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## What We Do: The Life and Work of the Legal Writing Professor

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## **What We Do: The Life and Work of The Legal Writing Professor**

David I. C. Thomson

### **ABSTRACT**

*The life of the legal writing professor in today's law schools is a challenging yet rewarding one. Out of necessity, over the last thirty years the pedagogy of legal writing has expanded to include much more than just writing skills—it has become every law student's introduction to a broad set of basic lawyering skills and is more appropriately styled the Lawyering Process (LP). The increasing gravity and responsibility of the Lawyering Process course has led to expansion of credits given to the course and gradually to greater status and equity to the faculty who teach it, although most of us still lag the benefits and privileges of our tenured colleagues. Because of the dramatic evolution of the course and in the professionalism of the faculty who teach it, many traditional tenure-track faculty members do not really know or understand what we do now. This Article seeks to fill that gap — to bring our colleagues up to date on what we teach and how. It also seeks to help our colleagues understand what sort of support we want and need to be even better and more effective at teaching this critical course in law school. Finally, it is hoped that this Article will be helpful to faculty new to the task of teaching the Lawyering Process course so they will have a more complete understanding of the joys and challenges that await.*

**What We Do: The Life and Work of The Legal Writing Professor**

David I. C. Thomson\*

*“[T]eaching tugs at the heart, opens the heart, even breaks the heart—and the more one loves teaching, the more heartbreaking it can be. The courage to teach is the courage to keep one’s heart open in those very moments when the heart is asked to hold more than it is able . . . . [I]f we want to grow as teachers—we must do something alien to academic culture: we must talk to each other about our inner lives—risky stuff in a profession that fears the personal and seeks safety in the technical, the distant, the abstract.”<sup>1</sup>*

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\* Professor of the Practice of Law and John C. Dwan Professor of Online Learning, University of Denver Sturm College of Law. I extend my thanks to Cliff Zimmerman, and the members of the Rocky Mountain Legal Writing Scholarship Group, who reviewed an earlier version of this Article, and Michelle Penn and Virginia Pitts, who provided research assistance. © 2021 David I. C. Thomson.

I have taught Lawyering Process full-time since 2003, when I switched to teaching after twenty years of practicing law. If one were to include my adjunct years teaching a precursor of the current course, that would total twenty-four years of teaching the course. I also served as Director of our program from 2008-2013. While I would never suggest I am perfect at it—there is always room for improvement—I did receive the University of Denver’s Distinguished Teaching Award in 2012, which is given annually to one faculty member University wide. But I do acknowledge that I am not an expert in teaching most other courses in the law school. I have taught Administrative Law before, and I regularly teach an upper-level course in the law of Civil Discovery, but I have never taught in the Clinic, or in Academic Achievement, or in the Externship program. So, while I have taught the course for twenty-four years, this Article comes from my experience only, and intentionally focuses on the one course.

I also want to acknowledge and note that at no point in this Article do I intend to suggest that other law professors of other subjects do not achieve some of the same learning goals I describe here in their own teaching. My aim is to describe them in LP and note that many Lawyering Process Professors regularly achieve these goals in their teaching, using many of the techniques I describe here. I also do not intend to allege that all of us do all of these things all the time, but instead that most of us do most of them, and some of us do even more.

Finally, this Article is dedicated to Frederico (Fred) Cheever, a good friend, doctrinal law professor, and former Associate Dean at the Sturm College of Law. Fred died in a rafting accident in 2017, a few days after he and I paused one of our several conversations on this very topic. In some ways, this Article is my attempt to finish that conversation with my dear lost friend.

1. PARKER J. PALMER, THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER’S LIFE 11-12 (10th Anniv. ed., 2007).

## I. INTRODUCTION

Most law schools today have a well-developed legal writing program, with dedicated faculty on long-term contracts (or, more rarely, tenure track). But those who do not teach the course do not truly understand what is taught there. This is understandable, of course. It is hard to understand a course you do not teach. Further complicating matters is that most law faculty went to the top schools, which are among the few remaining that continue to use fellows or part-time teachers to cover the course instead of full-time faculty dedicated to teaching a broad-based course.<sup>2</sup> As a result, they are mostly in the dark as to the extraordinary developments in this area of legal education that have taken place over the last twenty years. Today, legal writing pedagogy is broad, deep, and well-developed.<sup>3</sup> The course takes on much more than just how to write a memo or a brief. It has grown into its expanded role over the last twenty years in response to the call for more legal skills being taught in law school and a concomitant reduction in writing skills coming out of most undergraduate educational

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2. For example, Harvard Law School's Legal Research and Writing courses are taught by Climenko Fellows. Besides teaching legal writing, Climenko Fellows are preparing to go on the academic law school market. At the University of Chicago, Bigelow Fellows teach legal research and writing, while Stanford Law's Grey Fellows teach legal writing. The bulk of writing advice in Yale's legal writing program is doled out by 3Ls (Coker Fellows). See *Climenko Fellowship*, HARVARD L. SCH., <https://hls.harvard.edu/dept/climenko-fellowship/> (last visited Jan. 19, 2021); Claire Parins, *The Boldness of the Bigelow Fellowship*, UNIV. OF CHICAGO L. SCH. (May 1, 2020), <https://www.law.uchicago.edu/news/boldness-bigelow-fellowship>; *Grey Fellowship*, STANFORD L. SCH., <https://law.stanford.edu/legal-research-and-writing-program/fellowship/> (last visited Jan. 19, 2021); *Academic Affairs*, YALE L. SCH., <https://law.yale.edu/student-life/student-services/about-office-student-affairs/academic-affairs> (last visited Oct. 21, 2021) (describing the Coker Fellows responsibilities in introducing 1L students to legal writing).

3. See, e.g., J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247 (2015); Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 J. ASS'N LEGAL WRITING DIRS. 133-34 (2008); Russell Rutter, *Resources for Teaching Legal Writing*, in RESEARCH IN TECHNICAL COMMUNICATION: A BIBLIOGRAPHIC SOURCEBOOK 407 (Michael Moran & Debra Journet eds., 1985).

institutions.

As a result, Legal Research and Writing—what this Article refers to as Lawyering Process (LP)<sup>4</sup>—has become the fundamental and foundational course in all of law school. This is because it is the primary 1L full-year course that constructs the foundation for what lawyers *do*. Every lawyer in every day of their work life conducts or produces some form of legal research, analysis, and expression. The methods and building blocks for that fundamental tone in all legal work is what we teach.<sup>5</sup>

What is also not well understood is that LP is an easy course to teach poorly, but a difficult course to teach well. This is for many reasons, but the first one starts with the fundamental nature of the course. If a student in Contracts does not fully grasp the Mailbox Rule, they can still pass the course. But everything in LP is important because it is so fundamental—in one way or another—to all legal work. Another reason it is a difficult course to teach well is the fact that we have numerous and disparate learning outcomes that we have to achieve with all our

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4. The law school course this Article addresses goes by many names in American Law Schools. In addition to being called Lawyering Process (at D.U., U.N.L.V., and U.C. Davis) it also goes by the names Legal Research and Writing (at Stanford, Temple, U.C.L.A., Oregon, Virginia, and others), LAWR, etc. This Article uses the name Lawyering Process for two reasons: 1) that has always been the name of the course at the University of Denver where I teach it, and 2) I believe it is the most descriptive and accurate of the various names for this course. At the University of Denver, the course was titled that way in 1990 because it was conceived as a course that taught a full set of lawyering skills, of which research and writing were only two. As the course has broadened in its learning goals across the country, the courses that were historically called “Legal Research and Writing” often still are, even though almost all of them now have a broader focus, and include an introduction to ADR, negotiations, oral advocacy, contract drafting, and collaborative work in legal contexts. They now focus, in other words, broadly on the *process* that *lawyers* go through to do their jobs. For these reasons, I use Lawyering Process (“LP”) in this Article to refer to the course and its faculty, but this Article applies to all of the first-year legal research and writing-focused courses that go by several different names.

5. “The fundamental tone” is a term used in music which refers to the fundamental or lowest frequency of a vibrating object such as a violin string or a bell. The other tones are referred to as “overtones.” *Tone*, ENCYC. BRITANNICA, <https://www.britannica.com/science/ton e-sound#ref772724> (last visited Jan. 19, 2021) and *Overtones*, ENCYC. BRITANNICA, <https://www.britannica.com/science/sound-physics/Overtones> (last visited Jan. 19, 2021).

students in just forty-eight classes (on average) per 1L year. LP is responsible for teaching an array of legal skills and developing professional judgment in a very limited time frame.

But despite the fundamental nature of the course and its disparate learning outcomes, making it such a difficult course to teach well, LP teachers are given less respect and support in most law schools today.<sup>6</sup> This is gradually changing, but very gradually.<sup>7</sup> Part of the reason why this is the state of affairs for most LP Programs is that many of our colleagues who do not teach LP do not really understand what we do and how important it is to the journey our students go on as they train for the legal profession. This Article seeks to fill this gap in understanding.<sup>8</sup>

This Article proceeds as follows. After this Introduction, Part II addresses the substance of what we teach in the course, in the fall and spring semesters. Part III addresses the how of what we teach—the processes, pedagogies, and attitudes that are necessary to teaching the course well. Part IV addresses seven of the inherent challenges in teaching the LP course, most of which are unique to teaching it, particularly in the first year. Part V addresses what we need and want from administration and faculty of our law schools in the nature of support for us in this critical work. Finally, a Conclusion is offered summarizing the Article in a way that is personal to the author.

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6. See LINDA H. EDWARDS, *THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND* (2017).

7. There are schools that have successfully made the transition to putting their LP faculty on unitary tenure track. In 1999-2000, five programs used tenured or tenure-track faculty to teach legal writing, in 2019-2020, forty-six schools reported using tenured or tenure-track faculty to teach legal writing. ALWD/LWI ANNUAL LEGAL WRITING SURVEY 1999-2000, iii, [https://www.alwd.org/images/resources/2000%20Survey%20Report%20\(AY%201999-2000\).pdf](https://www.alwd.org/images/resources/2000%20Survey%20Report%20(AY%201999-2000).pdf) (last visited Jan. 15, 2021); ALWD/LWI ANNUAL LEGAL WRITING SURVEY 2019-2020, ix, <https://www.lwionline.org/sites/default/files/ALWD%20LWI%202019-20%20Institutional%20Survey%20Report%20FINAL%20Nov%2023%202020.pdf> (last visited Jan. 15, 2021).

8. I also hope that this Article will be helpful to professors new to the task of teaching the LP course. First, to help them understand what they have gotten themselves into, and second, to give them a starting point as they go about developing the myriad teaching methods and sensibilities that go into teaching the course well.

## II. WHAT WE TEACH IN LEGAL RESEARCH AND WRITING: THE LAWYERING PROCESS

It is now widely accepted that one of the best things educators can do to improve their teaching effectiveness is to articulate measurable student learning outcomes for every course they teach.<sup>9</sup> While the effort to understand and articulate learning outcomes is prevalent throughout K-12 and undergraduate education, law schools were slow to move in this direction. But in 2015, the ABA finally recognized the benefit of educators doing this work, when it required that every accredited law school develop learning outcomes and assessment plans throughout their curricula.<sup>10</sup> In most cases, LP Programs across the country were well ahead of the ABA in this effort, having articulated the learning outcomes for the course and published them to their students, for years.

### A. Learning Outcomes

At most schools, LP has carefully crafted disparate learning outcomes. They have to be, because our learning outcomes are different from each other—it is not a matter of “[I]earn and [u]nderstand the key concepts (one for each concept) in Tort Law, and exhibit that knowledge on a midterm and a final examination.”<sup>11</sup> Instead, our learning outcomes

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9. See, e.g., Julie Wallace Carr & Sarah Hardin, *The Key to Effective Assessment: Writing Measurable Student Learning Outcomes*, 34 RECREATIONAL SPORTS J. 138 (2010); David Goomas & Melissa B. Weston, *Establishing Performance Standards Using Common Assignments and Rubrics: Measurable and Achievable Student Learning Outcomes*, 38 CMTY. COLL. J. RSCH. & PRAC. 1049 (2014); Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661 (2016).

10. AMERICAN BAR ASSOCIATION, STANDARD 314, ASSESSMENT OF STUDENT LEARNING 17, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf).

11. See, e.g., Maryam Jamshidi, *Syllabus for Torts*, <https://www.law.ufl.edu/law/wp-content/uploads/Jamshidi-Torts-S20.pdf> (last accessed Jan. 19, 2021), and Peter Molk, *Syllabus*



are many and varied and are assessed throughout the year. To be successful teaching LP, a professor must move all of her or his assigned students from no knowledge to skill facility in two fourteen-week semesters. Skill facility is measured as the ability to learn and apply the skills to the following areas: legal research for a client problem, case reading (for doctrine *and* as applied to complex client facts), legal analysis, selecting cases, explanation of rules and application of those rules to client facts, client interviewing, client counseling, legal writing in memos, client letters, settlement letters on behalf of a client, briefs to be filed in a trial court and an appellate court, proper citation form in all these different written products, collaborative work with classmates in five or six major assignments during the year, oral presentation skills, and professional behaviors throughout the course and with fellow students.

Here are the specific and measurable learning outcomes for a typical LP Course:<sup>12</sup>

### Student Learning Outcomes

#### Legal Analysis

- Students can identify (1) the essential components of a case.
- Students can outline (2) a legal rule.
- Students can identify (1) hierarchy of legal authority.
- Students can construct (3) analogies (or make distinctions) between cases and client facts.
- Students can synthesize (6) multiple legal authorities into a coherent rule.
- Students can classify (4) and weigh client facts by legal relevance as applied to the rules.

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*for Contracts*, <https://www.law.ufl.edu/law/wp-content/uploads/2018/08/Molk-Contracts-F18.pdf> (last accessed Jan. 19, 2021).

12. These come from the University of Denver's Sturm College of Law. See *Program Goals and Student Learning Outcome in the Lawyering Process Program*, UNIV. OF DENVER STURN COLL. L. (Apr. 2011), <https://www.law.du.edu/documents/lawyering-process/LP-Program-Goals-and-Learning-Outcomes-2011.pdf> (last accessed Jan. 19, 2021). It was developed in 2008-09 and, with a few minor tweaks, has been used by the LP program there since.

- Students can predict (6) a client outcome through application of legal rules.

#### Legal Communication

- Students can produce (6) a document that provides an objective legal analysis.
- Students can produce (6) a document that provides a persuasive legal analysis.
- Students can tailor (6) their writing to audiences that include clients, courts, and other legal professionals.
- Students can present (6) a legal analysis in oral form to different legal audiences.

#### Legal Research

- Students can identify (1) the major forms of primary and secondary legal resources both in print and online.
- Students can design (6) and implement a research strategy that appropriately supports the requirements of a client problem.
- Students can evaluate (5) and organize (6) the outcome of their legal research in a form that supports their legal analysis.

#### Values of the Legal Profession

- Students exhibit (3) appropriate professional behaviors in the course.
- Students exhibit (3) appropriate professional behaviors in collaborative groups.
- Students exhibit (3) professionalism in their written and oral communication

Note that this list of learning outcomes is carefully drafted to use the correct terminology of learning outcomes which focus on what a student is *able to do* (as opposed to just “know”) at the end of the course.<sup>13</sup> Also,

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13. See generally Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. LEGAL EDUC. 376 (2018); Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269,

note that it includes numbers that reference Bloom's Taxonomy of learning, in which a (1) is the lower level of the learning pyramid (identify), and (6) is the highest level, requiring application of knowledge to relevant contexts (produce, predict, and design).<sup>14</sup>

This list of learning outcomes illustrates several key things about the course. First, it includes seventeen separate learning outcomes in four different main categories—our learning outcomes are many and indeed disparate from each other. Second, we teach to all these outcomes in both semesters of the course. Third, we intentionally design the course to address the spectrum of learning in Bloom's Taxonomy, so students are not just able to identify an issue, they are able to also design a research strategy (after we have taught them research skills) and organize and produce numerous written documents for multiple audiences. Fourth, the disparate nature of these learning outcomes is on full display, from legal analysis, citation skills, writing skills, organizational skills, and oral presentation skills, all in the context of exhibiting appropriate professional behaviors in the course and collaborative groups. Fifth, it does not specifically include citation skills, but that is part of what we teach; it is just embedded in producing each document students write throughout the year.<sup>15</sup> Finally, it illustrates that LP is the only course in the first year curriculum that emphasizes the importance of forming students' professional identities

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270-71 (2010); Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the \*# Does It Have to Do with the Challenges Facing Legal Education*, 45 MCGEORGE L. REV. 85, 85-87 (2013).

14. Jessica Shabatura, *Using Bloom's Taxonomy to Write Effective Learning Objectives*, UNIV. OF ARKANSAS TIPS (Sept. 27, 2013), <https://tips.uark.edu/using-blooms-taxonomy/>.

15. Some of our colleagues think something like this about what we teach: "You teach grammar and citation, what's the big deal?" Actually, they might be surprised to learn that we teach neither subject. Most LP Programs today have a "Writing Center" or "Writing Specialist" who focuses on helping those relatively few students who need remedial review of grammar basics. They offer separate classes on avoiding use of the passive voice, for example. As for citation, our Teaching Assistants focus on that subject, under our supervision. They teach portions of several classes, they offer extra sessions and office hours for help, and they grade accuracy of the citations on student memos and briefs (also under our supervision and review).

as emerging lawyers.<sup>16</sup>

Teaching LP, then, is a mix of knowledge transfer, skills development, and formation, which sometimes – particularly early in the fall semester – asks students to “build the airplane as they are flying it.” This indeed is one of the resistance points that we get from our students, but it is necessary and required, because there is no perfect or ideal order in which these subjects are taught. One cannot really say that teaching citation should always go first, or that legal research should go first, or writing a skeleton legal analysis should go first. They all go first at the same time. Teaching the course well requires very careful thinking and planning about the process of “scaffolding.”<sup>17</sup> And each of our classes contain components of each of these subjects, laid out in a step-wise fashion. We do not get to tell our students to read thirty pages in a casebook, start class, and end it, reviewing that material. Every class is different in design and layout, and we are constantly adjusting that design and layout for the class in front of us. We might spend five minutes on citation, twenty on memo format, fifteen on application of law to facts, and the rest of class on an exercise to build skills with those topics. This kind of “channel switching” is never perfect, but over time and with a lot of focus and effort, you can get better at it.

Adding an additional layer of complication is that we have to teach

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16. See David I. C. Thomson, “*Teaching Formation of Professional Identity*,” 27 REGENT U. L. REV. 303, 304 (2015). More on formation and transformation in the course can be found in Section II. D. and Section III. I. below.

17. See, e.g., SUSAN A. AMBROSE ET AL., HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING 215 (2010). A simple way to think about the benefit of scaffolding is to think of something you learned that “connected” to something else you already knew. If you did not have that connection to connect the new knowledge to, you likely would not have retained that information for very long. But if you have a “hook” on which to “hang” that new knowledge, you are much more likely to retain the new information. In the educational literature, this is also known as “learning as a constructive process,” where learners bring existing understandings to the forefront in making sense of new knowledge as they are learning it. See JEAN PIAGET, PSYCHOLOGY AND EPISTEMOLOGY: TOWARDS A THEORY OF KNOWLEDGE (Grossman, 1971); CATHERINE TWOMEY FOSNOT, CONSTRUCTIVISM: THEORY, PERSPECTIVES, AND PRACTICE (Teacher’s College Press, 2013).

these intertwined subjects in several different ways to reach our students who come to us with myriad learning styles.<sup>18</sup> While learning styles research has come under fire recently,<sup>19</sup> the reality is that students do learn in different ways, whatever the specifics. So, we often find ourselves presenting these elements of each class in several different ways—in a PowerPoint, in an example on the board, in group discussion, and in a brief exercise and then discussion. Repetition in different forms is the goal, while keeping in mind the bell curve of the class.<sup>20</sup> As for learning styles, we are occasionally intentionally addressing a particular learning style (for example, in using a kinesthetic exercise<sup>21</sup> in class), but we also intentionally challenge our students to learn differently than their preferred learning style, because, after all, clients do not cater to our preferred learning style as practicing lawyers.

The temptation is great, over the years of doing this fairly modest thing, to change it up in a way that is more interesting, ultimately, to the teacher. The problem this creates is that it often moves further away from what the students need, which is an ideal learning environment for them, and problem sets that are engaging and at a level they can realistically learn through. So, we cannot—or should not—use problems that might be interesting to us, but that are over the heads of our

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18. On learning styles *see, e.g.*, ALAN PRITCHARD, *WAYS OF LEARNING: LEARNING THEORIES AND LEARNING STYLES IN THE CLASSROOM* (2d ed., 2008); SYNTHESIS OF THE DUNN AND DUNN LEARNING STYLE MODEL RESEARCH: WHO, WHAT, WHEN, WHERE AND SO WHAT – THE DUNN AND DUNN LEARNING STYLES MODEL AND ITS THEORETICAL CORNERSTONE (Rita Dunn & Shirley A. Griggs eds., 2003); *see also* F. Coffield, et al., *Learning Styles and Pedagogy in Post-16 Learning: A Systematic and Critical Review*, LEARNING & SKILLS CTR. (2004), <https://www.leerbeleving.nl/wp-content/uploads/2011/09/learning-styles.pdf>, sections 1-7 for an overview of learning styles theory.

19. *See, e.g.*, Daniel T. Willingham et al., *The Scientific Status of Learning Styles Theories*, 42 *TEACHING OF PSYCH.* 266 (2015); Sanne Dekker et al., *Neuromyths in Education: Prevalence and Predictors of Misconceptions Among Teachers*, 3 *FRONTIERS IN PSYCH.* 1 (2012).

20. *See* discussion *infra* Section IV, Challenge #6, below.

21. Some students learn best by physical interaction - touching and moving. A kinesthetic exercise involves getting students on their feet or touching and moving printed components of a legal analysis. *See, e.g.*, Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 *U. DET. MERCY L. REV.* 1 (2003); Robin A. Boyle & Rita Dunn, *Teaching Law Students through Individual Learning Styles*, 62 *ALB. L. REV.* 213 (1998).

students. They end up floundering in their research and burning too much time away from the writing process. This is because—particularly in a constructivist pedagogy—deep engagement is essential, and this requires elements of meaningfulness, a “just right” challenge, autonomy support, social connection, and a sense of progress being made toward a clear goal.<sup>22</sup>

Because of the intricate scaffolding of a stepwise skill development process—different for each student—moving this course to online learning poses significant challenges. In the spring of 2020, LP professors across the country pivoted this complex course to an all-online environment in a matter of a few days. By then, the course was well underway and the learning community was formed. But in the fall of 2020, LP professors confronted the further challenge of forming a supportive learning community in a more difficult environment—over Zoom. Those schools who chose to teach their 1L classes in a hybrid environment—some online and some in-person—were probably in the best position, because they could leverage the best of both and build an effective learning community. As is typical of LP professors, across the country they have risen to yet another daunting challenge and leveraging technology to achieve their disparate learning outcomes in the course.<sup>23</sup> But whether taught in-person or online, the course is the same, and the progression of the course follows the typical pattern described below.

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22. EDWARD L. DECI & RICHARD M. RYAN, *The Initiation and Regulation of Intrinsically Motivated Learning and Achievement*, in *ACHIEVEMENT AND MOTIVATION* 1 (Anne K. Boggiano & T.S. Pittman eds., 1992).

23. See Ted Becker et al., *ALWD/LWI Legal Writing Survey, 2019-2020*, <https://www.lwionline.org/sites/default/files/ALWD%20LWI%202019-20%20Institutional%20Survey%20Report%20FINAL%20Nov%2023%202020.pdf> (last visited Oct. 10, 2021); William & Mary Conference for Excellence in Teaching Legal Research and Writing Online (June 18 - 19, 2020), [https://law.wm.edu/academics/intellectuallife/conferencesandlectures/excellence\\_online\\_teaching/index.php](https://law.wm.edu/academics/intellectuallife/conferencesandlectures/excellence_online_teaching/index.php).

## B. Fall Semester

### *Introduction*

The fall semester begins with Orientation. Generally, an introduction to law school course is part of the Orientation week, and LP professors are often called upon to teach a class or two. Most commonly, we teach an introduction to the American legal system, including the State and Federal Court systems, and each legislative branch. You might think that a student who had been admitted to law school would know these basics, but unless they took a government course, or were pre-law in college, they generally do not. And understanding where law comes from, and how it is shaped by the judiciary, is a basic foundational building block to learning law school material. It is hard to read a case—which is most of what law students do in the first year—without knowing how it fits into the pantheon of legal precedent, and how it came to be.

If Orientation has not allowed the introduction of these basics to all incoming students, it usually falls to the LP professor to teach these topics very early in the fall semester. And right away we are confronted with a fact about what we teach that is often overlooked or misunderstood. Many of our colleagues think we teach legal writing. It is the “legal writing” course, after all. But we actually teach much more than just legal writing—we spend more time teaching legal reasoning and analysis skills—which is one of the many reasons that a title such as “Lawyering Process” is more appropriate for the course. As Professor Pamela Lysaght has expressed it:

We all teach legal reasoning and analysis, an absolute pre-requisite before any student can successfully communicate in a legal community. Neither legal ‘writing’ nor legal ‘communication’ reflects the essence

of what students must learn first and foremost— understanding the hierarchy of legal authority, recognizing the law applicable to a specific legal problem, and predicting a solution. All of these are thinking and reasoning skills.<sup>24</sup>

### *IRAC (and Derivative Organizational Forms)*

In practice, this means that early on—while we do teach the basics of hierarchy of legal authority—we are quickly into simple legal reasoning examples, in lecture and workshop format. Within a week, students produce their first written form of legal analysis, and they receive prompt feedback on that writing. Part of this critical step is learning the classic legal reasoning form known as “IRAC.” This form, used for many years in most types of legal expression, dictates the statement of the (I)ssue, the (R)ule, the (A)pplication of the rule, and, finally, the (C)onclusion.<sup>25</sup> Students struggle with each of these critical elements of the form and with the use of them together. Simply stating a legal issue properly and accurately requires a significant cognitive leap and takes considerable practice on its own. This is also true of a rule statement. Application skills require the use of factual comparisons,

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24. ABA LEGAL WRITING SOURCEBOOK 377 (J. Lyn Entrikin & Mary B. Trevor eds., 3d ed. 2020).

25. This rhetorical form has come under criticism for entrenching hierarchy and white privilege in the legal system. In their recent article, Professors Elisabeth Berenguer, Lucy Jewell, and Teri McMurtry-Chubb argue that as far back as Aristotle and Plato, who created the foundations of rhetoric, these forms of thinking were created in a world that included enslaved peoples and assumed elite privileged whites were the only ones empowered and entrusted to use these rhetorical forms. In their article, the authors do not suggest dispensing with IRAC or its variants but, rather, encourage further study and development of possible alternatives. These are important arguments, and still more substantive criticism that all LP Professors need to be aware of, sensitive to, and stay current on possible changes to one of the fundamentals of what they teach. Elisabeth Berenguer, Lucy Jewell & Teri McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 220 (2020).



which are hard to make properly, and particularly to focus on the *legally significant* factual comparisons, rather than all available ones. Stating a concise conclusion based on the analysis that came before it also seems simple to explain, but turns out to require considerable practice to master.

Sometimes, it helps students to see that the IRAC form is not that different from other forms of expression in other disciplines. Journalism uses a similar form,<sup>26</sup> Music has the sonata form,<sup>27</sup> effective Photography adheres to certain rules,<sup>28</sup> and Programming relies on sub-routines.<sup>29</sup> The Mandelbrot set in the study of Fractal geometry also show us a complex structure arising from simple rules and the repetition of forms within the whole.<sup>30</sup> When viewed in this broader (and broadening) way, students can start to see the IRAC form all around them, and to be less intimidated by it.

But beyond laying down the basic building blocks of legal analysis, if the first month in LP has a theme, it is establishing the ground rules and procedures for the course and setting expectations for professional

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26. The common journalistic form starts with the lede, which includes key facts: who did what, where, when, and why. This is followed by the inverted pyramid form, from the most important to the less so. It often ends with a wrap up sentence that references back to the lede. Chip Scanlan, *Writing from the Top Down: Pros and Cos of the Inverted Pyramid*, POYNTER (June 20, 2003), <https://www.poynter.org/reporting-editing/2003/birth-of-the-inverted-pyramid-a-child-of-technology-commerce-and-history/>.

27. The sonata form—at least in Mozart’s day—uses Exposition, Development, and Recapitulation, very much like IR, A, and C in the IRAC format. Sonata format also uses what is known as an ABA format, which can take the form of A, BA, which often presents as AA, BA, BA. These forms are much like the more flexible structure of IRAC, which LP Professors also teach, where you might use IRARAC or IRRAAC, when multiple sub-issues are contained—and need to be addressed—within the same legal issue. For additional considerations of the ways in which music and legal writing intersect, see Ian Gallacher, *Four Finger Exercises: Practicing the Violin for Legal Writers*, 15 LEGAL COMM. & RHETORIC: JALWD 209 (2018); Ian Gallacher, *The Count’s Dilemma, or, Harmony and Dissonance in Legal Language*, 9 LEGAL COMM. & RHETORIC: JALWD 1 (2012).

28. These rules include avoiding trailing lines out of the frame, and composition that encourages the eye to move around the image.

29. Which is another form of repetition and recapitulation.

30. See BENOIT B. MANDELBROT, *FRACTALS: FORM, CHANCE AND DIMENSION* (Echo Point Reprint ed. 2020); see also JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (Penguin, 20th Anniv. ed. 2008).

behaviors within it. In addition, we spend time introducing sub-topics that will be with us throughout the year: research and citation skills, legal diction, working with partners, and building a community of trust within each section. By the second month, we have gotten into the rhythm of the work, learned to accept close feedback, and have additional partner assignments to navigate.

### *Citation*

Citation instruction is so important and yet so abstract that it presents its own challenges to teach. Most LP professors delegate the teaching of citation to their Teaching Assistants (TAs), for several reasons. First, and most importantly, they are usually closer to the subject than most professors are. They often are concurrently serving on law review or a similar journal, but at a minimum, they have just learned the subject the previous year. It is important that the teaching of citation be designed and directed by the professor, but having the students execute it is generally preferable. This also sets them up well to manage the grading of citations for accuracy as to form throughout the year, which allows the professor to focus feedback from them on substantive legal analysis and drafting concerns. Finally, the professor usually considers the TA relationship as its own teaching and mentoring relationship, and many TAs seek out the job for this reason. So, the professor can help the student to learn how to teach effectively and manage minor student issues. They will usually offer office hours during critical periods of the semester—right before major assignments are due. In these office hours they do not fix student citation form, but rather—with proper training and emphasis—will answer specific questions about citation form, rather than specific citations the students are using in a particular assignment. If the TA were merely to edit citations or answer questions like, “Is this citation correct?,” the opportunity for long-term learning and retention of these abstract

concepts is much reduced.

TAs exercise an absolutely critical role in the teaching of LP<sup>31</sup>—citation is only part it. They help to establish and maintain the community of learning by providing a buffer between the student and professor. They act as role models for the 1L students—having just recently been in their “shoes” they are accessible and relatable for them. They can—if you authorize them to—become an early warning system for a student who is struggling (whether in LP or the rest of law school). They have usually been a student of the LP Professor in the prior year, so they understand where the whole ship is headed—something that can be elusive to a 1L student in the middle of the journey. Weekly meetings with TAs are recommended for planning of upcoming classes, discussion of grading citations, discussion of struggling students, and discussion of how the class is progressing generally.

### *Hitting a Wall*

It is predictable—it happens every year like clockwork—that in the first week of October (usually right at or around October 5-7), 1L students hit a wall and start to wonder why they worked so hard to get into law school in the first place. They have been there about six weeks and subjected to the firehose of information that 1L courses inundate them with. Why do we do this? I think the most charitable reason is that lawyers must learn to separate the wheat from the chaff, and do so quickly with large volumes of information. The best way to do this is to bury students in reading and assignments, so they are forced to learn to manage within it. But this is something that is wise to address with your students directly, and most of us do (in one way or another). One way to express the problem they are confronting is, “The sponge is full, and

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31. Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems in Using Teaching Assistants: Hard Lessons Learned from Peer Teaching Theory and Experience*, 13 J. LEGAL WRITING INST. 269, 269 (2007).

they have not figured out yet how to grow more sponge.” It feels overwhelming to many students, like they are drowning. A pep talk of some sort here helps, but perhaps the best thing is to merely acknowledge it. LP professors who do so will soon be visited by many of their students who want to share how they are doing with it all, and this helps to build a community of trust, but it also helps them to know that at least one of their professors is aware of the situation and cares for them.

### *First Major Feedback*

In late October, students receive detailed feedback on their first full memo completed on their own (without partners), and this can be an uncomfortable time—for them and for the professor. It is wise to let students know before returning the papers that “if something I marked on your paper could be interpreted in two ways, and one of them is mean or nasty, I meant the other one.” Even with that caveat, often this is the first grade of real consequence that many 1L students have received, and they are aware (sometimes hyper-aware) that grades are important in the job search process. It helps to have a detailed rubric that covers many sub-skills in their writing, because this makes the feedback less subjective, and more instructive to the student.

### *Final Memo*

The final memo is where most of the grade weight comes in the fall semester of LP, and it involves, in substantial part, a rewrite of the previous memo on which they received detailed feedback. In many ways, with proper effort on the part of the student, this is where “it all comes together”—when the skills solidify and students become more confident in bringing all the skills they have learned together in one document. The last two memos are based on their own research, so the

final memo exhibits the state of their skills in legal research, legal analysis, citation, memo format, legal diction, and overall writing skills, such as grammar and punctuation.

The critical learning in LP, particularly in the fall semester, takes place in that uncomfortable space—where rewiring of the brain happens and a new form of expression becomes internalized. Keeping that chaos—the uncomfortable space—going, without circuits breaking, is the daily, sometimes hourly, job of the LP professor, and requires some level of customization to each student. This sometimes involves extra (above the regularly scheduled) conferences, and almost always involves extra questions via email sent near the end of the term. The professor cannot predict when the moment the student puts these critical tasks together, and it will differ for each student. Our goal is to be available to the students when those moments happen, to help them make the last cognitive leap they need to make to have it all come together.

### *Criticism of the Full Memo Focus*

There has been criticism over the last decade or so that we should give up teaching the full legal research memo, since many law firms do not have the client money to pay for that anymore.<sup>32</sup> Instead, many research projects in law firms are produced in the form of email, with perhaps a few cases attached. This is certainly more efficient, and probably takes less time. But the suggestion that we should just teach this shorter version of a legal research memo (which is not even a memo per se) and dispense with the full written memo is misplaced. We must

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32. See Ellie Margolis & Kristen Murray, *Using Information Literacy to Prepare Practice-Ready Graduates*, 39 U. HAW. L. REV. 1 (2016); Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 32-33 (2008) (arguing law school education should reflect that substantive emails are the preferred method of client communication, with the traditional legal memorandum becoming outdated).

teach the full memo for three reasons: first, it provides thorough training on the accepted forms of legal expression and lays a groundwork for brief writing in the spring semester (those who advocate dispensing with memos will admit that briefs are still written in great quantity). Second, if the student knows how to write the full memo, they can then flexibly reduce it to a smaller, more efficient form and send it in an email. Third, if they are asked to write a full memo, they will know how to do it. So, for all those reasons, we still teach the full research memo, but this does not mean that students do not benefit from learning how to write the shorter form as well. The solution is to teach both, simultaneously, which many LP professors do.

Throughout the semester, we are working with “mock” problems that provide an ideal vehicle through which students can learn and practice these skills. Though they are mock problems, we always work and act as if these were real clients, so we can advance the goal of professional identity formation. We often have a client interview, and sometimes reveal new facts over the course of the problem, just as a real client might do. It is important that the problems we select are engaging for students, seem real or close to their real-life experiences, but are well designed to provide the raw material to practice the skills they are learning, and are also not substantively or factually overwhelming to them.

### **C. Spring Semester**

#### *The Dark Days*

In the spring semester, students return to law school in the dark days of January, having recently received their grades for the courses they took in the fall (including the grade you gave them in LP). LP professors are generally the only professors who give a grade and then see the students again the next semester. Students who are disappointed with

their grade in LP sometimes require some additional outreach to soften the distrust sowed by the disappointment. Even with outreach, some students struggle to come back from the disappointment the rest of the semester. Others can accept it, and for them, it “clicks” into place just a bit later than their peers, and they are able to excel in the spring.

### *Transition to Persuasion*

While the fall semester is focused on *predictive* writing and expression, the spring semester is focused on leveraging the foundation from the fall to focus on *persuasive* writing and expression. This usually takes the form of trial and appellate briefs, but some professors also teach mediation statements or summary judgment motions. Some professors will carve out a week or so early in the semester to address topics around the legal writing aspects of contract drafting. This helps students who find themselves less interested by the litigation focus of much of the course<sup>33</sup> and, instead, are interested in “deal making” types of legal work. A contract drafting exercise can give a basic introduction to what that sort of work requires and thus give a student inclined that way an idea of how they might select courses for their second year of law school. It also, of course, offers opportunities to emphasize the importance of careful legal writing.

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33. The course is sometimes criticized for this litigation focus, but the reasons for that are sound, for three primary reasons: first, most legal work surrounds disputes (in active litigation or not), second, these dispute-related documents are useful tools to train students on the fundamentals of legal expression, and third, the skills students learn with these documents are transferrable to much of what any lawyer does, whether litigation or transactions. Even so, the litigation focus of LP can (and probably should) be mitigated by the introduction of a unit on contract drafting, and many LP Professors do that as well. After all, it is another form of legal writing!

*Advanced Citation and Federal Research*

Citation instruction continues in the spring semester, with advanced topics, such as the use of signals and parentheticals. Legal research, having been focused on state law in the fall, often switches to federal law in the spring. This allows the student to leverage the legal research skills they built in the fall and apply it to a new set of statutes and case law, thus both broadening and cementing the basic legal research skills. Also, the email memo format introduced in the fall semester continues, with three increasingly difficult assignments in the spring.

*Collaboration*

Having been exposed to partner work in the fall, and found some frustrations with it, partner work in the spring is generally less contentious and more constructive. It is important that students learn how to work with other lawyers—they will be doing that a lot in their practice lives after all. Students also need to get used to receiving even more and more detailed feedback on their writing in the spring and to take the criticism constructively, whether from TAs, their partners, or the professor.

*Finally, It All Comes Together*

The spring semester ends with the filing of a fairly lengthy appellate brief, and then students present an oral argument before a panel of volunteer judges. Most programs use real courtrooms in their city for this exercise and rent judicial robes for the volunteer attorneys. It is an immense logistical undertaking and amounts to approximately fifty one-hour long arguments and 150 judges, robes, and courtrooms. This final experience is the capstone of the course, and students often remark on how once again the course (and the entire year of work) comes together



for them. Indeed, students say they finally feel like lawyers after they have completed it. With the extensive work the students put into it, to the volunteer judges, they also look very much like lawyers.

#### D. Formation of Professional Identity

We law professors often think of our teaching as being focused on the “content” of the course. We have “material” to “cover.”<sup>34</sup> We need time to achieve “coverage.” This sort of language is shorthand, perhaps, but it is off target for most of what we should be doing in law school. We are forming—birthing if you will—new lawyers. And Parker Palmer reminds us why community building is so important in our teaching: “Formation may be the best name for what happens in a circle of trust, because the word refers, historically, to soul work done in community.”<sup>35</sup>

But more specifically to law school, the formation of the lawyer’s *professional identity* is a pedagogical goal identified by the authors of *Educating Lawyers*, commonly known as the *Carnegie Report on Legal Education*, published in 2007. In Chapter 4 of the report, the authors explain how formation of the professional identity of lawyers is distinct from the lawyer ethics course required of all law school curricula by the ABA, and it criticized law schools for not paying enough attention to this kind of formation, particularly in the first year curriculum.<sup>36</sup> “In most law schools, the apprenticeship of professionalism and purpose is subordinated to the cognitive, academic apprenticeship.”<sup>37</sup> In an effort to define the concept, it used the term “professional identity”: “th[e] apprenticeship of professional identity include[s] conceptions of the

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34. Of course, the teacher’s job is not to *cover* material, but to *uncover* it. That might seem a trivial difference, but it is not, and we should be careful how we use those words to describe our teaching goals. As any LP teacher will tell you, words matter.

35. PARKER J. PALMER, *A HIDDEN WHOLENESS* 57 (2004).

36. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 140 (2007).

37. *Id.* at 132-33.

personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession.”<sup>38</sup> The report goes on to explain that achieving a balance that includes professional identity formation in the curriculum will require significant work: “To achieve this balance, legal educators will have to do more than shuffle the existing pieces. The problem demands their careful rethinking of both the existing curriculum and the pedagogies that law schools employ to produce a more coherent and integrated initiation into the life of the law.”<sup>39</sup>

While strides have been made over the last decade to expand opportunities for explicit professional formation—particularly in upper level simulation courses,<sup>40</sup> clinics, and some externships—very little shuffling of “the existing pieces” envisioned by the *Carnegie Report* has taken place in the first year curriculum, and it has fallen mostly to the LP course to take on this responsibility. Fortunately, the nature of a course that focuses on *what lawyers do* already lends itself to this sort of formation—and indeed it was already happening to some extent. And many LP professors are former practitioners, so we are well positioned to do this. But since the *Carnegie Report’s* emphasis on professional formation, LP learning outcomes and curricula have become much more explicit about this kind of formation, and we regularly speak with our students about it and design learning activities around fostering it.<sup>41</sup>

As noted, one of the learning outcomes for the LP course is to provide opportunities in which our students can begin to develop their professional identities as lawyers.<sup>42</sup> We do have the advantage of being the only course in the first year that is entirely focused on what lawyers

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38. *Id.* at 132.

39. *Id.* at 147.

40. For a detailed analysis of how simulation courses, such as LP and upper level simulations, are ideal for offering opportunities for students to form their professional identities, see Thomson, *supra* note 16.

41. More on what these are is discussed *infra* Section III.I.

42. See discussion of learning outcomes *supra* Section II.A.

do in their jobs, whether it be client interviewing, legal research and analysis, writing and oral expression, and counseling the client. Indeed, as described above, the course integrates all those topics and offers opportunities to practice them in a safe learning environment. But it is easy for the formation aspect to get lost in the business of the daily topics and tasks we put before our students, and for this reason, it is important to be explicit about what is also happening within and without the topics and tasks in the course syllabus.

What is “formation of professional identity,” and what was the *Carnegie Report* referring to when it said law schools did not pay sufficient attention to inculcating that identity in their graduates?<sup>43</sup> It could not have been referring to the ethics course—that course is required of all law schools by the ABA—and the rules come up in upper level and clinical courses all the time. It must have been referring to something else—some sort of standard above the ethical line that is established in the Rules of Professional Conduct.

In a prior article, I offered the following definition of professional identity for lawyers: “Professional identity relates to one’s own decisions about professional behaviors ‘above the [ethical minimum] line,’ as well as a sense of duty as an officer of the legal system and responsibility as part of a system in our society that is engaged in preserving, maintaining, and upholding the rule of law.”<sup>44</sup> Put another way, when we say we are “teaching” professional identity “it means we ask our students to finish this sentence: ‘I am a lawyer, and that means for *me* that *I* will resolve this *above the line* ethical dilemma as follows . . . .”<sup>45</sup>

But formation of a student’s identity is not something that can be taught, didactically. You cannot expect to be successful in forming someone else’s identity for them. This is why orientation programs—

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43 SULLIVAN ET AL., *supra* note 36, at 14.

44. Thomson, *supra* note 16, at 315.

45. *Id.* at 316 (emphasis in original).

where Deans and local Judges lecture new students about the honor code and lawyer's ethical obligations—are about providing *information* more than they are successful in achieving *formation*.

Instead, we must create engaging learning opportunities in which our students are forced to make those choices—above the line—about where they want to live their future lives as lawyers. We must place them in the role of an attorney and create situations in which they have to make those decisions for themselves. In so doing, they begin to form the professional identity of the lawyer they will become. Practical legal education of all kinds (including clinics, externships, etc.) is all about putting the student in the role of the lawyer and setting high expectations for behavior and product. It is impractical to expect to achieve such goals in large doctrinal classes, so this is yet another reason the LP course is so important.

In the first year, each law student must start the process of transitioning from being a student working toward a grade to a lawyer trying to solve a problem for a client. Much of that transition begins in the LP class. It happens through the work we do, the client problems we are working to solve, and role-playing by the students in client interviewing, counseling, and presenting an oral argument. It should also be explicitly noted and encouraged, and there are several good opportunities to do this within the confines of the already overburdened course.

In late September, when students are about to hit the wall of feeling overwhelmed by too much information, I speak with them for about ten minutes and ask them to consider the simple question: “Why are you here?” Each student must answer that question for themselves, but I often have students in my office wanting to talk about the topic for them personally soon after I address it in class.

In late October, I speak with my students about what it means to be a lawyer, the lawyer's role in society, and the obligation they are taking on to preserve, improve, and support the rule of law in our country, and

specifically connect it to the work we are doing in the course. I mean this as motivation for the last month of the semester but also to help them think—in the context of putting them in the lawyer’s role all semester—about how those elements all connect, *for them*. I am explicit about the “formation” aspects of our learning outcomes, and again, this discussion often leads to private discussions in my office.

With the combination of being overwhelmed by the volume of information, tackling the tasks we put before them, and the dawning sense of the scope of the responsibility they are taking on, students often reach a crisis of confidence in the final weeks of both semesters. But interestingly, by that time they do have the skills and commitment to do the job sufficiently (for a first-semester 1L at least)—they just do not know it yet. And so, conferences near the end of the semester often involve looking for a way to help them see that and build confidence in decisions they are making. As that confidence grows into the spring semester, students have formed their nascent professional identities and have a deepening sense of how they will address complex ethical and behavioral issues when they get into practice.

### III. HOW WE TEACH THE LAWYERING PROCESS

The overarching design of the LP course is, appropriately, centered around learning that is co-created by teacher and student and situated in the context of how problems arise in law practice and how they are resolved there. So, all of the problem sets we work on are designed to mimic real-life problems that commonly arise in the practice of law, and all of our work is centered around that context. This approach is based in deep educational literature that shows that knowledge construction is closely tied to the circumstance in which it is constructed and subsequently used.<sup>46</sup> Thus, LP professors focus much of our effort

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46. John Seely Brown, Allan Collins & Paul Duguid, *Situated Cognition and the Culture of Learning*, 18 EDUC. RESEARCHER 32 (1989).

around getting our students to *use* the knowledge they are developing *while* they are learning it. We activate that type of contextual learning in the following significant ways.

### A. Collaborative Work

An important component of LP every year is that we require students to work in collaborative teams to prepare the early assignments in both semesters. Collaborative work was always a feature of the spring semester, when students would co-write a brief and give an oral argument in a team of two. But in the last decade or so many LP professors have incorporated collaborative work in the early part of the fall semester as well, even though students sometimes resist working with classmates as they have so strongly internalized the importance of grades in the first year.

There are a number of reasons why we have so broadly incorporated collaborative work in the teaching of LP, even though students push back against it some of the time. First, the general research showing that learning is effective when it is centered around an interactive social process—or *social* constructivism—is compelling.<sup>47</sup> Second, the specific research explaining the cognitive benefits from collaborative learning, particularly in law school, is also convincing.<sup>48</sup> Third, we all intuitively know from experience that “there is no better way to learn something than to try to teach it to someone else.” Fourth, the collaboration is only on the early assignments in the fall, and the more significant grade weight is on the last two assignments, which they do

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47. LEV VYGOTSKY, *MIND IN SOCIETY* (Harvard Univ. Press, 1978).

48. DAVID W. JOHNSON & ROGER T. JOHNSON, *LEARNING TOGETHER AND ALONE: COOPERATIVE, COMPETITIVE, AND INDIVIDUALISTIC LEARNING* (5th ed. 1999); Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Classroom*, 31 ARIZ. ST. L.J. 957 (1999); Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 J. LEGAL WRITING INST. 185, 187 (2003).

individually. Finally, and perhaps most importantly, we are training future lawyers, and most lawyers work with other lawyers in one context or another almost all the time. So, an important learning outcome for the course is to help students learn how to do legal work with their colleagues, and it also contributes to their professional identity formation.<sup>49</sup>

It helps to give some thought to the partner pairings, and to pair people up by difference, rather than similarity. For example, an LP professor might pair younger/older, male/female/non-binary, small college/large university, and engineer/journalist students as partners. We learn more from those who think differently from us, and lawyers often do not get to select their co-workers. The professor should make the pairings and try to switch them mid-semester into a second pairing to maximize the learning benefit of working with others.

Learning the fundamental skills of the lawyer's job is an iterative process, with trying and failing, getting feedback, and trying and failing again. This is very stressful at times for students, particularly in the fall semester. They have been told over and over that their grades are so important to their future options that they can be very stressed. So, to get students to fully invest in trying something they know they will, at first, fail at, requires assuring them that there is a support system in place to help and support them. A reasonable analogy would be that we ask them to walk out on a tightrope, but there is a net to catch them if they fall. A key aspect of that net is that most of the grade weight is on the last two memos, with more than half of it on the final memo. So, they have time to safely make mistakes early in the semester when they are learning. Another key aspect is the nearly constant support, feedback, conferencing, and an "email open door" that the LP professor, and the TAs, provide.

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49. *See supra* Section II.D.

## B. Building Confidence

As the spring semester progresses, the LP professor's job is to gradually remove the net underneath the students, so they build their confidence that they can do this on their own, without as much support and safety—because they will not have much of either when they start their first law job, for some as soon as a few weeks after first year spring semester finals have concluded. Indeed, an LP professor's job is to make himself or herself obsolete—no longer needed. At this point in the semester, I encourage my students to trust their judgment, and to focus their edits on whether the brief as a whole will make sense to their senior attorney and ultimately a judge. It is at this point where they begin to understand that there are no hidden answers that I am intentionally being opaque about—where if the student asks just the right question, the sun will come out. Sometimes we have to offer the famous quote: “No piece of legal writing is ever finished; it is merely abandoned.” In other words, there is always more we could be doing, thinking, editing, and polishing on a piece of legal writing, but, at some point, students have to get to the place where they can say they have really worked hard on this, and they have done as much as they can do.

Building confidence in first year students is more difficult than it should be, as much of the rest of the first year curriculum is at least in part based on *shaking* their confidence. The two parts of the curriculum work at cross-purposes in this way, and getting all of our students to have confidence in their writing is virtually impossible, because their confidence has been *so* shaken in the other courses that they feel they are on shifting sands. And yet we know that motivation to learn is critical to success, and students are motivated to learn when they perceive it to be valuable and relevant, and critically when they believe that they are *capable* of learning it.<sup>50</sup>

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50. See JERE E. BROPHY, *MOTIVATING STUDENTS TO LEARN* (Routledge, 2010).



Helping students to understand that they do not need you anymore is essential for their confidence, but it can be a bittersweet experience for the teacher—everyone wants to feel needed, and teachers generally feed on that need. This aspect of the teacher/student relationship has been described as “intimate, yet detached.”<sup>51</sup> Cycling through this kind of intimacy, and then abrupt detachment year after year, for hundreds and hundreds of students, can be emotionally draining. This is true for all teachers, but in law school, particularly for the LP professors. There is a need for them to build a practice of recharging over the summer. When August comes around—and it will—having spent the summer running around the country to speak at conferences or visiting family can be draining and can lead to burnout at some point during the upcoming school year.

Finally, building confidence in our students, and the fundamental abilities they have learned, is somewhat ephemeral. They know, after the course, that it made a difference in their lives, but because it has “become a part of them” and thus second nature, they do not usually remember fully what a transformation it was for them. Although, to be fair, some do, and write us lovely emails about it in the years that follow their time in our class.

### C. Assessment of Student Work

It is generally understood in the legal academy that the sort and quantity of feedback we give to our students is detailed and substantial. Everyone understands that learning how to write well requires significant feedback and rewriting based on that feedback. But beyond that basic understanding, it is not widely understood how substantial the feedback we give our students actually is.

Other than LP, the first year courses have traditionally ended with a

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51. Arnold Josie, *Learning from Psychotherapy for Postgraduate Supervision*, 5(2) J. UNIV. TEACHING & LEARNING PRAC, 56, 63 (2008).

final exam. Although the use of midterms—or at least “practice exams”—has increased many still end with the full grade weight on the one final. These are forms of assessment known as summative exams, since they assess what the student knows—and is able to express—*in sum* at the end of the course. This is assessment with the goal of “sorting students” and giving them a grade. Many professors are willing to review the exam with the student after grades have been submitted, but usually the next semester has begun, and students do not often take advantage of this.<sup>52</sup>

Formative assessment is distinguished as being *formative* of student learning during the pendency of the course. That is, it is a form of feedback designed to help the students learn the content of the course before the end of the semester. And it involves both multiple sets of detailed feedback on student written work and also many one-on-one conferences between the professor and the student during the course over more than a dozen different assignments.<sup>53</sup> In this way, the student learns iteratively what they need to learn, skill by skill. It comes from a process of trying and failing and receiving feedback, and trying again. So, the kind of assessment that LP professors provide has been formative in nature, in both semesters of the course, and it has pretty much always been that way.

Over the last decade, a deeper understanding of assessment for learning has come to law schools. In 2015, the ABA added a requirement that law schools establish learning outcomes across the curriculum and, in Standard 314, required law schools to “utilize both formative and summative assessment methods . . . to measure and improve student learning and provide meaningful feedback to

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52. Further, many schools have various rules that limit changes and appeals of grades, so students give up and move on without investing that potential learning time.

53. Even when a doctrinal course has a midterm, or even two or three of them, they are often ungraded and disconnected from each other and end with a non-cumulative final. It should be obvious from the discussion here that this is the opposite of formative assessment.

students.”<sup>54</sup> While it is good that the ABA has recognized the value of formative assessment, it is not clear that much has changed, at least in the first year. LP professors provide formative assessment, and most (although not all, and this seems to be improving) of the assessment provided by the other six or so courses students take in the first year are primarily summative only. In those courses, students learn how they were doing when they get their grade at the end of the semester. Opportunities for course correction and iterative skill-building during the semester remains limited in classes that provide limited, or no, formative assessment.

There is, of course, a reason for this. Providing quality formative assessment is hard and time consuming work, and that is a big reason why the LP classes are typically limited in size, and substantially smaller than most of the other first year courses. Indeed, it is recommended that LP classes are limited to sixteen to eighteen students in each section, and that LP professors have no more than thirty-six students in their teaching load.<sup>55</sup> Beyond that, it is difficult to provide the kind and quality of formative feedback that LP professors provide their students over the course of the semester.

A fairly typical group of assignments for the semester in LP are these: six citation exercises, three email memos, and four full research memos (two closed and two based on open research by each student). These memos increase in length and complexity over the course of the semester, starting at four to five pages and ending at twelve to fourteen pages. TAs help with the citation exercises and with supervision help provide feedback on the email memos, using a rubric designed for that purpose. But the four memos are typically assessed by the professor, and quick turn-around is essential, so the students get the benefit of the feedback close to the time they were writing the assignment. Each

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54. ABA Sec. Leg. Educ. & Admis. to the B., Standards for Approval of Law School and Interpretations, Stand. 302, 314.

55. AMERICAN BAR ASSOCIATION, LEGAL WRITING SOURCEBOOK (J. Lyn Entrekin & Mary B. Trevor eds., 3d ed. 2020). See, Becker, et al., *supra* note 23.

assignment gets individual feedback on the page, a detailed rubric marked, and an overall comment provided to direct further work.

In October, after students have submitted their third memo, and their first completed individually, and the first on their own research, it is typical for an LP professor to provide the following level of feedback: approximately thirty to forty comments in the margins, to tick thirty or so boxes on the rubric, and to write an individual comment for each of thirty-six to forty papers. This ends up totaling around 2,250-2,500 individual items of feedback across all students assigned to each professor. And the goal is to return the papers in a little over a week, so that there is sufficient time for conferencing and revision (and addition) to the final memo, which is the final submission at the end of the semester. To say that this is an exhausting process, physically and mentally, would be an understatement.

In the spring semester, the load of assignments is similar: six citation exercises, three email memos, and two major briefs, one addressed to a trial court and one addressed to an appellate court. There are often shorter skill-building assignments before the briefs, which also require feedback. The trial brief grading period comes in mid-March and has similar deadlines for turn-around as the third memo in the fall semester and a similar amount and quality of feedback provided. Also, similar levels of exhaustion for the LP professor. At the end of both semesters, the timing of feedback is not so short and critical, but the quantity and quality of the feedback is the same on the final work submitted by each student. That way, the summative assessment for the fall semester final memo becomes formative assessment for the next semester, as what has been learned about legal writing and expression carries over, and is built upon, in the second semester of the course.

Given that the formative assessment work during the semesters is so high—and yet so critical—it is common for LP professors to attempt various ways to reduce the burden of providing this crucial sort of formative assessment. Many have adopted a system of “live grading”

where the professor sits with the student and grades the paper in dialog with the student.<sup>56</sup> Others have experimented with voice comments, and even some macro programs to copy/paste the comment text.<sup>57</sup> Another approach is to use two or three dozen abbreviations for common problems, and use those as shorthand in commenting. But, generally speaking, we make a mistake when we think we can automate or streamline this hard work. The problem is, the best comments are those that are individual to the particular student. There are a number of problems that repeat across memos, for certain, but not that many. Students have a nearly infinite way of misunderstanding what they are trying to do in these assignments, but that is all part of the learning process for them.

#### **D. Student Conferencing and Teaching over Email**

*“At its deepest reaches, knowing is always communal.”*<sup>58</sup>

Student conferences are so important for our students, particularly when they are scheduled at just the right time to address what they are struggling with. The concept you have taught and retaught in every form you can think of might still be elusive to them, but the act of articulating the specific struggle they are having (which they might never do if you did not require the meeting) and your explaining it once more, in person, is often what closes the loop for some of them. A good LP teacher looks

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56. Patricia Grande Montana, *Live and Learn: Live Critiquing and Student Learning*, 27 PERSPECTIVES: TEACHING LEGAL RSCH. & WRITING 22 (2019). In 2012, Stetson University School of Law hosted a conference “The Pedagogical Method of Live Commenting and Grading,” proceedings of which can be found at <https://www.stetson.edu/law/academics/lrw/webinars.php>.

57. Anne Enquist, *Critiquing and Evaluating Law Students’ Writing Advice from Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1143 (1999).

58. PALMER, THE COURAGE TO TEACH, *supra* note 1, at 55.

forward to these “light bulb” moments.<sup>59</sup>

But it is very important to require the student to articulate the question. If they understand how to articulate the question, that is a learning step in itself. Sometimes students take advantage (or try to, without realizing that is what they are doing). They will read a sentence to you a few days before a legal memo assignment is due and say, “Is that right?” And then do it again, and again. They will do this through the whole memo if you let them. And so, you need to gauge if it is a question in there that they need help with, or whether they really just need a confidence boost. Sometimes you can tell right away that they are getting it—they are just a step or two away from locking onto the concept. A technique many LP professors use is to “answer around” the question—that is, affirm points related to the question, without answering the question directly. With that help, and confidence boost, they can generally then answer the original question themselves, and when they do that, they will have a much deeper understanding—and likely will retain better and be able to reuse it later—the concept they thought they were struggling with.

Often the question they are asking is something that is context specific: “Is this question presented a good one?” And while you can certainly comment on its form, the most important thing about a question presented is that it be properly reflective of the rest of the memo. You would have to read the entire memo to fully answer the question, so you need to, first, help them to understand that and, second, help them to see the relationship between the question presented and the rest of their memo. An LP professor in conference with a student over their work has to walk a fine line between helping them with a genuine problem they are having and not “approving” of what exactly they are doing, because you might—seeing the entire memo later to grade it—

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59. Robin S. Wellford-Slocum, *The Law School Student Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 257 (2004).

realize that in context they could have done this or that better, and then you risk the student thinking: “Well, (s)he said that it was fine when I asked her.” We are sometimes accused of “hiding the ball” when we do this, but what we are trying to do is get the student to answer the question themselves—with guidance—so they will learn it better. If a student conference involved merely the student asking over and over for approval of what they have written in draft, it would reduce the opportunity for deep learning to an editing exercise, and we must not be their editors. In our commenting—in writing or in conference—we show them the first errors and ask them to find the rest of the similar errors and fix them all.

There is also an intensely personal aspect to these conferences. Some students accept criticism willingly and openly, but many do not. So, we have to be aware of the sensitivities of the particular student as we provide feedback on their work. “It is important for the students to know . . . that they are not the work they make . . . [Students] who make flawed and misguided work are pained in their hearts because they think this is a judgment of who they are and who they can be.”<sup>60</sup> So it is important to provide feedback that is clear, supportive of further work by the student, while always being compassionate and recognize that the burden of the work you are asking the student to do is substantial.

LP professors engage in a kind of conferencing with our students that is unlike most student conferencing, and we do it for thirty-five to forty students at several key times per semester. Often, LP professors spend up to fifteen to twenty hours in a week doing this with our students, in rapid-fire sessions of several hours per day, particularly in the days leading up to the due date of a major assignment.

In addition to conferencing in person, there is much micro-conferencing that takes place via email. The important thing for the professor is to get the student to make the connections they need to make whenever that is. Sometimes, it is late at night, not in class, and not in

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60. JESSE BALL, NOTES ON MY DUNCE CAP 15 (2016).

conference. So, this often requires late night emails—sometimes a series of emails, rapid-fire. But the LP professor wants to be there with their students in the moment their understanding is coming together, whatever the medium. Students learn, build, and get these skills mostly in their own order and through their own special self-constructed pathways. Adjusting to that on the fly is a constant for an LP professor. Explaining each concept in a few different ways, and at different times, is essential for many students. So, LP professors are always on alert during the semester to these micro-teaching opportunities. We often read and reply to emails at all hours, believing that if this is the moment when it comes together, we want nothing more than to be there in that moment with them, even if it is late on a weekend night.

Having said that, there are also cases where the teacher has to decide whether to respond right away, and when to wait an hour or two for the question to percolate in the student's mind. Generally, these are the emails that are written before the student is ready to fully articulate the question. If you wait an hour or two, often the student will write another email that is just a smidgen further along in their thinking about this part of their writing assignment, and then you can answer the first one with, "See my answer to your second question . . ." and then give the full answer to the second one.

We write these emails—some of them quite long—and we re-write them so as not to make an error or state something in a confusing way. We endeavor to eliminate typos or be anything other than crystal clear about the question we have been asked. Otherwise, we set them back on their path.

Thus, if we are doing our jobs well, we end up living in a state of suspended animation during the semester, particularly near the end of each semester. All good teachers do this, but it is particularly acute for LP teachers. There is so much students learn outside of the classroom, and we need to be there in those moments when and where the



connections happen.<sup>61</sup> But, for the most part, we cannot be. Email has helped with their access to us at off hours, but it is common for some of those emails to take twenty minutes or more to write, each. As a result of this constant “on edge” stance—ready to jump in on a moment’s notice and help the student where they are at that moment. Near the end of each semester, we are engaged almost 24/7 in how our students are progressing, and it creates a level of anxiety that can be truly exhausting by the end of the semester. To say that we think about our students and their individual learning needs and circumstances 24/7 *all semester long* is a bit of an overstatement. But not much of one—when we are at our best, a significant portion of our “background processing” head space is dedicated to thinking about our students and where they are on their individual (and indeed, lifetime) journey as they begin their lives as attorneys.

### E. Counseling

*“This relational way of knowing . . . can help us reclaim the capacity for connectedness on which good teaching depends.”<sup>62</sup>*

Our students come to us for individual advice and career counseling—and sometimes just life counseling—all the time. We invite it, and we are a natural locus for it in the 1L year. We are not, by any means, replacements for the Associate Dean of Students or the University’s counseling service. But to a point, we need to be accessible to our students for those tentative questions as they are forming their understanding of their professional vocation and identity. Indeed, most of us consider it to be part of our jobs. Gaps in a less than robust faculty

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61. This discussion is in no way to suggest that we should be – or need to be – “helicopter professors.” Students must come to us and articulate the question they need help with – we cannot stand over their shoulders, literally or virtually – and interject ourselves. That would short-circuit the learning process. See Emily Grant, *Helicopter Professors*, 53 GONZ. L. REV. 1, 4-7 (2018).

62. PALMER, THE COURAGE TO TEACH, *supra* note 1, at 57-58.

advising system are often filled by us. When they have major life events in the first year, a baby, a death in the family, we are the ones—together with the Associate Dean of Students—that they turn to, and we try to help and support them, to carry at least a portion of those joys, sorrows, and burdens with them.

In the spring semester, when it comes time for students to register for their 2L courses, we become career counselors to those who seek us out for advice on courses to take in the next two years. Again, we do not replace, but rather supplement, the career guidance counselor in the law school. But we do provide an extra touch point of advice for them and help them to think through the balancing of coursework, internships, clinics, law journal work, and the many opportunities presented by most law schools today.

Because of the bandwidth required to do all of this, it makes it difficult to do much else during the semester—committee work can be balanced well with this, but the form of measurable disconnection required to write an article during the semester is very difficult. An LP professor, with two sections of students in the course, who is effectively writing a complex law review article during the semester, is either superhuman, or something is probably getting short shrift somewhere.

Yes, some of this kind of counseling by professors happens in other courses, particularly the clinic, but that is usually fewer students and it is not in the most formative part of law school—the first year. We are the only course that does this with new students, or perhaps more accurately, complete lawyer novices.

## F. The Attitude of Service Work

*“Teaching is Emotional Labor.”*<sup>63</sup>

At its best, teaching of all kinds is a service profession over all else. But not everyone approaches the task from this perspective. For many, particularly in higher education, teaching is an obligation that takes them away from their scholarship and research. And there are some good reasons for this, because the research and scholarship imperative are important too, and being a productive scholar does not necessarily involve the same skills that great teaching does. This is because teaching with a service orientation requires a tremendous amount of time and attention to each student combined with a kind of softness and vulnerability. And it requires Vulnerability, Humility, Courage, Passion for the subject, and yes, even Love.

### *Vulnerability*

Vulnerability is probably one of the greatest challenges to teaching LP, year after year. We have to allow ourselves to be disliked, even hated, as we give tough assignments and push our students into uncomfortable mental spaces where the real learning takes place. Each student has a different path to building this knowledge and skill, and an LP teacher must be willing to subordinate themselves to this reality and treat each student as an individual. Interestingly, this softness and vulnerability—which we must carefully maintain—is sometimes at odds with faculty politics. Indeed, it can be simply incompatible with the bloody knuckle faculty political battles that sometimes occur in law schools. When we rise to that bait, we risk losing our vulnerability in the classroom that is so important to creating community there, and the

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63. BARBARA LARRIVEE, CULTIVATING TEACHER RENEWAL: GUARDING AGAINST STRESS AND BURNOUT 37 (2012).

motivation to keep giving that vulnerability to our students.

### *Humility*

Great teaching of the LP course requires humility—an essential modesty. An LP teacher who is drawing attention to himself is drawing it away from the students. This is very hard to maintain over the years, because a sustained subordination of ego is not natural for most humans. But what we teach is inexact, and we must be in service to others—our students—as we ask them to stretch and grow.

### *Courage*

It also requires courage—it takes courage to teach in an open-ended way because in legal client matters the attorney does not know what will happen all the time. In an anatomy course in medical school, when the professor is lecturing on the bones of a skeleton, this is a subject that is fixed. But our subject is about balance between competing choices, and teaching it requires courage to stand behind inexact arguments and terminology.

### *Passion*

You have to have passion for what you do in many areas of life, but particularly in teaching this course in law school. Passion for the subject is infectious, and students often comment favorably on their professor's passion for the subject they teach, whatever the course. The late novelist David Foster Wallace was a creative writing teacher for several years at three colleges. In *The David Foster Wallace Reader*, there is a collection of his syllabi for the courses he taught at those schools. His mother, also an English teacher, offers this wisdom about teaching—describing how her son David approached his teaching—in an introduction to his

teaching materials: “Good teachers are those who so love their subjects that they try with all their might and main to help students to love them, too, forever.”<sup>64</sup>

In LP, the professors who teach it are—in most cases—giving it the best years of their legal careers, and have largely put aside ambition for wealth or academic recognition, which is already a powerful measure of their passion for the subject. They feel called to the work, and it becomes their vocation. The poet David Whyte, in his book *Consolations*, says this about the relationship between ambition and vocation:

Ambition, left to itself, like the identity of the average billionaire, always becomes tedious, its only object the creation of larger and larger empires of control; but a true vocation calls us out beyond ourselves; breaks our heart in the process and then humbles, simplifies, and enlightens us about the hidden, core nature of the work that enticed us in the first place.<sup>65</sup>

In his seminal book, *The Courage to Teach*, Parker Palmer stresses the importance of establishing a “community of truth” in every classroom to encourage and support deep learning.<sup>66</sup> But he laments that most teaching goes against this principle. Instead, he writes:

[O]ur conventional pedagogy emerges from a principle that is hardly communal. It centers on a teacher who does little more than deliver conclusions to students. It assumes that the teacher has all the knowledge and the students have little or none, . . . that the teacher sets all the standards and the students must measure up. Teacher and students gather in the same room at the same time

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64. THE DAVID FOSTER WALLACE READER 601 (Little, Brown & Co., 2014).

65. DAVID WHYTE, CONSOLATIONS: THE SOLACE, NOURISHMENT AND UNDERLYING MEANING OF EVERYDAY WORDS 14-15 (Many Rivers Press, 2015).

66. PALMER, THE COURAGE TO TEACH, *supra* note 1, at 97.

not to experience community but simply to keep the teacher from having to say things more than once.<sup>67</sup>

### *Agape Love*

Establishing a community of truth in the LP classroom requires vulnerability, humility, courage, and infectious passion for the subject. And it also requires a kind of *love*—specifically, the kind of love described in the Ancient Greek concept of *Agape*.

To be absolutely clear, when using the word “love,” there are those who might recoil, but this would only be through a misunderstanding of the point being made. There are plenty of cases in all levels of education where teachers have abused their position of trust and engaged in a different kind of love—*Eros*. In no way is the use of the word “love” here meant in this way. Indeed, there probably is no better way than to destroy a community of truth than to engage in an inappropriate relationship with one of your students. But the ancient Greeks articulated four different kinds of love, including *Eros* (the type of love *not* being suggested here), *Storge* (empathy), *Philia* (the type of love through which we love our friends and family), and *Agape*—which refers to a very different sort of love than the other three.<sup>68</sup> It is also one we do not talk about much, especially in academia.

One of the modern world’s most expressive proponents of *Agape* love was Dr. Martin Luther King, and it was central to his belief in the importance and impact of non-violent protest. He explained through

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67. *Id.* at 118. If there is one overwhelmingly common characteristic of teaching LP, it is that we have to say things way more than once, and this is because the nature of what we teach requires an iterative learning process.

68. John P. Miller, *Education and Eros*, in INTERNATIONAL HANDBOOK OF EDUCATION FOR SPIRITUALITY, CARE AND WELLBEING 581 (Marian de Souza et al. eds., 2009) (for a discussion of *Agape* (587-88), *Storge* (583-85), *Philia* (585), and *Eros* (589)). See also C.S. LEWIS, THE FOUR LOVES (1960).

many sermons and writings<sup>69</sup> that *Agape* is not a sentimental or affectionate kind of love but rather love in the sense of deep understanding and redemptive good will:

*Agape* means understanding, redeeming good will for all men. It is an overflowing love which is purely spontaneous, unmotivated, groundless, and creative. It is not set in motion by any quality or function of its object . . . It is a love in which the individual seeks not his own good, but the good of his neighbor. *Agape* does not begin by discriminating between worthy and unworthy people, or any qualities people possess. It begins by loving others *for their sakes*. It is an entirely “neighbor-regarding concern for others,” which discovers the neighbor in every man it meets . . . Consequently, the best way to assure oneself that love is disinterested is to have love for the enemy-neighbor from whom you can expect no good in return, but only hostility and persecution.<sup>70</sup>

Most faith traditions also contain this concept. “The notion [of *Agape*] is nearly identical to one of Buddhism’s four *brahmaviharas*, or divine attitudes—the concept of *Metta*, often translated as loving kindness or benevolence.”<sup>71</sup> In Japanese culture, it is expressed in the

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69. See THE PAPERS OF MARTIN LUTHER KING, JR. VOLUME I: CALLED TO SERVE 263-67 (Clayborne Carson et al., eds. 1992); Martin Luther King, Jr., *A Comparison of the Conceptions of God in the Thinking of Paul Tillich and Henry Nelson Wieman* (Apr. 15, 1955), reprinted in THE PAPERS OF MARTIN LUTHER KING, JR., VOL. II 339-544 (Clayborne Carson et al., eds. 1994) (Ph.D. dissertation, Boston University); Martin Luther King, Jr., *Contemporary Continental Theology* (Jan. 15, 1952), reprinted in THE PAPERS OF MARTIN LUTHER KING, JR. VOL. II 113-39 (Clayborne Carson et al., eds. 1994) (graduate student paper); Martin Luther King, Jr., *The Christian Way of Life in Human Relations: An Address Delivered at the General Assembly of the National Council of Churches* (Dec. 4, 1957), reprinted in THE PAPERS OF MARTIN LUTHER KING, JR., VOL. VI 322-28 (Clayborne Carson et al., eds 2007) at 322-328.

70. MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 19 (reprint ed. 1990).

71. Maria Popova, *An Experiment in Love: Martin Luther King, Jr. on the Six Pillars of Nonviolent Resistance and the Ancient Greek Notion of ‘Agape,’* BRAINPICKINGS, <https://www.brainpickings.org/2015/07/01/martin-luther-king-jr-an-experiment-in-love/> (last visited Oct. 22, 2021); see, e.g., BHANTE HENEPOLA GUNARATANA, *LOVING-KINDNESS IN PLAIN ENGLISH: THE PRACTICE OF METTA* (2017).

word *amae*, or “indulgent love,” that dictates that all relationships should be based on the kind of love that indulges people’s needs as well as their idiosyncrasies, even when it is difficult to do so.<sup>72</sup> Christianity also contains the concept, and uses it to describe God’s love for man. The passage of the Bible often used in wedding ceremonies—from St. Paul’s letter to the Corinthians—speaks to this:

If I speak in the tongues of men and of angels, but have not love, I am a noisy gong or clanging cymbal. And if I have prophetic powers, and understand all mysteries and all knowledge, and if I have all faith, so as to remove mountains, but have not love, I am nothing. Love is patient and kind; love is not jealous or boastful; it is not arrogant or rude. Love does not insist on its own way; it is not irritable or resentful; it does not rejoice at wrong, but rejoices in the right. Love bears all things, believes all things, hopes all things, endures all things.<sup>73</sup>

The great Christian writer C.S. Lewis describes this as a selfless love, a love that is passionately committed to the well-being of another, and argues that it is the “greatest of the four loves.”<sup>74</sup> This kind of love transcends and *serves* regardless of circumstances.

A related concept of service to others in the Christian tradition is one of the three virtues, *Caritas*, or Charity.<sup>75</sup> This refers to charity towards others through an altruistic love for them, particularly those less fortunate than ourselves.<sup>76</sup> While that might seem like a stretch in the

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72. Yu Niiya, Phoebe C. Ellsworth & Susumu Yamaguchi, *Amae in Japan and the United States: An Exploration of a “Culturally Unique” Emotion*, 6(2) *EMOTION* 279, 280 (2006).

73. 1 Corinthians 13:1-2, 4-7 (Revised Standard).

74. See LEWIS, *supra* note 68.

75. Katie Eriksson, *Caring Science in a New Key*, 15 *NURSING-SCI. Q.* 61, 62 (2002).

76. *Id.*



context of legal education, it is not. We forget sometimes that we are incredibly fortunate and privileged to have been able to go to law school ourselves, and excelled enough at it that we became law professors. Many of our students are struggling to get through the day, and they (mostly temporarily) hate us for piling on the work. We might have to do so for pedagogical reasons yes, but when we lose touch with our student's struggles, we bruise the community of truth we want to establish and maintain in the classroom—students are never our enemies. When, for example, you hear a colleague or two complaining about their students (late to class, surfing on their laptops, etc.), this sets up a dynamic that can damage community. Dr. King reminds us of the centrality of community in the concept of Agape this way:

*Agape* is not a weak, passive love. It is love in action . . . *Agape* is a willingness to go to any length to restore community . . . It is a willingness to forgive, not seven times, but seventy times seven to restore community . . . [I]f I respond to hate with a reciprocal hate I do nothing but intensify the cleavage in broken community. I can only close the gap in broken community by meeting hate with love.<sup>77</sup>

The idea of applying this sort of love to students is not a common one, but it is also not a new one. The progressive eighteenth century Swiss educator Johann Heinrich Pestalozzi was groundbreaking in his time for his work educating the whole student, seeking to achieve “an equilibrium of what he called ‘head, hands and heart.’”<sup>78</sup> Pestalozzi believed there was an “inner dignity” to each student, and that “without love, neither the physical nor the intellectual powers will develop naturally.”<sup>79</sup>

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77. KING, *supra* note 70, at 20.

78. ANNIK LAFARGE, CHASING CHOPIN: A MUSICAL JOURNEY ACROSS THREE CENTURIES, FOUR COUNTRIES, AND A HALF-DOZEN REVOLUTIONS 66 (2020). This sounds a lot like the integrated learning propounded by the Carnegie Report. *See* discussion *supra* notes 36-39.

79. *Id.*

More recently, law school Deans of Students have discovered the benefit of selfless love when working with students. In an article by Associate Dean David B. Jaffe entitled *The Key to Law Student Well-Being? We Have to Love our Law Students*, he describes the ways in which Deans, Faculty, and the Admissions and Orientation processes can all be reoriented to greater care of our students during their time in our law schools: “Together, greater expressions of love to our students and attention to their wellness and mental health can only result in these individuals experiencing more healthy and productive lives in law school and in the profession.”<sup>80</sup>

In contrast, too often in legal teaching, we feel like we have to use fear to motivate our students. Fear of the grade, fear of a withheld letter of recommendation, but more immediately—fear of in-class humiliation. The “Socratic Method”—so famous in law school—often involves humiliation of one kind or another. Over the years, I have had many students tell me they felt humiliated in their doctrinal classes. But there are at least two problems with using fear or humiliation as a teaching technique. First, if we ever humiliate or insult a student, the lesson is quite plainly over—not only for that student, but for similarly situated ones as well. It is just not an effective way to open a channel for learning—instead, it shuts it down and creates unnecessary student stress.<sup>81</sup> Second, as Barbara McClintock’s work says about the kind of love great teachers have for their students—it is a kind of “intimacy without the annihilation of difference.”<sup>82</sup> Through this lens, teaching

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80. David B. Jaffe, *The Key to Law Student Well-Being? We Have to Love our Law Students*, PD QUARTERLY, February 2018, at 16 (NALP). If there is a silver lining to the 2020-21 Covid pandemic, it is that it seems to have encouraged all faculty to acknowledge and emphasize the importance of mental health and wellness more than we have in the past.

81. Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649 (2018); Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 781 (2013).

82. EVELYN FOX KELLER, *A FEELING FOR THE ORGANISM: THE LIFE AND WORK OF BARBARA MCCLINTOCK* 55 (Freeman, 1983).

through humiliation not only shuts down student learning and bruises community, but it also serves to undermine inclusive teaching practices. All of our students, regardless of circumstances, race, gender, sexual orientation, or any other kind of difference from the “mainstream,” deserve to be treated with equal dignity, respect, and yes, love. Of course, when you have a student who is struggling, and you treat them with equal respect and dignity, it is good to remember that everyone else in the class is watching you. This is a truth heightened in the small-sized classes we teach in LP.

### **G. Teaching Methods to Advance Community and Agape**

If this Article has convinced the reader of the need to establish and maintain a healthy community of learning that includes Agape love in the LP course, some practical methods of doing so might be in order at this point. Fortunately, there are some fairly obvious—although none of them easy—teaching methods that can be used, and many teachers use them already, and many LP Professors use them regularly and with care. But perhaps a “Top Ten” list here will be helpful.

#### *1. Manage Expectations Throughout*

Because there are so many “moving parts” to the LP course—there must be, we have so many disparate learning outcomes to achieve—it is incredibly important to keep students apprised of what has been covered, what is coming up, and to explain why. Instructions on assignments need to be written and provided to students and explained in class, and these instructions must be crystal clear. This helps students to understand what they are doing now, and why, and what they will be asked to do next, as well as how all of that interrelates.

#### *2. Sweat the Details*

Again, because there are so many moving parts in the course, it is

important to keep track of all the details and make sure the “trains run on time.” Our Teaching Assistants help tremendously with this. An LP professor can lose their students in even one significant logistical problem, or perhaps two in a semester. And the least we can do is make it all seem seamless, so as to keep students focused on the work, rather than confusion on the details.<sup>83</sup>

### *3. Be Hyper Organized*

To sweat the details requires being hyper organized. Some of our colleagues have accused us of being “perfectionists.” But all we are trying to do is keep our students from becoming over stressed, while also putting a great deal of work on them. We would much rather they spend their bandwidth on the work, rather than having to ask us, TAs, or their classmates what the heck they are expected to do next. Hyper organization helps us do this—call it perfectionism if you like.

### *4. Encourage the Growth Mindset*

Carol Dweck’s groundbreaking work on the growth mindset<sup>84</sup> has significant application to students in law school generally, but especially in LP. The growth mindset in a student is one that is able to accept criticism, and handle setbacks, and who can see that a failure or setback is not a measure of inability.<sup>85</sup> Who is able to move from “prove” to “improve.”<sup>86</sup> Students who look at their work that way are open to the

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83. I sometimes describe the course—to my TAs and colleagues—as being “like a jalopy held together with chewing gum and string going down the highway at seventy-five miles an hour,” and further, that our job is to hold the jalopy together, and to keep our students from seeing us do so.

84. CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (Ballentine, 2007).

85. *Id.* at 7-9.

86. *Id.* at 6.

significant and sometimes painful growth that happens in LP. In contrast, those who have a “fixed mindset,” believe that their abilities are static givens, which cannot be changed in any significant way.<sup>87</sup> If they are not doing well in LP, they can shut down and feel like giving up. Sometimes those students can “sour” on the course and the professor, and it is important to identify those students early and speak with them (privately) about the growth mindset, and offer extra help and time to them. Their skepticism and resistance can infect other students as well. When you see a student slipping, it is not necessarily their first choice. They are overwhelmed, and they need you to reach out to them, and see what it is they need to stay current and focused. If the professor empowers them to, teaching assistants can help identify these students early for intervention efforts.

#### *5. Select Great Teaching Assistants*

One might think that a great TA is one who got the highest grade in the course the previous year. Yes, it is important to have TAs who have taken the course with you—so they understand and can explain your methods to occasionally skeptical students. But a TA in the LP course needs to be approachable and relatable first, and if you have a candidate who excels in those categories and did at least reasonably well in the course, pick that person. For these reasons and many others, we simply cannot teach this course effectively without the assistance of TAs.

#### *6. Have Some Fun and Remember to Smile*

It is important to make high demands of students, but when you do and give clear instruction, they usually rise to meet those demands. They will also be more willing to rise to those demands if they see you are working just as hard as you are asking them to. Providing detailed

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<sup>87</sup>. *Id.*

feedback, and great effort, is one way to do this. And while all of that is quite serious, it is important to find opportunities for fun and add some levity to the proceedings. These are personal to every professor, so what works for one might not work as well for another. But professors have been known to bring fruit into class, donuts (for a reason related to the lesson), and to provide cake for certain achievements as a class. And the power of a smile is great—we must remember to use it, often.

### *7. Intentionally Build a Community for the Class*

If we are trying to foster a community of truth in our classes, one way to do that is to tell students that it is important to you and tell them how you hope they will contribute to it. Students appreciate having limits on their behavior, as long as they are explained and announced in advance and, of course, fairly administered. Allocating a small portion of the semester grade to professional behaviors is one way to do this. But the better way is to encourage it when you see it and add to it yourself. Reading emails from former students reflecting on the course from the perspective of their first summer job—we get many of these over several years of teaching the course—helps current students to see the goal, and even connects the community in those years with the current year. Bringing former students back to speak to the class also does this.

### *8. Teach with Your Authentic Self*

Ethos is part of what we teach—good teachers can see the ethos of the student and acknowledge and offer respect to it. We teach the importance of ethos in persuasion, using the Aristotelian model. So, we should be able to model it and offer it daily in our teaching and interaction with our students. And we should help them to see the Ethos of their partners in collaborative work as well. “Good teachers join self

and subject and students in the fabric of life.”<sup>88</sup>

### 9. *Use Silence*

We have so much to “cover” we often want to fill in the quiet spaces in any community interaction. But using “white space” is important in all forms of communication in teaching. Jesse Bell said this well:

It is a great comfort to learn to use silence in pedagogy. Figuring out the difference between when a quiet class is thinking and when they have given up and are just waiting for the next thing, it is a difficult skill. I’m sure no one gets it quite right. But as a general rule people tend to call a halt to silence too early.<sup>89</sup>

### 10. *Tell Them You Love Them and Love What You Are Doing*

Ultimately, Agape teaching incorporates the other qualities of excellent teaching: vulnerability, courage, humility, and passion for the subject. An LP professor can be vulnerable enough to express their affection for their students, and to have the courage and humility to do so, and thus make their passion for the subject infectious. Students love professors who they see are being their authentic selves and who are willing to do anything to reach them and help them, whether it be Saturday meetings, online video meetings, conferences, office hours, long emails late at night, or all of those. As Dr. King explained, Agape is “Unconditional Love”—a love that takes all our strength and energy to offer and to live into.

Many of us experience Agape love in our relationships with our parents, and that—on our best days—is what we try to give to our

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88. PALMER, *THE COURAGE TO TEACH*, *supra* note 1, at 11.

89. BALL, *supra* note 60, at 123.

children. For many, it is hard to expand it outside of those small units, but teachers are called to do so every day. Teaching LP, year after year, is an act of Agape love—or Caritas teaching if you prefer—in the face of adversity and disrespect of our colleagues, and even sometimes from our students, each of whom we love anyway.

### H. Personal Characteristics of Effective LP Professors

*“[G]ood teaching cannot be reduced to technique; good teaching comes from the identity and integrity of the teacher.”<sup>90</sup>*

It should be apparent by this point that teaching LP excellently requires significant dedication to the teaching craft. But it does not require that only naturally gifted teachers can teach the course well—desire and hard work can make up for a lot, and our students are generally forgiving when they see how hard we work. With teaching LP, you (and your students) will benefit from your overwhelming desire to become a successful teacher of the course. Subject matter teachers do not need to be students of great teaching; they can bury their students in brilliant and deep knowledge of the subject. They can ask questions to keep students back on their heels and from feeling inferior. They can be a font of wisdom, a “sage on the stage,” and offer the fear of the one test at the end of the semester to keep their students focused.

But LP has so many disparate learning outcomes, many of which do not require brilliance or deep knowledge of the subject matter. Indeed, that can be a hindrance, because students know better—they know that the practice of law does not require every-day exactitude on what a split infinitive is or is not. Brilliant LP teachers struggle to teach the course well, because they tend to rely on their deep knowledge of the passive voice or stress their instructions on staple placement. One of the harder

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90. PALMER, THE COURAGE TO TEACH, *supra* note 1, at 10.



things a good LP teacher does is gradually build confidence in their students, while guiding and motivating and critiquing their work. People who were brilliant law students have always had confidence that they can do legal analysis and expression, so they typically have a shallow understanding of how to build and nurture those skills in their myriad students with disparate needs.

We are indebted to our predecessors in this work, who thirty years ago started laying what is now an extraordinary foundation that supports new and experienced teachers in the field. We have two professional associations (LWI and ALWD), each of them publishes respected peer-reviewed journals.<sup>91</sup> Both organizations offer annual conferences on alternate years, and both support grants and workshops to support emerging scholars of our discipline. There are also regional conferences, and One-Day conferences hosted at a half-dozen (rotating) schools in early December. And there is a section of Legal Writing of the AALS, which every year hosts up to three well-attended substantive sessions. There are numerous opportunities, therefore, for new and experienced teachers to meet and learn from colleagues from around the country and to develop as teachers of the course.

It should be fairly obvious by now that hiring faculty to teach this course is a difficult thing to get right. But there are some characteristics a hiring committee should look for, among them: a person who can allow themselves to be vulnerable in the classroom, who practices humility, who has courage, and a burning desire to teach this course well, and who has the ability to truly love (*Agape* love) and respect their students.

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91. The Legal Writing Institute (LWI) was founded in 1985. *About LWI*, LEGAL WRITING INST. (2017), <https://www.lwionline.org/about>. The Association of Legal Writing Directors (ALWD) was founded in 1996. *About ALWD*, ASSOC. LEGAL WRITING DIRS., <https://www.alwd.org/about> (last visited Oct. 22, 2021).

## I. Rewards Are Found in the Transformation That Takes Place

The work of an LP Professor has many low points and late nights, but it also has many joys. Among those, and probably most memorable for us, are those moments when students see and experience the massive transformation that has taken place in their lives over the course of the academic year. Much of that (though not all) happens in LP, and it is among our joys to regularly receive emails from students who have taken a summer job after 1L year, and who write to say how much the course helped them.<sup>92</sup> They often cannot see the transformation that is taking place in the course while it is taking place, but once they look back, they can see it and appreciate it.<sup>93</sup>

LP transforms in numerous ways. It is the first course in which students are placed fully in the role of lawyers, and they gradually grow into that role. We are the first course to introduce the lawyer's ethical obligations, and when we put them into group work, we require that they behave like ethical professionals with each other. Further, by giving them problems that lawyers face, and teaching them the ways that lawyers research, solve, and write about those problems, we help them to see themselves as lawyers by acting as lawyers do. Some LP Professors divide their classes into "law firms" where students are associates and the professor is the partner. Admittedly, this role playing is a fairly thin veneer—it is still a class, they are not getting paid—but it still helps students to think of the role they are growing into. Some

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92. You can go into any LP Professor's office and ask, "Would you be willing to share your student email accolade file with me?" And if they agree, they will be able to put their hands on it in a matter of seconds. We print these emails out and put them in that file all year long. We know where it is, but we do not usually dwell on it or even read through it often. But when we do, it can help to get us through the difficult patches in the year.

93. By emphasizing the transformation that takes place in the LP class, I do not mean to suggest that some of this transformation does not occur in their other 1L law school courses. Certainly, it does. The work in their other courses that is often described as "learning to think like a lawyer," when successful, is transformational for them, too. But the distinction is that in LP that they also "learn to think like a lawyer," but that is not all they learn. Because the nature of the difference is that in LP the student learns to "think *and do* like a lawyer," and that is the nature of the transformation that happens to our students, and we see it happen in our classes every year.

professors will take this to another step, and teach students to bill for their time, and require a time record tracking time spent on the course each semester.

At the end of the semester, when students stand up in court to present their first oral argument, the transformation is complete (at least for the first year). They have become lawyers and feel that way too. Sure, they have two more years of law school and the bar exam before they are recognized by the Supreme Court in their state as practicing lawyers, but for most intents and purposes, they are lawyers at the end of the first year.<sup>94</sup> Certainly, there is more work to be done in their development, as counselors with a deeper understanding of one or more areas of substantive law, and in enhancing their legal research, writing, and oral presentation skills in other courses. But these are layers of ability and experience that are placed on top of the foundation that is laid in the first year course. In eight months, most students have laid that foundation to become life-long learners of the law upon which they will build for the rest of their careers.

One way to more deeply understand the nature and the source of the transformation that takes place in the LP course is to examine the field of study in academic pedagogy known as “Threshold Concepts.”<sup>95</sup> A threshold concept is a portion of learning in a given subject matter that has the following characteristics.<sup>96</sup>

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94. Further evidence in support of this point is that at the beginning of their second year, many students start work in a clinical setting, and start the year being sworn in under the local student practice act. This ceremony, usually presided over by a local judge, looks very much like the swearing in ceremony they will participate in after they pass the bar exam.

95. Carolina Baillie, John A. Bowden & Jan H. F. Meyer, *Threshold Capabilities*, 65 HIGHER EDUC. 229, 244 (2013) (“[T]he Threshold Concepts Framework is a powerful one that has literally swept the world, across many different disciplines.”). See Catherine King & Peter Felton, *Threshold Concepts in Educational Development*, 26:3 THE J. FAC. DEV. 5 (2012), for an overview of how threshold development has been activated in several fields (Economics, Mathematics, etc.).

96. Threshold concepts were initially described by Jan H. F. Meyer and Ray Land in 2006. See generally Jan H. F. Meyer & Ray Land, *Overcoming Barriers to Student Understanding: Threshold Concepts and Troublesome Knowledge* (2006), [https://www.academia.edu/1335539/3/Overcoming\\_Barriers\\_to\\_Student\\_Understanding](https://www.academia.edu/1335539/3/Overcoming_Barriers_to_Student_Understanding). Researchers since that seminal work have

Threshold concepts (TCs) are *bounded* by the discipline, in that they are contained within it, they are *troublesome*, because they are conceptually difficult, do not connect directly with something else the learner knows, and because they ask learners to take on new identities that may be uncomfortable. TCs are *liminal*, in that they are thresholds the learner must pass through to move on in the discipline, involving a two steps forward, one back, process as the student pushes against knowledge they will find troublesome in some way. TCs are also *integrative*, in that they require the integration of new patterns of meaning around the concept, and TCs are *transformative*, because they transform the learner's understanding of a concept central to the field, after which their new learning builds upon that concept. Finally, TCs are *irreversible*, because once the learner passes through the threshold, it is unlikely they will be able to unlearn or “unsee” the concept—to ever see it again in the way they did before.<sup>97</sup>

In her seminal article beginning the examination of the TCs embedded in legal education, Professor Mel Weresh addresses the Threshold Concept of the malleability of law which is embedded in the idea that doctrinal courses typically focus on: teaching students how to “think like a lawyer.”<sup>98</sup> Part of that transition happens when students come to realize that law is malleable, which is troublesome because many students start law school believing that the law can be defined and is mostly fixed at any given time:

Malleability of law is a concept *bounded* within the discipline, because it serves as a demarcation of law as a

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described threshold concepts in their fields, including Economics (see Peter Davies, *The Construction of Frameworks in Learners' Thinking: Conceptual Change and Threshold Concepts in Economics*, 30 Int'l Rev. Economics Educ. 100135 (2019)) and Writing Studies (see, e.g., LINDA ADNER-KASSNER & ELIZABETH WARDLE, NAMING WHAT WE KNOW (2016)).

97. *Id.*

98. Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. LEGAL EDUC. 689 (2014).

disciplinary area. It is a concept that is *integrative*, because, once revealed, it exposes students to interrelated concepts. Once mastered, the concept is *irreversible*. Understanding the malleability of law is *troublesome* for most students and may seem counterintuitive or alien. Finally, it is *transformative* as it occasions a shift in the student's perception of the law and how it applies to society.<sup>99</sup>

Within legal education, the discipline of legal writing is both a practice and a field of study that contains a set of essential threshold concepts. A group of legal writing professors around the country are currently engaged in the recursive process of defining the threshold concepts of legal writing. A working draft of the threshold concepts include:

1.1: Legal Writing creates and recreates the law; 1.2: The fundamental role of legal writers is to construct arguments that will persuade an audience about the meaning of language; 2.1: Legal writing denies its rhetorical nature; 2.2: Legal writing reflects facts that are constructed and determined; 2.3: Legal writing rests upon a unique and complicated understanding of authority; 2.4 Legal writing has genres that are designed for different purposes and different audiences; 3.1: Legal writing involves ethical and persuasive choices about what constitutes good arguments; and 3.2: Legal writing is a synthetic process that typically requires a multi-layered approach, multiple revisions, ongoing internal

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99. *Id.* at 690.

dialog, and ideally, time.<sup>100</sup>

While more work remains to be done in defining the threshold concepts of the legal writing discipline, it is apparent that one cannot become a “legal writer” without passing through these thresholds of learning. What is important for this discussion is that, as Professor Weresh puts it: “Threshold concepts differ from those that are core or foundational primarily in their transformational quality.”<sup>101</sup> Indeed, it is likely that the transformation that students experience in LP—and often express to their teachers after the class has concluded—is rooted in these threshold concepts of legal writing. More work on this is underway.<sup>102</sup>

#### IV. INHERENT CHALLENGES IN TEACHING THE LAWYERING PROCESS

Beyond the complexity of what we teach, and how we teach these interwoven learning outcomes, the LP course has several significant and built-in challenges to success—for the student and the teacher of the course. Among those challenges are those based in the personal nature of what we teach—writing—and that the course is so transformational for our students. In addition, we are usually the only small class 1L students have, and we have them for the full year, rather than just a semester. We are thus usually the only professor who gives them a final grade and then sees them all again a few weeks later. Like every law school class, we usually have a mix of students, but in the small class size and the nature of what we teach, the variability of a class can have an impact on success and require a special awareness, sensitivity, and

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100. MELISSA WERESH & KRISTEN KONRAD ROBBINS-TISCIONE, THRESHOLD CONCEPTS IN LEGAL WRITING (forthcoming 2022) (Ruth Anne Robbins, Linda Berger, Kirsten Davis, David Thomson contributing eds.) (on file with author).

101. *Id.* at 691.

102. *Id.*

quick adjustment. Unlike a doctrinal professor, we generally cannot let our students fail the course, because to do so would admit failure to reach basic competency in the course's learning outcomes, and nearly all do. Added on top of these significant challenges, we all work against the daily headwind of not being taken as seriously as our doctrinal colleagues, and this often impacts the dynamics of the class, as well as our own ability to do this difficult work with the unflappable equanimity it requires. The nature of each of these challenges is described more fully below.

### **Challenge #1: In the Nature of What We Teach**

Writing, unlike any other subject, combines myriad faculties and skills and students have usually had varied and numerous experiences with writing before they get to us. And writing, because it combines numerous brain functions, is inherently difficult to teach and difficult to learn. Human beings have been able to engage in verbal communication for an estimated 100,000 years or more.<sup>103</sup> As Professor Jim Levy has noted, we have been speaking so long in evolutionary terms that we are hard-wired for verbal communication, and there is a discrete area of the brain devoted specifically to speech.<sup>104</sup> But we are not hardwired to write, which “helps explain why all of the world’s healthy adult population can communicate verbally, but only a small fraction of that number is literate.”<sup>105</sup> In evolutionary terms, a widely accepted theory is that humans acquired the ability to write only 5,000 years ago.<sup>106</sup> Thus, unlike the discrete area for verbal communication, the human brain has not developed a specific area of the brain to manage writing. Instead,

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103. James B. Levy, *A Neurologist Suggests Why Most People Can't Write—A Review of The Midnight Disease: The Drive to Write, Writer's Block, and the Creative Brain*, 13 PERSPS. 32 (2004) (reviewing ALICE W. FLAHERTY, *MIDNIGHT DISEASE: THE DRIVE TO WRITE, WRITER'S BLOCK, AND THE CREATIVE BRAIN* 162 (2004)).

104. Levy, *supra* note 103, at 33; FLAHERTY, *supra* note 103, at 162-63.

105. Levy, *supra* note 103, at 33; FLAHERTY, *supra* note 103, at 162.

106. Levy, *supra* note 103, at 33; FLAHERTY, *supra* note 103, at 162-63.

writing employs several different brain functions that must be coordinated, and thus writing is a far more cognitive-heavy function. “To draw a very rough analogy, speaking is, in neurological terms, more like breathing (another hardwired activity), while writing is more like welding—a skill that is not innate but that the brain can learn by engaging in several different neurological functions to make it happen.”<sup>107</sup> Writing is also more difficult to teach because we hold it to a higher standard than speech, particularly legal writing because the things we are describing are complex, and clarity and precision are much more important.<sup>108</sup>

Further, writing skills are something that are usually *intensely* personal to each student. And so, while we teach, we must ask students to enter into an uncomfortable space—which can feel chaotic to the student—where the “rewiring” of the brain happens (usually under some stress). But while doing that, we must assure them that there is a net beneath them to catch them if they fall. Otherwise, if they do not feel there is a net in place to catch them, they will be much more reluctant (understandably) to go out on the tight rope of learning and rewiring. This is, in part, why we put most (though notably not all) of the grade weight at the end of the semester. That way, they can make mistakes (fall) and there are low consequences (the net catches them), and in the cyclical, iterative process, deep learning happens. We provide feedback in numerous lower stakes assessments early in the semester, but we give them significant detailed feedback when it matters—later in the semester. If they have worked hard up to that point, they are ready to walk the rope without a net and produce law office quality original legal research and writing, in memos or briefs, or some other genre of legal expression. In eight months of work.

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107. Levy, *supra* note 103, at 33.

108. FLAHERTY, *supra* note 103, at 164.



**Challenge #2: In the Student Prior Experience**

The relationship between student prior experience and understanding and their capacity or lens through which to acquire new understanding is one of the complexities of teaching this course over the other first year courses. This is because every student has extensive, and highly varied (across a population of students) experience with writing. But although they may have signed a contract to lease an apartment or rent a car, they likely did not read it, much less give much thought to its provisions or the reasons (historical and practical) for each of them. So, a student in first year Contracts has a few “hooks” on which to build their understanding of contract law but is otherwise typically a blank slate. But a student of legal writing has had extensive experience with writing, in variant and multiple forms. They have had variant experiences with it—good, bad, indifferent—and they have attempted to write in multiple forms, such as the five-paragraph essay so commonly taught in grade school or a college-level term paper. But students also may have experience writing a blog post, long form writing on a platform such as Medium, or indeed even shorter form writing experiences such as posts to Twitter, Instagram, Reddit, Facebook, Snapchat, or similar social media platform. There was a time when legal writing teachers lamented the small amount of writing students had done before law school,<sup>109</sup> but today, students have often written a great deal on many self-publishing platforms available on numerous devices, including their phones. They have composed written missives while standing in a bank line, waiting for a movie to start, and late at night and often to an indeterminate audience: the world. And so over the last two decades, the gap between the prior understanding of a subject of the first year curriculum has grown between legal writing and

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109. See, e.g., George M. Joseph, *So Rollo Can't Read, So What?*, 14 J. LEGAL EDUC. 43 (1958) (lamenting the writing experiences of many law students, among other complaints of prelegal education).

every other subject. In spite of this unfortunate reality, we find that many of our students have been told they are good writers, passing the problem up the line. Our ethical duty, in preparing students for the practice of law, is that they not pass us without achieving basic legal writing competence, including all the component skills.

And this is important, and something every legal writing teacher has to address, because learning theory tells us that the extent to which a student's prior understanding of a field creates an immense influence on their ability to acquire new knowledge within that field.<sup>110</sup> It also influences the teacher's ability to help them acquire this new knowledge, but it does so in a highly variable and individual way. Each student is different, had different experiences with writing, and wrote in different forms and styles before they came to law school. So, a good LP professor must learn each individual student's level of prior experience with and understanding of writing and build from there.

### **Challenge #3: In That We Have Them for the Full Year**

An often overlooked but important difference between the LP course and all the other courses students take in the first year of law school is that at most schools we have the students in the class for the entire academic year.<sup>111</sup> This has a number of effects. First, it allows us to get to know each student better, and build more rapport and trust with each of them. It is a longer term commitment, for them and for us. Second, we have to give them a grade in the interim, between semesters, which has good points and bad. A doctrinal professor can give a low

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110. Joseph J. Williams, *Explanation and Prior Knowledge Interact to Guide Learning*, 66:1 COGNITIVE PSYCH. 55 (2013).

111. It is certainly true that some law schools still have students in full-year doctrinal subject courses. But this is increasingly rare. As law schools started giving the LP course more credits to address the additional work it needed to do with students, many schools switched to four credit, one semester course formats for all the other courses in the first year.

grade and never have to see the student again (or, with anonymous grading common in many schools, even know to whom they gave that grade). But we have to, in some cases, disappoint a student, and then motivate them again to do better in the next semester. For those who do well and deserve a good grade, they can be even easier to connect with, and motivate, so that can be an “upside” to the mid-year grade. Third, because we are with them all year, and they get another crop of new teachers for their other courses, it is easy for them to get tired of us. This requires some extra counter measures in the spring, to mix things up a bit and keep them engaged. But as long as the LP Professor has built up a reservoir of trust with each student, working again with them in the spring semester can be a net positive.

*The Carnegie Report* on legal education<sup>112</sup> suggested that more law school courses should integrate doctrine and lawyering skills.<sup>113</sup> Thirteen years later, much of this integration still only happens during the first year of law school in the LP course. This puts an extra burden on the course, since the course remains an “outlier” in the curriculum, and we often have to explain why we are doing something different. We have to swim upstream against a tide of traditional courses that operate differently. Although not mentioned by *The Carnegie Report*, among the many advantages to a more integrated first year curriculum would be that students could see the benefits of skills integration throughout their course load and expect it, and LP would be less of an outlier and would face less resistance as a result.

#### **Challenge #4: In Not Being Taken Seriously**

New law students often arrive at the first day of orientation with

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112. See SULLIVAN ET AL., *supra* note 36.

113. SULLIVAN ET AL., *supra* note 36, at 191 (criticizing law schools for taking an “additive” rather than an “integrative” approach to delivering professional skills and values training). See also, Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN’S L.J. 3, 15 (2019) (“The balance of students’ professional training occurs in programmatic silos on the “fringes” of the curriculum.”).

surprisingly clear ideas about what they are expecting law school to be like. There are many sources for this standardized view of law school—books such as Scott Turow’s *One L*<sup>114</sup> and movies such as *Legally Blonde*.<sup>115</sup> In addition, with the advent of the Web, there are numerous websites that offer a similar version of what law school entails.<sup>116</sup> The problem is that these portrayals of the law school experience either leave out, or de-emphasize, the increasing importance of skills training, and some neglect to mention that this critical part of legal education starts in the first year. The overwhelming emphasis in these depictions of law school is on first year grades in the doctrinal courses, and while those are important, many students discover near the end of the first year that employers mostly want to hear from their LP professors about how good they are at legal research and writing because that is what they need them to do.

And so, as the first year begins, some students are a bit thrown off by the intense research and writing course we present them with, and they cannot really believe there are law professors who teach it. The image of a law professor is one who calls on students in large classes to discuss cases, something we very rarely do. And some students pick up rather quickly on the hierarchy that exists in most law schools, placing LP professors at some inferior position to that of their doctrinal professors.<sup>117</sup> For many years, we went by different titles, immediately signifying to students a difference in our status and, ultimately, the importance of our work.

This state of affairs exists in the face of increasing demand from the

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114. SCOTT TUROW, *ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* (1978).

115. *LEGALLY BLONDE* (MGM 2001).

116. See, e.g., sites such as [abaforlawstudents.com](http://abaforlawstudents.com), [www.lawschool.life](http://www.lawschool.life), and [www.lawschooltoolbox.com](http://www.lawschooltoolbox.com).

117. Rachel Arnow-Richman, *Integrated Learning, Integrated Faculty*, 92 *TEMP. L. REV.* 745, 750 (2020).

American Bar Association—through its law school accreditation process—that law schools establish learning outcomes and experiential courses that improve success at graduating practice-ready lawyers. As Professor Rachel Arnow-Richman has noted, the second-class citizenship of LP professors (and other skills teachers) remains in place at most schools, even while “law schools and their accreditors are embracing the importance of experiential education and an integrated curriculum while simultaneously condoning the lesser treatment of faculty essential to fulfilling that mission.”<sup>118</sup>

Beyond the absurdity of that fact—which becomes more absurd every day—is the negative reality of how this undermines the educational mission in our course. Put bluntly, inevitably some of our students every year pick up on these differences and think we are losers and second-raters for doing this work. Why would we leave the practice of law (which they see as vaunted, and their current goal in life) to grade papers—and lots of them—and not even be treated as an equal to the doctrinal professors they have in their other courses?

We have to fight for credibility in our teaching all the time, and it is frankly exhausting, particularly for female teachers and teachers of color, who unfortunately and regrettably deal with this sort of marginalization all the time.<sup>119</sup> There is a reason that female professors make up approximately 70% of the teachers who teach LP, and as a result for many years, the field was for a long time known informally as the “Pink Ghetto.”<sup>120</sup> It has roots in the patriarchy in the legal academy,

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118. *Id.* at 752.

119. See, e.g., Victor Essien, *Visible and Invisible Barriers to the Incorporation of Faculty of Color in Predominately White Law Schools*, 34 J. BLACK STUD. 63 (2003); Kerry Chavez & Kristina M.W. Mitchell, *Exploring Bias in Student Evaluations: Gender, Race, and Ethnicity*, 53 PS: POLITICAL SCI. & POLITICS 270 (2020); Anish Bavishi et al., *The Effect of Professor Ethnicity and Gender on Student Evaluations: Judgment Before Met*, 3:4 J. DIVERSITY HIGHER EDUC. 245 (2010).

120. Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Renee Nicole Allen et al., *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525 (2019).

which has been widely documented elsewhere.<sup>121</sup> But it also comes from the kind of close student relationships that we form, the nature of the support we provide, and the detailed feedback we give. The work we do has for many years, appallingly, been seen as “women’s work.”

Something often overlooked is the reverse side of this coin. While male LP teachers have the advantage of looking like what unfortunately some of our students think lawyers “should” look like—and we probably have an “authority advantage” as a result—there is a cost as well that male teachers deal with. The attitude male teachers often confront from students (as well as colleagues)—explicitly or implicitly—might be fairly summarized as: “If it is women’s work, why are *you* doing it?” To combat these stereotypes one thing all LP professors have to do—male or female<sup>122</sup>—is to explain their practice backgrounds, why they are there (instead of in practice), and why they love what they do. We have to explain ourselves in a way that our doctrinal colleagues never do just to get to credibility to teach what we teach.

But while we have to explain our practice backgrounds, unlike for an adjunct professor, “war stories” are rarely relevant for our classes, so we do not get that ego boost and credibility gain that many adjunct law teachers get. And most of us have given up active practice to teach and thus lose the credibility that adjuncts have, who are still engaged in the practice of law. We have to balance our bid for credibility with our backgrounds and always remember to bring our authentic self to class. Over time, we win over most of the skeptical students with the

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121. See, e.g., JOAN HOFF, *LAW GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991); TRACY A. THOMAS & TRACEY JEAN BOISSEAU, *FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW* (2011).

122. By addressing this point in binary form, by no means should it be overlooked that transgender Lawyering Process professors also have gender-related challenges in the classroom. These assumptions of what a “normal” lawyer looks like (or is) all come from our being considered—again, by students and colleagues—as outside of the norm. It puts all of us at the disadvantage of assumptions being made about us when we—students and colleagues alike—should be focused unambiguously on the work.

seriousness with which we take the work we give them to do.

Another significant challenge is found in the grading of the LP course as opposed to the doctrinal classes. The latter gets to test actual knowledge—do you understand this or that concept of Contract or Property Law, and can you apply it? Generally, that is fairly clear: a student either understands the elements of adverse possession—and they are able to identify and apply it correctly in an exam question—or they do not. This is so much easier, and more gratifying, than testing skills, because students gain base knowledge in mostly one way, but they gain skills in myriad ways. The work they produce in LP during the course of each semester is embedded with judgment calls, and their success is measured on some form of a scale of developing, competent, and advanced. In resolving a legal problem and writing about it, it is rarely decisive that one case was cited versus another one. So, we generally should not, and rarely do, say that “citing case X was wrong, you should have used case Y here.” This makes triage of their work much more difficult because we have to focus on explaining *how* a different approach would have been better than what they chose.<sup>123</sup> And this makes commenting on papers, and the crafting of proper and helpful responses on their work, even more difficult.<sup>124</sup> So, teaching this course well requires a kind of vulnerability and humility because what we teach is inexact, and sometimes hard to pin down with precision, and this is a challenge that can fester with a student who is struggling.

### **Challenge #5: In the Evolution of the Course**

You might think that a subject like legal writing has not changed much in the last fifty years. After all, an IRAC analysis form is still widely used in legal expression, whether via email or over Zoom. But many elements of the course have changed substantially in the last two

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123. Daniel L. Barnett, *Triage in The Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651 (2007).

124. For a more complete discussion of commenting on student work, see discussion *supra* Section III.C.

decades. It is the job of LP professors to keep up with those changes and make appropriate adjustments to the course as they teach it.

The first substantial change, of course, has been in our students. Over the last two decades, students have graduated college with increasingly deficient writing skills than in the past.<sup>125</sup> Indeed, getting our students to the point where they can *become* good legal writers is one of the reasons the course has—in response to this trend—expanded credits for the course and professionalized the faculty who teach it. Also, as the Internet and hand-held technology have become ubiquitous, our students have become broadly comfortable with using technology. But they have rarely learned—before coming to law school—how to use it well to support their learning. And they are mostly unaware of how to use it effectively to accomplish lawyer work.

Technology has also revolutionized writing itself. Before blogs and Twitter and Snapchat, the amount of college level student writing that was being required in course work was declining.<sup>126</sup> But, since Internet forms of writing have proliferated, students have actually *increased* their writing output.<sup>127</sup> The only problem is that over time the nature of the writing being done has become shorter and more abbreviated. And while more writing experience is generally a good thing, the distance from a Twitter post or a Snapchat caption to a properly constructed and written twenty-page legal brief is vast.

Technology of course has had a profound and far-reaching impact

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125. Michael J. Carter & Heather Harper, *Student Writing: Strategies to Reverse Ongoing Decline*, 26 ACAD. QUESTIONS 285 (2013); Jill Singleton-Jackson, D. Barry Lumsden, and Ron Newsom, *Johnny Still Can't Write, Even if He Goes to College: A Study of Writing Proficiency in Higher Education Graduate Students*, 12:1 CURRENT ISSUES EDUC. 1 (2009).

126. CARTER AND HARPER, *supra* note 109, at 287-88 (noting the increase in multiple-choice exams over essay questions and other changing requirements as contributing to declines in student writing quality).

127. Kristen Purcell et al., *The Impact of Digital Tools on Student Writing and How Writing is Taught in Schools*, PEW RESEARCH CENTER (Jul. 16, 2013), <https://www.pewresearch.org/internet/2013/07/16/the-impact-of-digital-tools-on-student-writing-and-how-writing-is-taught-in-schools/>.



on the methods and procedures for conducting legal research in law practice. As a result, the teaching of legal research methods has, over the course of the last twenty years, adapted year after year. Every LP Program has scheduled a presentation for the review of changes to the two major legal research databases (Lexis and Westlaw), and even had to review and consider new databases (such as Bloomberg and Casemaker) in those years. The impact of these annual advancements in legal research technology has added strain on the course and the teacher to keep up.

LP Programs at different schools have addressed these changes in legal research technology in different ways. At some schools, LP professors outsource to the library faculty the teaching of legal research skills. Others have worked cooperatively with their library faculty to co-teach to those learning outcomes. And there has been a growing debate in some programs about whether, or when, we should teach law library book research at all.<sup>128</sup>

In the practice of law, driven increasingly by financial pressures and the need for increased efficiencies, the traditional legal research memo has sometimes been supplanted by shorter email memos.<sup>129</sup> This has caused a debate about whether we should be teaching the memo form at all.<sup>130</sup> But many programs still teach the memo form, believing that it is the best vehicle to teach the skills that can then be adjusted to an email format, or any other format the senior attorney requires. And we have *added* email memos to our curriculum, so students have practice with both the full version *and* the shortened version.

As a result of these evolutions in the practicing bar outside the

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128. Ellie Margolis & Kristin E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117 (2012).

129. Daniel Martin Katz, *Quantitative Legal Prediction—Or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013).

130. *See, e.g.*, Robbins-Tiscione, *supra* note 32, at 32, and Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the Casebook Classroom (Without Grading Papers)*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 23 (2004).

course, LP professors have had to adjust their teaching every year in substantial ways to keep the course current and applicable to the practice our students will be graduated into. Of course, a doctrinal course has changes too—the addition of new cases every year for example, but those changes are typically much slower. But LP professors have had to teach to a less capable cohort of students (on sheer writing skills), that is saturated in technology, while the practice of law and the world of legal research has been dramatically changing.

### **Challenge #6: In the Mix of Students in Each Class**

Being a skills class with substantial feedback given, in most schools, LP sections are kept small. The size recommended by the ABA's Legal Writing Sourcebook is thirty to thirty-five total, with most schools assigning sixteen to seventeen over two sections<sup>131</sup> per LP professor. The reason given for this recommended faculty/student ratio is that it allows for the kind of feedback and one-on-one conferencing that effective teaching of the course demands. But another reason, often not mentioned, is that ideally the community dynamic in the smaller sections is close and constructive, and an experienced teacher can leverage that dynamic to form a tight-knit learning community. When you have a class of fifty to eighty—as many of our doctrinal colleagues do—this is much harder to do. While the creation of a successful learning community can be very beneficial for the students in the course, this is not automatic, and sometimes is very difficult to achieve.

As Alfie Kohn so well explains in his book *What to Look for in a Classroom*, while we may think we teach the same materials annually, the groups of students we face each year—as a group—are different:

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131. AMERICAN BAR ASSOCIATION, *supra* note 24, at 251 (stating that “a reasonable target teaching load for full-time faculty teaching solely LRW and no other courses is 30-35 students, regardless of how many sections the faculty member teaches.”).

Once I was out of the classroom, I came to understand that a course is created *for* and *with* a particular group of students. I didn't see it that way before because I wasn't thinking about learning, only about teaching. I was trying to find the most efficient way of giving students the knowledge and skills I already had, which meant that I was treating the students as interchangeable receptacles - as rows of wide-open bird beaks waiting for worms, if you will.<sup>132</sup>

But each section of students we are assigned are different, and contain students with different backgrounds, experiences with writing, and perspectives. They come together in different ways too, some better than others. Thus, we often find many differences between what each of our sections of students need, in different years, and even across semesters of the same year.

In a typical section of the course, students fall on a bell curve in terms of their writing abilities, backgrounds, and orientation to the class. For example, often on the left side of the bell curve, you will find students who took an undergraduate major such as engineering that required little writing, and on the right side, students who enjoy writing and selected a major that required significant research-based writing in each course and an extended honors thesis. Most students fall in the middle, with some writing experience, but not very much, or older students who are capable but have not written more than an occasional corporate memo and lots of email over several years. The challenge for the teacher is to teach everyone in the class effectively, of course, and that requires sometimes risking boring the students who are at the right end of the curve, or teaching mostly to them, and risking losing the students who are on the left side of the curve. Teaching just to the middle

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132. ALFIE KOHN, WHAT TO LOOK FOR IN A CLASSROOM ix (1998).

is a common approach in many forms and levels of teaching (not just law school) and it often is the best a professor can do in a class as big as most first year classes are. But this approach, while economical, is not as effective for all students than when some effort is made to balance the level of the instruction to include some of the “left to right” varying needs of the class. Because we teach a small class, we all make an effort to do this to some degree, and it is one of the key reasons that this course is harder to teach than some others.

Each class provides a good reminder that, as Alfie Kohn says, students year over year are not “interchangeable receptacles.”<sup>133</sup> Every class is different, and because we must achieve the learning goals of the course with each individual student we are assigned, we are constantly adjusting the course each year—as we go—to be responsive to the needs of each class.

Even in those years when you have a “normal” bell curve class, the eighty-twenty rule<sup>134</sup> applies, as it does in so many contexts. Generally speaking, 80% of your students will need a baseline of attention, feedback, and support. But 20% will need much more than the baseline. As the educational psychologist William Spady has noted, “All students can learn and succeed, but not on the same day in the same way.”<sup>135</sup> There are days when we find ourselves frustrated by a student who asks a question which we addressed in class the previous day. Or multiple students with multiple questions previously addressed. But we endeavor

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133. *Id.*

134. This is known as the Pareto Principle, and sometimes this is expressed as: 80% of the consequences come from 20% of the causes. In mathematics, the Pareto Principle is a power law distribution, and numerous natural phenomena have been shown to exhibit this distribution. It was named after economist Vilfredo Pareto, who first described the 80-20 relationship in 1896 finding that 80% of land in Italy at the time was owned by 20% of the population. In business it is commonly found that 80% of sales come from 20% of clients. The 80-20 rule has been found in numerous contexts, including taxation, coding optimization, and video tape rentals. *Pareto Principle*, in *Encyclopedia of Management* 851 (8th ed. 2019).

135. WILLIAM G. SPADY, *OUTCOME-BASED EDUCATION: CRITICAL ISSUES AND ANSWERS* 9 (MaxCor, 2014).

to remember that the 20% of students in every class who do that on a regular basis may just learn slower or in a different way and need extra help and support. The job of an LP professor is to be in that metaphorical space—wherever and whenever it is—that the student has opened a window on the skill and is ready to learn what they need to learn about it. Sometimes this happens late at night over email,<sup>136</sup> sometimes in a third or fourth conference focused on successive drafts of a particular writing skill the student is struggling to master. Good LP professors will not just go the extra mile, but an unlimited number of miles, to answer every question a student asks. We do this because we know our students take these skills on board in different ways on different days. Much of the 1L experience is, unfortunately, about “sorting” students<sup>137</sup>—and we also are required to do that at the end of the semester—but *during* the semester, our focus is on triage.<sup>138</sup>

### **Challenge #7: In That We Cannot Let our Students Fail**

Another important aspect of the course is that we cannot let our students fail the course at the end of the semester. A doctrinal professor may do so, and hold such a threat over their students, but we cannot. Well, of course we *can*, but if we do, *we* have usually failed that student in some way. As long as a student does the work—not to a minimum standard, but done it reasonably well—then they have passed the course. They may have only earned a “C,” but they have passed. They have reached a level of basic competency in the necessary research, writing, citation, and oral presentation skills that we teach. If a student does not

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136. It is common for an LP Professor to find a student late in the evening over email who is finally in a place to learn a crucial concept. They may have to take many mini-steps to get where they need to go, and break down each step into its own question via email. Recently, I sent twenty-five email responses to a student’s questions over three days. It helped this particular student to break through the threshold concept.

137. Richard A. Epstein, *Grade Normalization*, 44 CAL. L. REV. 707 (1971); Richard A. Ippolito, *The Sorting Function: Evidence from Law School*, 51 J. LEGAL EDUC. 533 (2001).

138. See BARNETT, *supra* note 123.

hand in assignments, or makes little attempt on them, then they will, reluctantly, get an “F” in the course. In the rare situations when this happens, there are usually other issues with the student—they are often struggling with something well beyond the material in the course, and we make an effort to get help to the student through the office of the Dean of Students.

Because students understand the essential nature of the course, and understand that they really cannot be lawyers unless they know how to do the things we teach them to do, they are almost always diligent about getting their (many) assignments completed in the course, and submitted on time.

Even though our attitude is to do whatever it takes to help our students reach at least minimum competence, we still have students who resist what we are teaching them. In every section, almost every year, no matter the professor or their experience teaching the course, there is always one.<sup>139</sup> One student who just does not “get” the professor’s approach, or who feels particularly injured by feedback on his or her writing, or who otherwise just hates the course. Because we cannot fail any student, we have to continually reach out to even those students who dislike us and the course, to make sure we have given them whatever they need. Despite these efforts, we will, inevitably, receive an unfair, inaccurate, or vindictive evaluation from that student at the end of the semester. Yes, student evaluations are anonymous—and of course they should be—but because we know our students so well, when we receive a long, rambling, highly negative evaluation—in the midst of very positive ones—we can pretty much tell who the writer of that comment

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139. This is a saying I use with LP Faculty colleagues whom I have mentored over the years, most commonly when reviewing their student evaluations with them, and finding the “one” in the form of an evaluation comment that can best be described as a “rant.” It is very hard to do this work, and then when reading student evaluation comments \*not\* to focus overly much on this “rant” comment. Part of what I do with mentee colleagues is to focus them on the really good comments they have received and the ones that contain constructive criticism.

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All of these factors may combine to be the primary cause of LP faculty generally receiving lower student evaluations than their doctrinal counterparts. A study conducted in 2000 found that 86% of LP professors received lower evaluations in their LP courses compared to when the same professor taught a doctrinal course in the same semester.<sup>140</sup>

## V. WHAT WE NEED AND WANT

“What do they want?” becomes a common question overheard in the hallways on the rare occasions when issues important to LP faculty come up in faculty meetings. Occasionally our issues—such as governance rights—are met with resistance, but they are almost always met with impatience. Why a group of faculty would assume that another group of faculty would dedicate some of the best years of their working lives to being a faculty member yet would not want to have some say in the running of the institution they have given themselves to, is hard to fathom.

In schools where LP faculty do have governance rights, we are often assumed to “vote as a block,” when in fact we rarely do. The reality is that in our own group we do not agree on everything, and we respect the tenured positions on our faculties more than they might assume. Those of us who are not tenured (that is most of us, at most schools) are not in a good place from which to wage civil war. A good Dean’s office can counterbalance some of this—with effort and some reputational cost unfortunately. But not all Deans want to get involved in defending their LP faculty when they—however rarely—take a position that is resisted by the tenured faculty.

If one of the goals of an intellectual faculty is to create and support

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140. Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the “Legal Writing Pathology” Diagnosis Confirmed*, 5 N.Y.C. L. REV. 115, 126 (2002).

a collegial community, we have rarely done so in the legal academy, and the separation between tenure-track and LP faculty are part of the problem. Perhaps the pain and disfunction created by the disconnect between us and our colleagues is captured best by Parker Palmer when he writes:

Such community is not easily achieved in academic life, given all that divides us. It is most likely to happen when leaders call us back to the heart of teaching and learning, to the work we share and to the shared passion behind that work. If we can create such communities of collegial discourse, they could offer more than support in the development of work-related skills—they could offer healing for the pain of disconnection from which many faculty suffer these days.<sup>141</sup>

### A. Understand What We Do

Perhaps the thing we need the most from our colleagues is that they understand, fully, what we do and how we go about it. It is hoped that this Article will go some distance toward doing that, at least for our colleagues who read it. Perhaps it would then also help to make an effort to reach out for a discussion with the LP professors in our midst. We also need our colleagues to understand the challenges we face in doing this work—some of which are inherent in the course, but others of which are external to it.

The externals—the “out group” status in the legal academy,<sup>142</sup> the almost daily microaggressions we suffer at the hands of our

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141. PALMER, *THE COURAGE TO TEACH*, *supra* note 1, at 166.

142. Arnow-Richman, *supra* note 117, at 757-58.



colleagues<sup>143</sup>—are discouraging and debilitating over time. They are also examples of discrimination and poor personnel management.<sup>144</sup> Because it is very hard, indeed nearly impossible, to do the work described here in this Article with the care and intensity it requires to do well when you work in an environment that does not value you as an equal. It is toxic.<sup>145</sup> We have created a culture in which some colleagues do not feel they belong! This can all lead to burnout among your LP faculty and a sense of going through the motions. If you work in a law school where you have your doubts and concerns about the quality of the work your LP professors are providing, you might first look inward for answers as to why.

And it is galling, because on the one hand law schools have spent a lot of time and marketing budget money over the last decade touting that they produce practice-ready graduates, while treating poorly the people who help make that happen—starting with every first year law student. As Professor Arnow-Richman puts it: “True preparation for practice requires students not only to master the core components of the profession individually, but also the ability to bring them all to bear simultaneously in a realistic professional context.”<sup>146</sup> If this article has done anything, I hope it has made clear to everyone who reads it that this is exactly what the first year LP course accomplishes, and also that it sets a critical foundation for students to build on for the rest of law school and in their careers.

## **B. To Be Treated Fairly**

We need to be treated fairly and equally, which might seem obvious,

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143. Ruan, *supra* note 113, at 30.

144. Arnow-Richman, *supra* note 117, at 746-64.

145. Lucy A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 115 (2015).

146. Arnow-Richman, *supra* note 117, at 756.

but inequality of LP faculty has been well-documented.<sup>147</sup> This is not an article about how all LP faculty should be allowed access to the tenure track. There are numerous articles on that subject,<sup>148</sup> most recently by no less than the President of the AALS.<sup>149</sup> But we should not—in theory—*have* to have the same contract status to be treated fairly and equally. It is not, necessarily, that we all want tenure—that is way too simplistic. We want equal pay, recognition, and respect for what we do. To many law school faculties, tenure is the only thing that provides those benefits. But why does it have to be that way? The simple answer is: it does not. If it were possible to stay on long term contracts with governance rights and get equal pay and respect and inclusion—to do away with the microaggressions and "out-group" perceptions about our work—then it could work.

Unfortunately, it is apparent at many law schools that the only way to be so treated in academia is to have that T on your faculty card. But it should not necessarily be so. There is a considerable body of law—offered usually as an elective in most law schools—that all or nearly all law teachers profess to support, which holds that discrimination is a moral and a legal wrong, and presumes that it can be rooted out, however difficult and challenging it may be to do so. The appalling truth is that law faculty who supposedly hold such views—and some of whom hold them vociferously—allow such discrimination to happen in their own hallways, and look the other way. Discrimination is never good,

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147. See Ruan, *supra* note 113; see also Arnow-Richman, *supra* note 117.

148. Kent Syverud, *The Caste System and Best Practices in Legal Education*, 1 JALWD 12 (2002); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010); J. Lyn Entrikin et al., *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OR. L. REV. 1 (2020).

149. Darby Dickerson, *President's Message: Abolish the Caste System*, ANN. NEWSL. ASS'N AM. LAW SCHS., <https://www.aals.org/about/publications/newsletters/aals-news-fall-2020/presidents-message-abolish-the-academic-caste-system/> (last visited Nov. 2020).

but perhaps especially pernicious when it is perpetuated by those who would be most horrified if they could see it.

In a presentation at the University of Denver in 2018, Parker Palmer said this about status issues in academia: “I care a lot about how fraudulent it is to let myself or our relationships or a whole institution be driven by such . . . a nonsensical, flimsy, thin a thing as status . . . It is the tragic gap. [And I mean] tragic in the Greek sense, in the Biblical sense, the Shakespearean sense.”<sup>150</sup>

### C. Understand that Our Voice Is Different

In a different but related vein, we need our colleagues to understand we generally should not take political positions. There are many times, particularly today, when it is hard to not bring politics into the law school classroom. And there are certainly classes where those hard discussions are appropriate, such as Constitutional Law. But mostly we should keep our politics out of the classroom—because we are teaching skills. If we do not, we risk compromising our relationship with our students. We need to be *Tabula Rasa* as much as possible, because as soon as we take a political position, we risk losing a student who disagrees, and we are off topic for the course. This can be stifling and self-abnegating for us, and takes its own toll. And our faculty colleagues sometimes circulate letters taking a political position, and sometimes do not understand, and think less of us or are suspicious of our leanings, when we do not sign on. Or, we do sign on—because we believe in the cause and do not want to be seen as not caring about it—but we worry that it might backfire in class. Also, of course, because many of us do not have the protections of tenure, taking political positions can be fraught for us.

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150. Univ. of Denver Morgridge Coll. of Educ., *Parker Palmer & Diana Chapman-Walsh: A Celebration of the 20th Anniversary of Courage to Teach*, at 57:04, YOUTUBE (Apr. 5, 2018), <https://www.youtube.com/watch?v=Q-ZCzG86TTs>.

If you look around the room over a group of faculty meetings, take note of how many of your LP faculty (if they are not on tenure track) speak up. The number will usually be low, particularly for controversial topics, because speaking up in the internal fights that happen sometimes in faculty meetings is very dangerous, and has caused backlash and even verbal bullying behaviors by tenured faculty at a few institutions. This is, unfortunately, one of the things we compare notes on during our various annual conferences. As Professor Nantiya Ruan described it, after giving several presentations about her draft article—which became *Paper Cuts: Hierarchical Microaggressions in Law Schools*— “The response from [attendees] in the legal writing discipline was uniform: ‘Me Too.’”<sup>151</sup>

#### **D. Support for Our Scholarship**

It is sometimes a surprise, and even a threat, to some of our colleagues when they learn that many of us want to write scholarship. It is a surprise because for those of us not on tenure track there is usually no requirement to produce scholarship. And it is a threat because if we do produce scholarship then the difference between us is much reduced, and the arguments against treating us as equals is similarly reduced. As Professor Arnow-Richman notes: “[T]he most pernicious aspect of the bifurcated faculty is that, like the ideal worker norm and the problem of subconscious biases more generally, it reproduces itself. Those who have the desire and ability to teach skills are ineligible for tenure and consequently are not incentivized to produce scholarship.”<sup>152</sup>

Not surprisingly, when we do write scholarship, the comparisons come out, and an article on the pedagogy of the LP course—such as this one—is deemed lesser than one on a doctrinal law subject. One of the

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151. Ruan, *supra* note 113, at 43.

152. Arnow-Richman, *supra* note 117, at 761.

advantages of not being on tenure track is that you may write what you want, and the opinions of colleagues about its relative merit as compared to their own become irrelevant.<sup>153</sup> Given what has been written in this article (and many others, some of which are cited here), the Scholarship of Teaching and Learning<sup>154</sup> should also be welcomed, as it helps all law school faculty become better teachers and deepen understanding of emerging methods to achieve their primary mission: to prepare our graduates to be competent and ethical lawyers. The problem is, this is not how it currently works in the legal academy. "[L]aw schools currently prioritize the publication of full-length law review articles placed in elite journals when evaluating faculty scholarship. The publication of such articles, however valuable, should not be the sole criterion by which law schools assess faculty contributions to academic discourse. Rather, scholarship should be evaluated for its quality, irrespective of its subject, format, or methodology."<sup>155</sup>

Today, the evidence is overwhelming<sup>156</sup> that non-tenure track LP professors at many law schools want to, and do, write what, by any standard, is valid and rigorous scholarship in many different forms. Some have written books too,<sup>157</sup> and their work has been widely downloaded, and there is even at least one example of an LP professor being cited in an opinion written by no less than Justice Ruth Bader Ginsburg.<sup>158</sup> Simply put, what we want is for those of us who want to write scholarship to receive the same types and forms of support, such as sabbaticals, stipends, and research leaves, as is common for tenure-

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153. Although it should be noted that at some schools, the type of scholarship one writes may be factored into annual evaluations and raises.

154. See PAT HUTCHINGS, MARY TAYLOR HUBER & ANTHONY CICCONE, SCHOLARSHIP OF TEACHING AND LEARNING RECONSIDERED: INSTITUTIONAL INTEGRATION AND IMPACT (2011).

155. Arnow-Richman, *supra* note 117, at 763.

156. Terril Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 J. LEGAL WRITING INST. 3 (2005); Rideout, *supra* note 3.

157. See EDWARDS, *supra* note 6; see also DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE (2009).

158. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (broadly citing Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103 (2012)).

track faculty in the same institution.

### **E. Extra Teaching Capacity**

Which leads to something else we want and need, which is extra capacity. Many LP Programs are run with exactly the number of faculty that are needed to keep the student-faculty ratio at level the administration finds acceptable, with no additional faculty position to cover research leaves or sabbaticals. Thus, we are sometimes in a position of requesting a visitor or temporary fellow to cover someone who is due for a sabbatical or has applied for other research leave. This extra capacity should be built into the regular faculty cohort assigned to teach the course. In years when the extra capacity—really just one "extra" faculty member—is not covering a colleague on leave, it would reduce the student-faculty ratio in all the LP sections offered, and even more one-on-one support can be provided to each student.

Another use for extra teaching capacity is to allow more senior teachers of the course to teach other courses than just LP. On a rotating basis, they could teach on a 1-and-1 model, with one section of LP in each semester, and two other courses they teach in conjunction with LP. Unfortunately, at some schools some faculty and Associate Deans believe that LP faculty should not be teaching anything other than LP. And while that might be appropriate for new teachers of the course, after they have been through several reviews and reached the top level of promotion in the program, they—by definition—have become very skilled teachers of a very difficult course to teach well. As they wish, and the needs of the curriculum demand, the decision to *not* being open to deploying them to teach courses other than LP is another missed opportunity for good personnel management. Additionally, it helps with the potential burnout caused by teaching such a demanding course year after year after year.

Finally, it has to be noted that by creating a class of highly capable,

but institutionally limited faculty is poor personnel management for yet another reason. In many law schools, even those where LP Faculty are allowed to serve—and perhaps even chair—faculty committees, the more “prestigious” posts, such as Chair of Appointments or Dean Search, overwhelmingly go to members of the tenure-track faculty. However, all Deans, in making appointments to the committees, are looking to spread the committee burden as evenly as possible.<sup>159</sup> This is difficult to do if a group of faculty—even the most senior and experienced ones—are not deemed sufficiently able, or perhaps sufficiently respected, to take on those tasks.

## VI. CONCLUSION

Most of us who teach LP have given this low status service work the best years of our professional lives. However, we do this—willingly—because we believe in it, and because it can be and often is transformational in the lives of our students. Our students come to us and ask: “I think I want to be a lawyer; can you help me understand what that entails and what lawyers do in their jobs?” The rest of law school does this too, of course, but it is only in the first year where it is most intense and most transformational on the fundamental lawyering skills, and much of that happens in the LP class.

The novelist Jesse Ball in his book *Notes on My Duncce Cap*, says this about teaching, and it describes much of what it is like to teach LP:

You should give as much as you can, keeping in mind that you will give and be disdained and misunderstood for years on end, perhaps for the entirety of your career.

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<sup>159</sup> Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 262 (2004), (“For example, of the 183 law schools participating in the 2004 national survey, only 19 writing directors and 14 writing faculty were reported as members of appointments committee that year. This powerful committee was the committee least likely to have a member who teaches legal writing”).

You will be thought stupid. You will be understood by the entire class as a whimsical jackass. But on some days, the tide may turn, and then one is helped, and another is helped. Depending on the students, it may be possible to create a small and separate cosmos—a joyful laboratory. Then you need to do very little as a teacher, because everyone is busy learning from each other.<sup>160</sup>

On a personal note, I will offer this reflection about the experience of teaching the course for almost a quarter century now. There are some crystalline days in this work—when I and my students are at our best—that I do not really teach at all, as Professor Ball suggests. What I really do is hold the door open: and I stand there, somewhat like a circus barker, and invite students in. If they choose to come in—and it happens no other way than by their agency—they come face to face with the basic building blocks of the law, the foundation upon which all the rest stands: Research, Legal Reasoning, Client Counseling, and the proper Written and Oral expression of legal matters. These make up the essence of their future work as lawyers, no matter what type of law they go on to practice. When students work hard with these fundamental lawyering skills, and start to make their own way within them, the world opens and they are changed forever. For the LP Professor, this is what is called “teaching” —but for the student, it is much more than “learning”—it is transformational. On some level, I know I should take little credit for it—what is happening is so much bigger than I am, sometimes the best thing I can do is drop my baton on the downbeat for the whole glorious symphony— then steadily keep the beat going—and otherwise get out of the way. It is a process of incredible richness and beauty, and I am lucky—and have been blessed beyond description—to have been be a part of it all these years.

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160. BALL, *supra* note 60, at 15.