Dobbs* briefs rhetorically lead the reader to very different conclusions.

Finally, I would like to work with professors outside the LRW arena to expand the assignment's potential.[3] Certainly, the assignment as is could easily be incorporated into the *Terry* stop unit of a 1L criminal law class. But the bones of the assignment would also work well with any substantive area where the legal rule is inequitable by design or in its impact. Thus, the assignment should be adaptable for other 1L courses, such as contracts or property, or even as a capstone project for college seniors headed to law school. The key for me would be to find professor partners committed to giving students a practice-oriented start on challenging the discriminatory norms they will encounter throughout their law school careers.

ASSIGNMENT

Breaking the Rules

Overview

In our final unit before the exam, we will discuss how lawyers sometimes seek not merely to apply a legal rule to their client's circumstances but to change the rule altogether.

Assignment Part A—Critical Consideration of the High-Crime Area Rule

Read *Illinois v. Wardlow*, 528 U.S. 119 (2000), both the majority opinion and Stevens's partial concurrence. Then read this news article in *The Guardian* about the death of Elijah McClain following a *Terry* stop in Aurora, Colorado.

- OPTIONAL: You are *not* required to watch the video embedded in the news article, which depicts the events of that night. The video is very disturbing.
- ALSO OPTIONAL: If you are interested in reading the full independent report about Mr. McClain's death, it is available here.

Come to class prepared to discuss your answers to the following questions:

- Based on *Wardlow*, what is the rule for the extent to which an officer may rely on "high-crime area" as a justification for a *Terry* stop? What facts established reasonable suspicion in *Wardlow*?
- The officers who stopped Mr. McClain said that they had reasonable suspicion for the stop. Based just on the article in *The Guardian*, what facts did the officers rely

on for this claim and what was the independent report's conclusion about those justifications?

- Do you feel that the *Wardlow* rule regarding officer reliance on a "high-crime area" justification strikes the right balance between the competing interests wrestled with in *Terry* (legitimate law enforcement vs. riding roughshod over individual rights)? Why or why not?

Assignment Part B—Authorities to Challenge the Rule

Lawyers have a long tradition of advocating for change. For example, consider the fight over abortion. Jane Roe, the plaintiff in *Roe v. Wade*, could not obtain a legal abortion because of the Texas statute prohibiting abortions except to save the life of the mother. For Roe to prevail, her lawyers had to attack the existing rule—the Texas prohibition—and propose a new rule. Fifty years later, Thomas Dobbs, the Mississippi State Health Officer who was the lead plaintiff in *Dobbs v. Jackson Women's Health Organization*, successfully argued to uphold a Mississippi statute that prohibited abortion after fifteen weeks' gestation, with limited exceptions. Dobbs could not prevail under the *Roe* rule tying abortion rights to fetal viability; accordingly, Dobbs's lawyers argued that the rule crafted by *Roe* and its progeny was wrong and proposed a new rule to take its place.

Skim the Supreme Court brief for Roe, available on Westlaw at 1971 WL 128054, and the Supreme Court brief for Dobbs, available at 2021 WL 3145936,[4] focusing on the breadth of authority—legal and otherwise—relied upon by the parties. Come to class prepared to discuss your observations in this regard. Specifically:

- What types of authority did Roe's lawyers rely on to argue that abortions for reasons other than saving the mother's life are permissible?
- What types of authority did Dobbs's lawyers rely on to argue that pre-viability restrictions are permissible where a rational basis supports the prohibition?

Assignment Part C—High-Crime Area Rule and Research Project

1. New Client: Shakima Greggs

You represent a new client, Shakima Greggs, who was arrested as a result of evidence found during a *Terry* stop. The officer who stopped Ms. Greggs said he reasonably suspected that she was involved in an illegal drug deal based on a combination of the following:

- Ms. Greggs and another person were observed sitting together in a parked car for ten to fifteen seconds at the far end of a dimly lit parking lot late at night. Ms. Greggs and the other person seemed to be looking at something that Ms. Greggs was holding in her hand.
- The parking lot was located in a neighborhood that, according to the officer, was "well known" in his precinct as a "high-crime area," and the officer himself had made three drug-related arrests during the past year within a six-block radius of the parking lot. The officer did not have any empirical data to support the "high-crime" designation ascribed to the area.

Ms. Greggs and her companion were both Black women, and the parking lot was in a majority-Black residential neighborhood.

Although neither aspect would be sufficient on its own, precedent cases in your jurisdiction have found reasonable suspicion in similar combined circumstances. Accordingly, Ms. Gregg's best argument is that the basic high-crime area rule from *Wardlow* should be refined or, perhaps, rejected entirely.

2. Research Project

Counsel for Ms. Greggs (i.e., everyone) will argue for a new "high-crime area" rule. The rule should be well-supported by authority, even if not by precedential majority opinions.

Collectively, the members of your team should (1) craft a new HCA rule and (2) locate three sources that would be particularly effective authority to support this rule. At least one source should be a court opinion (which may be in the form of a dissenting opinion) and at least one source should be something other than a court opinion. Keep recency, authorship, and relevance considerations in mind.

Procedure: Decide as a group how to divide up the work and get started. We may have time to start the project during class time. No one should spend more than two post-class hours on this project.

Product: The team should produce a report identifying (1) the proposed new rule and (2) the three authorities that you have selected.

- No particular format is required.
- The report should be polished and easy to follow, geared toward allowing a senior lawyer who has not yet done any research herself to quickly understand the proposed rule and assess the strength of each authority listed.
- I posted two research reports from last year's class in the Samples module. Read the NOTE before looking at the samples.

For each of the three sources of authority:

1. Provide sufficient information for the reader to be able to locate the source. Include a link for online sources. Don't worry about *Bluebook*[5] format for this exercise.
2. In no more than six or seven sentences, describe why the source seems to be particularly good authority for the argument that your proposed rule rather than the *Wardlow* test should apply in Ms. Greggs's case. Point to specific parts of the source that contain helpful analysis.

Notes

[1]Thank you to Amy Griffin for her thoughtful comments on a draft of the essay; to Nick Grande for his excellent research assistance; to Georgetown University Law Center for supporting the project; and to my students, whose responses to the assignment inspired me to write this article.

[2]Many legal writing programs follow a similar format of covering predictive writing in the Fall semester and persuasive writing in the Spring semester, but not all do.

[3]The introduction to this special issue includes some suggestions for adapting assignments in this issue to contexts outside the contributors' own areas of focus.

[4]Both briefs are available as supplements to this article on the *Prompt* website.

[5]The *Bluebook* (Columbia Law Review Association et al., 2021) is the citation manual predominantly used by law students and lawyers for their writing.

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.187.

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