

## Comments Worth Making: Supervising Scholarly Writing in Law School

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These are unsettling times for teachers and scholars like us, whose primary medium is the printed page. The relation between electronic and print media and its effect on scholarly writing are open questions. Will the screen complement or extinguish the page? How will the idea of text itself evolve?<sup>1</sup> Will the linearity of traditional print scholarship—its sustained exposition and detailed argument—be supplanted by the modularity and mutability of electronic text?

In this uncertain climate, it's easy to panic and despair when our best students turn in seminar papers that are elegantly processed but empty of ideas, mere abstracts of research with fragmentary analysis and vanishing theses. Panic and despair are joined by a sense of perfect futility when we realize that, at this stage, critique reduces itself to a description of the paper *we* would have written—a teaching technique as useful and stimulating as telling our children how we did things “in our day.”

Perhaps the problem for law teachers supervising student scholarly writing<sup>2</sup> is not (at least not yet) that we are crunched in an epochal shift from print to electronic literacy, but rather that our teaching methods have not caught up to yesterday. Successfully guiding a student through an extended writing project calls on a law professor to exhibit skills beyond those of teaching the law itself, specialized skills in which most of us have had no training. Yet

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1. At the margins, some commentators believe that change will be as dramatic as the shift from oral to written culture. As the computer becomes the dominant “primary medium for presenting and working with texts,” and as “we take control of computer-based texts, the existing lines between reading and writing will tend to blur into a single notion of use.” Stephen A. Bernhardt, *The Shape of Text to Come: The Texture of Print on Screens*, 44 *C. Composition & Comm.* 151, 173–74 (1993) (citing John M. Slatin, *Reading Hypertext: Order and Coherence in a New Medium*, 52 *C. Eng.* 870 (1990)).
2. By student scholarly writing, we mean student law review articles and the papers often written to satisfy the upper-class writing requirement that is a feature of almost every law school's curriculum.

careful supervision of student writing requires knowledge of the writing or “composing” process and of techniques for fostering invention and providing meaningful feedback at each stage of the process. The past twenty-odd years have seen composition become an academic discipline and its teaching an art,<sup>3</sup> and it is time for us to become better acquainted with both theory and practice so that we can make upper-class writing a more educational and, ultimately, a more rewarding experience.

Of course, the desire to redeem scholarly writing in law school proceeds from a belief that this sometimes painful and frustrating enterprise is (still) worthy of pursuit. As scholars ourselves, we continue to believe that it is a good thing to add to the intellectual corpus of the law and a good thing for members of the profession to keep up a lively conversation about its growth and direction, much though we differ among ourselves about the proper road to take. In addition, some theorists regard writing itself as a unique mode of learning.<sup>4</sup> Of the four verbal “languaging” processes—reading, writing, talking, listening—writing more than the others involves us in “deliberate structuring of the web of meaning.”<sup>5</sup> Thus it seems that scholarly writing in law school is an effective way both to learn subject matter<sup>6</sup> and to gain insight into reasoning itself, into the cognitive process.<sup>7</sup>

3. In the sixties and early seventies, many colleges adopted an open admissions policy, a decision that meant a good number of entering students lacked skills college teachers had come to assume. English teachers met this challenge with intensive research into the reading and writing processes. See Mina P. Shaughnessy, *Errors and Expectations: A Guide for the Teacher of Basic Writing* 1–13 (New York, 1977). Two helpful summaries on the development of composition theory are Maxine Hairston, *The Winds of Change*; Thomas Kuhn and the Revolution in the Teaching of Writing, 33 *C. Composition & Comm.* 76 (1982); James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, in *The Writing Teacher's Sourcebook*, 2d ed., eds. Gary Tate & Edward P. J. Corbett, 47 (New York, 1988).
4. See, e.g., Janet Emig, *Writing as a Mode of Learning*, in *The Web of Meaning: Essays on Writing, Learning, and Thinking*, eds. Dixie Goswami & Maureen Butler, 123 (Montclair, N.J., 1983). Emig argues that “writing serves learning uniquely because writing as process-and-product possesses a cluster of attributes that correspond uniquely to certain powerful learning strategies.” *Id.*
5. *Id.* at 127 (citing Lev S. Vygotsky, *Thought and Language*, trans. Eugenia Hanfmann & Gertrude Vakar 100 (Cambridge, Mass., 1962)). Although we believe that critical reading and Socratic dialogue also involve deliberate structuring of meaning, we concede that writing results in our most intense and sustained efforts.
6. The relation between writing and learning subject matter is discussed in Lee Odell, *Teaching Writing by Teaching the Process of Discovery: An Interdisciplinary Enterprise*, in *Cognitive Processes in Writing*, eds. Lee W. Gregg & Erwin R. Steinberg, 139 (Hillsdale, N.J., 1980). More recently, studies suggest that although writing tasks that require only knowledge-telling do not result in the accretion of knowledge, writing tasks that require problem-solving do apparently result in knowledge restructuring. See Laurel Oates, *Beyond Communication: Writing as a Means of Learning*, presented at the Legal Writing Institute Conference (Chicago, July 1994). Oates discusses the following studies, among others: J. M. Ackerman, *The Promise of Writing to Learn*, 10 *Written Comm.* 334 (1993); J. D. Marshall, *The Effects of Writing on Students' Understanding of Literary Texts*, 21 *Res. in Teaching Eng.* 30 (1987); A. M. Penrose, *To Write or Not to Write: Effects of Task and Task Interpretation on Learning Through Writing*, 9 *Written Comm.* 465 (1992).
7. Insight into the cognitive process may only develop, however, if teachers use the writing projects to alert students to “intuitive communication strategies writers already have, but are not adequately using.” Linda Flower, *Writer Based Prose: A Cognitive Basis for Problems in Writing*, in *The Writing Teacher's Sourcebook*, eds. Gary Tate & Edward P. J. Corbett, 268, 269 (New York, 1981). Teachers must help students think about their thinking by monitoring and intervening in the writing process.

Scholarly writing immerses students in a specialized area of law and gives them a sense of what it means to be an *expert* in a field—to know its history and literature, its issues and solutions; to synthesize all that is currently known on a subject to see how it fits together. Originality most often comes after expertise is established. Only after the field has been canvassed can a writer come up with new speculations, show how one area of law sheds light on another, explore the truth of a matter and prove it to others.<sup>8</sup>

Furthermore, scholarly writing develops students' legal reasoning skills by requiring them to adopt a more global perspective than any individual case presents. It introduces students to a perspective and a type of writing other than the purely instrumental or practical—namely, critical writing. And far from being useful only to scholars, this new dimension enhances the practitioner's ability to draft appellate arguments, estate plans, and other complex documents.

Beyond the substantive and practical contexts, however, scholarly writing is also a tool for helping students to hone fundamental cognitive processes. To narrow a topic and to develop and support a thesis, students must engage in a number of intellectual operations. They must identify and summarize viewpoints, synthesize material, shift perspectives, make comparative judgments, move up and down the ladder of abstraction, apply principles, predict consequences, make recommendations, and delineate causes and effects.<sup>9</sup> Finally, extended writing projects are a good way of teaching process itself, of learning how to break an intellectual enterprise down into manageable units.<sup>10</sup>

But for scholarly writing to accomplish these goals, the type of supervision provided is crucial or the enterprise may not be worth the effort. Our research and experiences have led us to three basic conclusions. First, like writing teachers generally, supervisors of scholarly writing need to intervene earlier in the writing process.<sup>11</sup> Since narrowing a topic and finding a thesis are both

8. The notion that creativity often requires substantial expertise is borne out by a description of creativity as "the capacity to solve problems through insights that are arrived at independently," a process that goes through five stages: first, recognition of a problem; second, preparation; third, option generation; fourth, option evaluation; and fifth, a decisional stage. Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 *Hastings L.J.* 725, 744–45 (1989).
9. This skill breakdown comes in part from an essay on the relation between assignments and skills. Anne J. Herrington, *Writing to Learn: Writing Across the Disciplines*, 43 *C. Eng.* 379, 384 (1981).
10. See generally Hairston, *supra* note 3.
11. A recent study of teacher comments on college papers indicated that "[o]ver 59% of the initial and terminal comments were grade justifications, 'autopsies' representing a full stop rather than any medial stage in the writing process. In contrast, only 11% . . . exhibited commentary clearly meant to advise the student about the paper as an ongoing project." Robert J. Connors & Andrea A. Lunsford, *Teachers' Rhetorical Comments on Student Papers*, 44 *C. Composition & Comm.* 200, 213 (1993). In our advanced legal writing seminar, we try to intervene in the "on-going project" of writing a seminar paper, as shown in the schedule we give out at our first class.

*Feb. 8, Choice of Project/Preliminary Thoughts.* Hand in a page with your choice, some preliminary ideas and theses, and the results of some initial research. Don't just describe the case or topic—use your best and most original thinking.

*Mar. 1, Hand in Research Logs, Reading Journals, Thesis Statement.* You may also submit any "freewrites."

crucial and consistently difficult stages for students, our assistance is especially needed here.<sup>12</sup> Second, we need to teach our students strategies for invention, for finding theses and arguments so that the undertaking is more rewarding and the product more substantial. And third, we need to learn to provide the types of feedback that are most appropriate for each stage of the writing process.<sup>13</sup>

This article begins with an overview of the writing process. We then take a closer look at the student's and the teacher's roles at each stage, making suggestions for both student and teacher as we go along. Finally, we conclude with some thoughts about institutional and curricular changes that might make scholarly writing in law school a more satisfying enterprise for all concerned.

### I. The Process of Scholarly Writing

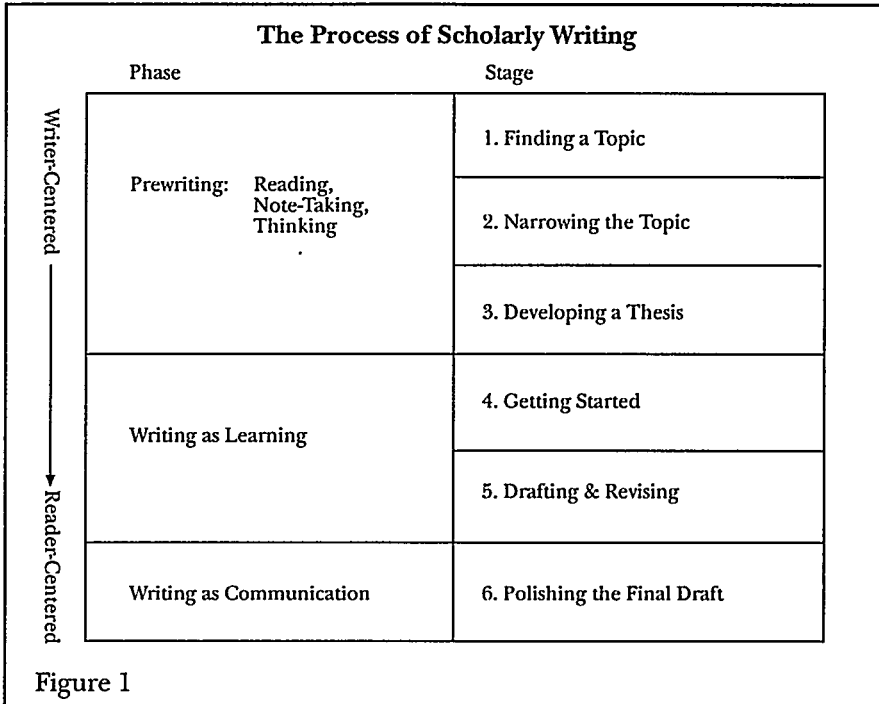
Conforming our intervention as teachers to the stages of the scholarly writing process requires first of all a sense of the process itself. The chart in Figure 1 describes the process, and the first thing to note about it is that it is wrong—wrong in that it depicts as linear a process that is really recursive, a kind of spiral or helix.<sup>14</sup> All writers know from their experience that serious writing projects involve one endlessly in Prufrockian “decisions and revisions which a minute will reverse.” But like so many things that are not entirely true, our chart is useful. Most important, it shows the progression from complex and lengthy writer-centered activity to more straightforward reader-centered activity. Composition theory traditionally divides the mainly writer-centered part of the process into two phases. The first is *Prewriting*<sup>15</sup>—useful jargon for inspiration and knowledge accumulation. We've further divided that phase

*March 29, Detailed Outline.* This should be in standard “Roman” form, about 5 pages long, indicating not only the organization, but the substance of your project as well. It should be based on completed research and develop an original thesis. If you have trouble outlining, come talk to us.

*April 12, First Draft.* This should be a complete draft, with footnotes or endnotes, and the results of your best intellectual efforts, not a “rough draft.”

*May 15, Final Draft.*

12. As one teacher puts it, “Who wouldn't rather influence the process at . . . [a] formative stage, tell [students] what to keep and build on, than complain about what they haven't done or what they've done wrong when it's too late? A teacher can point to evolving lines of reasoning, proto-arguments, effective details, the tracks of developing thoughts.” M. Elizabeth Sargent Wallace, *How Composition Scholarship Changed the Way I Ask For and Respond to Student Writing*, in *Modern Language Association, Profession '94*, ed. Phyllis Franklin, 34, 37 (New York, 1994).
13. For example, teachers “need to develop an appropriate level of response for commenting on a first draft, and to differentiate that from the level suitable to a second or third draft. . . . In a first or second draft, we need to respond as any reader would, registering questions, reflecting befuddlement, and noting places where we are puzzled about the meaning of the text.” Nancy Sommers, *Responding to Student Writing*, 33 *C. Composition & Comm.* 148, 155 (1982).
14. This chart significantly elaborates on one that appears in Jessie Grearson, *Process to Product: Teaching the Writing Process in Law School*, 9 *Second Draft* 1, 7 (1993).
15. See, e.g., Robert Scholes & Nancy R. Comley, *The Practice of Writing*, 2d ed., 15–18 (New York, 1985).



for our purposes into *Finding a Topic*, *Narrowing a Topic*, and *Developing a Thesis*. The second writer-centered phase is *Writing as Learning*; here problems are solved and new knowledge structures formed as the writer writes. We divide this phase into *Getting Started* and *Drafting and Revising*. The second of these two stages takes the writer to the end of the wholly writer-centered phase, and into the reader-centered process, culminating in a complete draft, one that has most likely already been considerably revised by the writer and may be the first “submitted” draft. By this point the writer has already begun to take the reader into account, but it is in the third and last phase of the writing process, *Writing as Communication*, that the writer’s primary concern is meeting reader expectations, an undertaking that requires polishing the prose and conforming to the conventions of scholarly writing. Our chart shows just one stage here, *Polishing the Final Draft*.

The writer-centered phases, *Prewriting* and *Writing as Learning*, are the most complex and creative part of any writing project. It is not for nothing that they occupy most of our chart. Yet teachers traditionally intervene the least in those stages; and without intervention, students seem to spend the least time there. Our own observations suggest that students spend most of their time at our Stage 5, *Drafting and Revising*, struggling to fashion intelligible syntheses and paraphrases of their reading. They have skimmed on Stages 2, 3, and 4—that is, on narrowing their topic, developing a thesis, and generating ideas on paper. Once their drafts are submitted, there is little we can do but make suggestions for revision of a paper that in too many cases cannot be really redeemed.

In an effort to help students write better papers and get more out of the experience, we have created a second chart (Figure 2) that suggests writing and teaching techniques for each stage of the process. The *Techniques for the Writer* column lists activities and heuristics that we can suggest or even require as students begin a given stage. The *Teacher's Role* column suggests appropriate kinds of intervention and types of feedback as students complete each stage. We distinguish here among four basic kinds of feedback: exploratory, descriptive, prescriptive, and judgmental.<sup>16</sup>

Writing and Teaching Techniques			
Phase	Stage	Techniques for the Writer	The Teacher's Role
Writer-Centered	1. Finding a Topic	<ul style="list-style-type: none"> <li>• Consult your interests</li> <li>• Ask an expert</li> <li>• Browse looseleaf services &amp; online current developments</li> <li>• Read the newspaper</li> </ul>	<ul style="list-style-type: none"> <li>• Before student starts, suggest techniques at left</li> <li>• Give appropriate type of feedback: primarily exploratory                             <ul style="list-style-type: none"> <li>• Suggest topics</li> <li>• Provide bibliography</li> <li>• Check student has read widely enough to be able to situate the topic</li> <li>• Be a second reader of journals &amp; freewriting, noting good ideas and themes</li> <li>• Be a sounding board</li> </ul> </li> </ul>
	2. Narrowing the Topic	<ul style="list-style-type: none"> <li>• Use the zoom lens</li> <li>• Investigate categories of argument</li> </ul>	
	3. Developing a Thesis	<ul style="list-style-type: none"> <li>• Keep a reading journal</li> <li>• Freewrite</li> <li>• Take a problem-solving approach</li> <li>• Adopt different jurisprudential perspectives</li> <li>• Search for inconsistency and omission</li> <li>• Examine the context</li> <li>• Find a niche</li> <li>• Examine types of legal argument</li> </ul>	
Writing as Learning	4. Getting Started	<ul style="list-style-type: none"> <li>• Use graphics</li> <li>• Make dump lists</li> <li>• Flesh out a prefab                             <ul style="list-style-type: none"> <li>• Fill in the outline of a typical law review article</li> <li>• Develop paradigms</li> </ul> </li> <li>• Write a zero draft</li> </ul>	<ul style="list-style-type: none"> <li>• Before student starts, suggest techniques at left</li> <li>• Give appropriate types of feedback: primarily descriptive and prescriptive                             <ul style="list-style-type: none"> <li>• Check thesis</li> <li>• Check content coverage</li> <li>• Check organization</li> <li>• Give organized written comments</li> <li>• Diagnose sentence level problems &amp; make sample corrections</li> </ul> </li> </ul>
	5. Drafting & Revising	<ul style="list-style-type: none"> <li>• Write in order of ease</li> <li>• Try invisible writing</li> <li>• Stop before you're stuck</li> <li>• Assess first draft                             <ul style="list-style-type: none"> <li>• Do a rhetorical analysis</li> <li>• Make a topic sentence outline</li> <li>• Play devil's advocate</li> </ul> </li> <li>• Revise in stages                             <ul style="list-style-type: none"> <li>• Content</li> <li>• Organization</li> </ul> </li> </ul>	
Reader-Centered	6. Polishing the Final Draft	<ul style="list-style-type: none"> <li>• Paragraph revision                             <ul style="list-style-type: none"> <li>• Unity</li> <li>• Cohesion</li> </ul> </li> <li>• Sentence revision                             <ul style="list-style-type: none"> <li>• Tone</li> <li>• Syntax</li> <li>• Mechanics</li> <li>• Style</li> </ul> </li> <li>• Proofreading</li> </ul>	<ul style="list-style-type: none"> <li>• Before student starts, suggest techniques at left</li> <li>• Assess revision</li> <li>• Give appropriate type of feedback: primarily judgmental</li> </ul>

Figure 2

16. These four types of feedback are described in Kristen R. Woolever & Brook K. Baker, *Diagnosing Legal Writing Problems: Theoretical and Practical Perspectives for Giving Feedback*, presented at the Legal Writing Institute Conference (Ann Arbor, July 1990).

First, there is exploratory—that is, brainstorming—feedback. Here the reader questions assumptions and raises alternative interpretations, meanings, and strategies. Because explor-

## II. Supervising Scholarly Writing

### A. *Finding and Narrowing a Topic*

Our Stage 1, *Finding a Topic*, is the most straightforward part of the writing process. If students need help here, the first suggestion is "Consult your interests"; experienced writers know it is always a bad idea to write about a thing one ultimately feels no connection to. More specific suggestions might include asking an expert or mentor, browsing Highlights on Westlaw and Hot Topics on Lexis, reading a good news magazine or daily newspaper, and consulting the notes that follow leading cases in casebooks.

The second stage, *Narrowing the Topic*, is more difficult. Here, two techniques can help. First is the zoom-lens trick.<sup>17</sup> It involves using the imagination to zoom in close to a subject, pull back for a global view, or settle somewhere in the middle distance. Take, for example, a student who finds a newspaper article about new legislation affecting the rights of unmarried couples and who chooses domestic partner legislation as the subject of his seminar paper. This student still needs to narrow the subject. He could zoom in very close and parse the language of a particular statute. In the middle distance, he could compare legislation in several jurisdictions. Or he could zoom all the way back and ask why the law privileges certain kinds of relationships over others. A similar topic-narrowing technique uses some of Aristotle's "topics" of argument: definition, comparison, causation, and substantiation by evidence.<sup>18</sup>

atory feedback helps writers think through the problem, it is especially helpful at Stages 1 through 4 of our chart.

Second is descriptive feedback, where the reader simply describes her reaction to the paper and tries to give back to the author the meaning conveyed by the text. Descriptive feedback is not judgmental, but it shows why the reader thinks revision is necessary. Descriptive feedback is helpful in the middle stages of the writing process. Skillfully rendered descriptive feedback is especially valuable because it allows the writer to forge her own solutions.

Prescriptive feedback begins with a diagnosis of the problem with the paper and then suggests some ways to cure it. The difficulty here is deciding how directive or nondirective to be. In general, weaker students need more detailed instruction, strong writers less. Prescriptive feedback is appropriate in the middle stages, but it should be used judiciously. It is almost impossible to be prescriptive without taking initiative away from the writer, directing her to write the paper as we would have written it.

Finally, there is judgmental feedback. As teachers, we must eventually evaluate quality not just because grades are usually required, but also because students need to have a sense of their proficiencies and deficiencies. To have educational value, judgments should be based on shared criteria; they should also be positive as well as negative, and geared to the particular stage of the writing process.

17. See Sarah W. Sherman, *Inventing the Elephant: History as Composition*, in *Only Connect: Uniting Reading and Writing*, ed. Thomas Newkirk, 211, 214–21 (Upper Montclair, N.J., 1986).
18. *The Rhetoric of Aristotle*, trans. Lane Cooper (New York, 1932); see also Linda Flower, *Problem Solving Strategies for Writing* 74–75 (New York, 1981). Our hypothetical student writing about domestic partnership legislation could work through these categories to narrow the subject, perhaps as follows.

Definition: What constitutes a domestic partner relationship? Is "family" being redefined?

Comparison: How do domestic partner rights in one jurisdiction compare with those in others?

Causation: What effect will the legislation have? What prompted it?

#### THE TEACHER'S ROLE

At this point the teacher's role includes suggesting techniques for narrowing subjects, checking to see that the student is reading widely enough to situate the topic accurately, suggesting research techniques, and serving as a sounding board. Feedback here is essentially exploratory.

In addition, the teacher needs to encourage familiarity with the genre. Students who are not familiar with legal scholarship as a discourse, with its conventions and rhetorical situation, must become so during these early stages. They should understand the audience,<sup>19</sup> purpose,<sup>20</sup> and formal constraints of traditional legal scholarship, and also be aware of at least some of the ways in which the genre is being challenged and transformed.<sup>21</sup> Students should be encouraged to notice the structure and tone of scholarly articles as well as their content. As experienced writing teachers point out, novice writers who do not familiarize themselves with the genre in which they intend to write end up "reinvent[ing] the wheel when what is needed is the invention of the axle, the bearing, or the differential gear."<sup>22</sup>

Finally, we need to be sure that students are doing more than just reading at Stage 2. Writers who separate research and writing into discrete activities risk massive attacks of writer's block. As the researching and narrowing stage progresses, the teacher should encourage students to record their thoughts; writing in fact begins in prewriting. And at least three practical don'ts are appropriate to this stage: Don't use a highlighter pen (it's useless for recording ideas). Don't print out or xerox everything you find (take notes and copy sources selectively as your focus narrows). And don't read important sources on the screen (the poor contrast interferes with concentration).

#### B. *Developing a Thesis*

Our Stage 3, *Developing a Thesis*, is too often simply skipped. Once students narrow their topic, they acquire more knowledge about it and then limit themselves to paraphrase and, at best, synthesis. Commenting on a judicial opinion, they tell us it was correct for the reasons expressed by the majority, or incorrect for the reasons expressed by the dissent. The challenge here is to help students find their way to their own particular intellectual take on the

Substantiation by evidence: Why is this a good (bad) solution?

19. Students should be aware that the audience of legal scholarship is both unitary and multiple. Almost all readers of legal scholarship are law-school-educated, but they come from all walks within the profession. Legal scholarship is generally read by specialists but written for generalists—a peculiarity that students should keep in mind when determining the appropriate level of discussion.
20. When thinking about the purpose of legal scholarship, it is helpful for students to realize that although some legal scholarship is empirical and some interpretive, most legal scholarship is both normative (it has a social goal) and prescriptive (it recommends or disapproves of a means to a goal). See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 *Mich. L. Rev.* 1835, 1847–53 (1988).
21. The use of narrative in legal scholarship is perhaps the most striking (and liberating) development. See generally Symposium, *Legal Storytelling*, 87 *Mich. L. Rev.* 2073 (1989). The creation of a new, less formal genre, the "essay" or "commentary," is another recent development.



subject, to find something new and illuminating to say. This is a dicey business for teachers: on the one hand, we need to nurture ideas without supplying or dictating them, but on the other hand, there is the danger of being too miserly with our ideas. We need to make it clear that legal scholarship is a continuum and that building on the ideas of others is as respectable as it is natural—so long as we acknowledge our sources.

There are many techniques for finding a thesis. No single technique works for everyone, or on every topic. All we can do is put out a range of suggestions. Many are “codifications” of activities that expert writers engage in automatically. Keeping a reading journal and freewriting are two techniques much in favor with teachers of analytical writing. Some teachers require these activities in an effort to ensure that students start thinking critically and recording their ideas *early*.

Reading journals combine traditional note-taking with a record of the reader’s own reflections, reactions, and ideas. (Of course, the reader rigorously separates the two.) In one format, the reader takes notes on the left-hand page of a notebook, and records ideas on the right-hand page.<sup>23</sup> In the example below, a reader describes and reacts to a decision on the First Amendment speech rights of government employees.<sup>24</sup>

Notes

Under old rule in 2d Cir. (“Piesco rule”) gov’t employee couldn’t be fired for speech on issue of public concern unless speech “actually disrupted” gov’t operations. Relying on new Sup. Ct. decision (Waters v. Churchill), 2d Cir. reverses case decided under former rule. 2d Cir. now holds that university professor’s removal as dep’t head ok because there was a “reasonable prediction” of disruption. “Even where the speech is squarely on public issues,” 2d Cir. says Waters “indicates that the gov’t’s burden is to make a substantial showing of likely interference and not an actual disruption.”

2d Cir. says Waters “has loosened Piesco’s shackles on public employers.”

Ideas

Acad. freedom issue?

Is this a ruling by S.Ct.? What does “indicate” mean? Check Waters.

Slaves and prisoners wear shackles, not Gov’t. Manipulative tone?

22. Scholes & Comley, *supra* note 15, at 14.

23. Jill N. Burkland & Bruce T. Petersen, An Integrative Approach to Research: Theory and Practice, in *Convergences: Transactions in Reading and Writing*, ed. Bruce T. Petersen, 189 (Urbana, 1986) [hereinafter *Convergences*].

24. *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir.), *cert. denied*, 116 S. Ct. 173 (1995).

Students can then reread their journals to see what ideas, themes, or motifs have emerged that could form the basis of an interesting thesis.

Another technique to come out of the writing-as-learning movement is freewriting. The writer sits down, focuses on the topic, and just writes and keeps on writing in stream-of-consciousness fashion, that is, without regard to structure, grammar, or spelling.<sup>25</sup> When the writer can't think of anything to write, she writes just that, "I can't think of anything to say," over and over until there is a breakthrough. At the end of a predetermined period of time (15, 30, or 45 minutes is recommended), the writer sums up the ideas and themes that emerged. After this, she can do a more focused freewriting on one of those themes.

In addition to being powerful brainstorming tools, reading journals and freewriting can prevent writer's block. As "practice" writing, they do not produce the anxiety that attends "real" writing, anxiety that is often born of fear of evaluation.<sup>26</sup>

Yet reading journals and freewriting will be only as meaningful as the writer's reading practice is rich. In the past several years, we have spent a lot of time thinking and writing about critical reading and how it might be taught and encouraged in law school.<sup>27</sup> Our interest came in part from a perception about the way law students read judicial opinions. Sometimes they seem to us to be mesmerized by the court's reasoning, like rabbits caught in the glare of headlights. The challenge is to get them moving, thinking independently. We need to encourage case debriefing as well as case briefing.

One good technique is Karl Llewellyn's famous "problem-solving" approach to reading cases.<sup>28</sup> It asks the reader to imagine all of the arguments that could have been made by all of the parties. Students can also be encouraged to read a judicial opinion looking for all of the types of arguments made—e.g., authority, social policy, institutional constraint—and also seeing which are missing. We often give our students Judge Robert A. Leflar's excellent article, "Honest Judicial Opinions,"<sup>29</sup> and ask them to look for his "authority reasons," "rightness reasons," and "goal reasons" when they read judicial opinions.

Theses also materialize when students read for historical context, jurisprudence, and rhetoric. In particular, it is helpful to think how judges with different approaches would decide the case, and how less court-centered

25. The great guru of freewriting is Peter Elbow, author of *Writing Without Teachers* (New York, 1973) [hereinafter *Elbow, Writing Without Teachers*] and *Writing with Power* (New York, 1981). See also *Nothing Begins with N: New Investigations of Freewriting*, eds. Pat Belanoff et al. (Carbondale, 1991) [hereinafter *Nothing Begins with N*]. We give an example of freewriting in section C below.

26. Scholes & Comley, *supra* note 15, at 14–15.

27. See *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 *Cornell L. Rev.* 163 (1993) [hereinafter *Fajans & Falk, Against the Tyranny*]; *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers* ch. 2 (St. Paul, 1995) [hereinafter *Fajans & Falk, Scholarly Writing*].

28. *The Current Crisis in Legal Education*, 1 *J. Legal Educ.* 211, 213 (1948).

29. 74 *Nw. U. L. Rev.* 721 (1979); see also Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *Cornell L. Rev.* 707 (1978).

approaches would view the controversy.<sup>30</sup> Equally, looking at the way courts use language and the kinds of rhetorical devices they use can generate ideas.<sup>31</sup>

Students can also be encouraged to find a thesis in a much-written-about field by finding a niche, frequently by building on suggestions thrown out by other writers in conclusions or in textual footnotes. We need to emphasize here again that as important as originality is, writers work in a continuum and it is acceptable to use another's work as a starting point, so long as we acknowledge the source of our inspiration.

Finally, when a thesis is not forthcoming and the subject is not assigned, students have to be willing to give up if they conclude after serious efforts that there is nothing new or useful to say. This is one reason why it is so important to start early; backing out of a dead end is at once an obligation and a luxury for a scholar. And having some time to spare can help save a promising thesis that doesn't want to work. Cognitive psychologists have observed that if we take time off from an intellectual problem, we forget the dead ends and are more able to work it through satisfactorily when we go back to it. (Reading that novel or watching that game may be nature's way of working out the problem.)<sup>32</sup>

#### THE TEACHER'S ROLE

The most important thing a teacher can do at this stage is to suggest, even teach, some of the brainstorming techniques mentioned above. In addition, teachers can assist students by being second readers of reading journals, even of freewrites, helping to pull out potential theses. At the same time, the teacher should continue to monitor the student's research and continue to be a sounding board, perhaps playing devil's advocate. Feedback here is still essentially exploratory, although commenting on an extended freewrite might also involve some descriptive feedback as well.

#### C. *Getting Started*

Next to developing a thesis, the hardest part of any writing project is getting it started.<sup>33</sup> How does one plot a route to a destination when all roads are under construction? There is no panacea here, no method for getting started that is universally helpful.<sup>34</sup> But here are some possibilities.

30. See Bailey Kuklin & Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* 48-63 (St. Paul, 1994); see also William L. Twining, *Reading Law*, 24 *Val. U. L. Rev.* 1 (1989).

31. See generally Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *Yale J.L. & Human.* 201 (1990); Haig A. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale, 1992).

32. Flower, *supra* note 18, at 77-78.

33. For disabling cases of writer's block, prescribe Karin Mack & Eric Skjei, *Overcoming Writing Blocks* (Los Angeles, 1979).

34. "Having an outline or a design ahead of time is one of those things that's a great help to people it's a great help to." Bill Stott, *Write to the Point and Feel Better About Your Writing* 56 (New York, 1991).

For some students, an outline is an essential first step—the sole means of fending off paralyzing anxieties about where to go next.<sup>35</sup> This type of writer is unable to focus on trees without a map of the forest.<sup>36</sup> For other students, the most destructive advice you can give is “Think before you write.”<sup>37</sup> For these students, spontaneous, freewheeling, and far-ranging writing is the best way into a subject, and the most promising way of finding connections essential to logical organization.<sup>38</sup> But whatever basic instincts students have about their writing processes, what most need to learn is that getting ideas down on paper, fleshing them out, and putting them in a logical and compelling order will take all their resources—and then some.

For those students who need to write about the topic before they can even begin to think about outlining it, or for those students who are still forging ideas and synthesizing material, the best thing to do is simply to plunge into the writing process by working on a rougher-than-rough draft—a zero draft.<sup>39</sup>

Essentially an extended freewrite or free association, a zero draft should be approached in the spirit of adventure. Because the exercise is a private, casual, nonstop exploration of the topic, it is often an excellent way of breaking down reserves and getting into the material.

We illustrate the uses of freewriting below, with one writer’s meditations on the case used above in a reading journal—a case holding that public university officials did not violate the First Amendment rights of a teacher when they demoted him because of a controversial speech made outside the classroom.<sup>40</sup>

All of the cases say that the government can regulate speech more when it acts as an employer than it can when it is making laws, because the government has an interest in getting things done efficiently by its employees. If everybody is mouthing off, it’s hard to get things done. I guess this makes sense. Cases say if the government wants to fire you because of what you said, they have to prove that their interest in not having you say it is greater than your interest in saying it. A good old balancing test, the scales of justice.

But does the test consider what you’re weighing as well as how much it weighs? Does it matter what the government’s business is? Is efficient operation as important in a school

35. Writing blocks often come from feeling overwhelmed by the task. If the student can break the task into steps, the enterprise may be less overwhelming. See Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written*, 2d ed., 353 (St. Paul, 1993).

36. The poet Donald M. Murray says that, at the very least, he “must have, in his mind’s eye or on paper, an idea of where he is going to begin and where he is going to stop.” *A Writer Teaches Writing* 7 (Boston, 1968).

37. See Peter Elbow & Pat Belanoff, *A Community of Writers: A Workshop Course in Writing*, 2d ed., 99 (New York, 1995).

38. “[I]t is when I write, not when I outline, that I work most closely with my subject, see its complexities most fully, and can best estimate what readers will have trouble understanding.” Stott, *supra* note 34, at 56.

39. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 12 (St. Paul, 1991).

40. *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir.), *cert. denied*, 116 S. Ct. 173 (1995).

as in a police department? What about other people's interests, like the interests of the students if the government wants to fire a controversial teacher? Or is that also part of the government's interest—to expose kids to a broad range of ideas. If this is a government interest, doesn't it weigh against its other interest—efficiency? What happens to balancing when efficiency conflicts with exposure to the marketplace of ideas?

If you're talking about something very important, "public concern" stuff, the cases say the government has a heavy burden to show the speech was bad for its operation—but Second Circuit says the Supreme Court changed that in Waters and now the government just has to show that it was reasonable to think that what you said would interfere with getting government business done. Only Supreme Court didn't say it was changing the rule.

And Waters isn't really about the balancing test anyway—it's about whether it's o.k. to take retaliatory measures if the employer just thinks you said something but you really said something else. The Court said retaliation is legit, even though the statement could only have a hypothetical effect since it was never really made. Waters is spooky. How can it not be a defense to say you didn't say it? Doesn't government have interest in integrity, truth? Maybe if the government's business is saving hostages it's o.k. to prevent disruptive speech. But this is a school case. How important is running it efficiently? Is there too big a danger that teachers with unpopular views will get fired? All the school has to say is we thought she said X and this controversial view might lead to a sit-in or a moratorium—or it might make it hard to get money from the alumni. On the other hand, aren't these real dangers? Or maybe we have such a big problem with hate speech that it isn't so bad? Maybe as employer of teachers, government (also?) needs to show that students harmed? Would potential harm be enough?

Once a freewrite is finished, the student can try to pull an outline out of the draft by combing through it, spotting interesting issues, and cross-referencing themes. In the sample above, for example, we notice that after some tentative initial concessions about the fairness of the decision, the author becomes increasingly critical—and, in one instance, even critical of her own criticism. The following ideas emerge from the freewrite.

Efficient operation is a legitimate government concern.

But is it always appropriate to balance government's interest in efficiency against an employee's free speech rights?

Does it matter what the government's business is? A university is not an army.

Are there third-party concerns? Student interests? Aren't these antithetical to the government's?

Should efficiency trump even when the government was mistaken about the disruptiveness of the employee's remarks? How can we punish the innocent? In a democracy, innocence should always be a defense.

Can potential disruption justify disciplining a teacher for controversial statements? Maybe if it's "hate speech"?

After listing these thoughts, the writer's next step is to wrestle them into an outline. First, related ideas should be grouped; then primary ideas should be separated from secondary ideas; finally, headings should be articulated.<sup>41</sup> Such efforts might produce the following outline.

- I. Waters says government can fire employee if government reasonably believes employee said something that would be likely to interfere with efficient government operations. This is a bad rule, especially for educational situation like that in Jeffries.
  - A. In general:
    1. Problem: Government integrity—you can be fired even if you didn't say it! O.k. in a democracy? Sets bad example?
    2. Problem: Too easy to prove—no need to show actual anything, just belief in what was said and what might happen. Can always show controversial statement could cause disruption.
  - B. In the school context:
    1. Problem: Same as "in general"—integrity and proof.
    2. Problem: Interest in efficiency justified? No.
      - a. Student/government interest in education, multiple views weightier? Academic freedom?
      - b. Government real interest in avoiding harm to students?
    3. Solution: Propose new test: did speech actually interfere with educational mission or harm students?

Freewrites and zero drafts, besides leading to outlines, may also yield actual text. Sometimes, simply by deleting digressions and looping together related points using the "block" and "move" functions, a writer produces usable paragraphs. And even if a first freewrite falls short of usable prose, it may yield enough to make it profitable to undertake the more focused types of freewriting discussed above.<sup>42</sup>

Thus far we have talked about starting techniques for students who are comfortable generating text without an outline, who indeed can generate their outline from their text. Writers who simply cannot begin this way, who need an aerial map of the forest before they can examine the trees, might be relieved to learn that there are several ways to generate an outline other than starting with Roman numeral I.

Some students have visual imaginations, and for them, graphics might be the first step toward the overview necessary to sound organization. For example, if a student is so bogged down in research that she cannot see patterns

41. See Ray & Cox, *supra* note 39, at 12.

42. See Elbow, *Writing Without Teachers*, *supra* note 25, at 18–22.

and trends, a case chart may help her to gain perspective.<sup>43</sup> To create a chart, list the cases down the left margin and the issues across the top. Then fill in the boxes. The example in Figure 3 was created by a writer organizing case law for a paper on the First Amendment issue that we have used in previous examples.

Case Chart					
Case	Court	Context	Speech on issue of public concern?	Interference with government functioning?	1st Amendment violation?
<u>Connick</u> <u>V.</u> <u>Myers</u>	U.S. Sup. Ct.	Dist. Atty's Office	In a "limited sense"	"Clear potential"	No
<u>Rankin</u> <u>V.</u> <u>McPherson</u>	U.S. Sup. Ct.	Sheriff's Office	Yes	None shown	Yes
<u>Piseco</u> <u>V.</u> <u>City of NY</u>	2d Cir.	Dep't of Personnel	Yes	No "actual"	Yes
<u>Levin</u> <u>V.</u> <u>Harleston</u>	2d Cir.	Public University	Yes	No "actual"	Yes
<u>Jeffries</u> <u>V.</u> <u>Harleston</u>	2d. Cir.	Public University	Yes	"reasonable prediction"	No

Figure 3

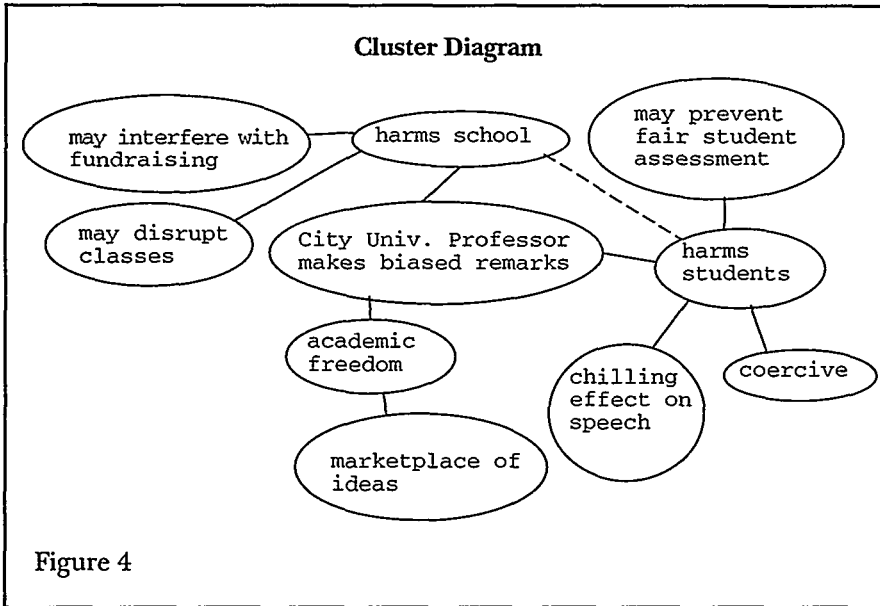
When the relations among ideas are perplexing, cluster diagrams help some students make logical connections:<sup>44</sup> the writer jots down a significant idea in the center of a page and then surrounds it with all the ideas he can think of that bear upon it. Closely associated ideas are put near the center and remote connections at the perimeters, with related points next to each other. The writer then draws connecting lines between closely related points. Although the final diagram may have some crisscrossing lines, major clusters of ideas should become apparent, as well as some of the ties between clusters. Reacting to the First Amendment issue used above, one writer drew the cluster diagram shown in Figure 4.

Once the writer has drawn a cluster diagram, the next step is an issue tree that arranges the ideas hierarchically:<sup>45</sup> the student puts a primary idea at the

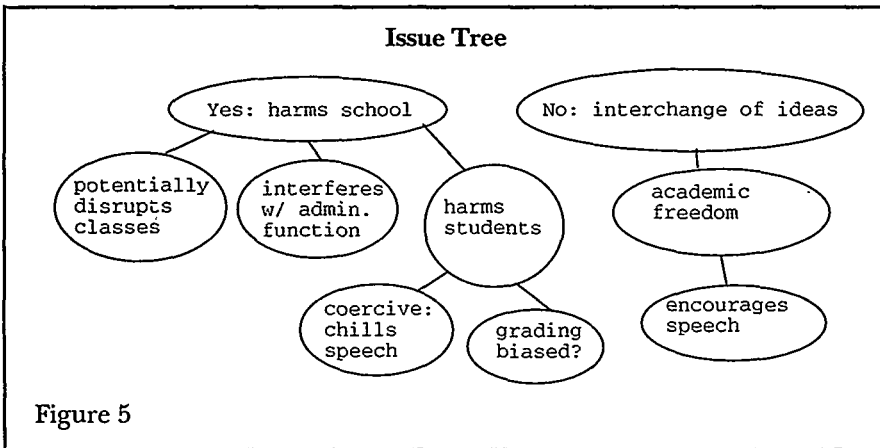
43. See Kristin R. Woolever, *Untangling the Law: Strategies for Legal Writers* 42-43 (Belmont, Cal., 1987); Deborah B. McGregor, *Charting*, presented at the Legal Writing Institute Conference (Ann Arbor, July 1990).

44. Laurel Currie Oates et al., *The Legal Writing Handbook: Research, Analysis and Writing* 513-15 (Boston, 1993); Elbow & Belanoff, *supra* note 37, at 13.

45. Frederic G. Gale & Joseph Michael Moxley, *How to Write the Winning Brief: Strategies for Effective Memoranda, Briefs, Client Letters, and Other Legal Documents* 20-21 (Chicago, 1992); Flower, *supra* note 18, at 87-91.



top of the tree and works down through the subpoints. As the issue tree grows, some subpoints may sprout their own branches, creating subdivisions that require separate discussions. The cluster diagram above led to the issue tree in Figure 5, where the writer wonders whether a public university professor's biased remarks justify disciplining him.



Finally, an issue tree can easily be turned into a formal outline like the one below.

A public university professor's biased remarks should be punished only if they have an actual and harmful impact on students, not if they simply interfere with efficient administration.



- A. Academic freedom is essential in a democracy.
  - 1. Progress results from the free exchange of ideas.
  - 2. Academic freedom encourages speech, doesn't chill it.
- B. Speech should be punished only if it harms educational mission.
  - 1. Students are coerced into intellectual submission.
  - 2. Students have a perception of biased grading.

If a student is eager to generate an outline but doesn't have a visual imagination, she could try a dump list.<sup>46</sup> She should begin by listing every idea she has on a topic. Then she should follow a procedure similar to the "play" that follows a freewriting exercise: she should group related points, separate those points into issues and subissues, articulate principles, discard the irrelevant, and experiment with order. This process moves a writer towards an outline.

Once this kind of conceptual play generates major arguments, students may be able to meld their smaller outlines with larger organizational schemes. Legal scholarship—like the boilerplate of pleadings, leases, contracts, or wills—has a traditional structure that provides at least a provisional framework for almost any topic. Students can plug information into this "prefab" or "writing plan," adapting it as necessary.<sup>47</sup>

#### Traditional Structure of a Law Review Article

##### Introduction

1. Introduce and note why the topic is important.
2. Briefly summarize necessary background information.
3. State your thesis.
4. Convey your organization of the paper.

##### Background

1. Describe the genesis of the subject.
2. Describe the changes that have occurred during its development.
3. Explain the reasons for the changes.
4. Describe where things are now. (You may also want to indicate the reasons for further change.)

46. Ray & Cox, *supra* note 39, at 12.

47. Although "structure is not inherent in the information we present, but is something we impose upon it," we can find assistance in writing plans. Barbey N. Dougherty, *Writing Plans as Strategies for Reading, Writing, and Revising*, in *Convergences*, *supra* note 23, at 82, 82. Writing plans

exist as part of our culture and are acquired as a result of our experiences in reading and writing. . . . As cognitive structures, these plans are like blueprints. Just as a blueprint describes the structural underpinnings of a building without yet realizing a particular building made of specific materials, so a writing plan sketches out the relationship of ideas with broad penstrokes without yet realizing any specific content.

As writers we use these plans as a way of exploring and thinking . . . .

*Id.* at 82–83.

Statement of the Case  
(for a case note or case comment)

1. Include the relevant facts.
2. Include the procedural history.
3. Include the court's holding and reasoning at each level, as well as the reasoning of dissenting or concurring opinions.

Analysis  
(large-scale organization)

1. Discuss the major issues.
2. Separate issues and subissues.
3. Order issues logically.

(small-scale organization)

4. Introduce and conclude on each issue.
5. Present your argument and rebut opposing arguments.
6. Use organizational paradigms where appropriate.

Conclusion

1. Restate thesis.
2. Summarize major points.

Although the outline provided above is a step toward a concise and logical exposition, it need not be followed rigorously. In the end, the issues raised by a particular case or topic should shape not only the analysis, but also the structure. Plans and paradigms, however helpful, should be treated as heuristic devices, not ends in themselves.<sup>48</sup> Nonetheless, students may come up with useful provisional outlines if they try inserting the specific content of their topics into this structure.<sup>49</sup>

They should understand, however, that working outlines need to be detailed. An outline consisting of words and phrases is far less helpful to a writer than a substantive outline, one that asserts ideas, often in full (if unpolished) sentences. The working outline for a thirty-page paper might easily be five pages long.

In addition to shaping an analysis around traditional seminar paper structures, students may want to borrow from established organizational paradigms—that is, basic patterns of reasoning—when their arguments correspond naturally with them. In fact, they may find it helpful to use a general outline in conjunction with basic paradigms.<sup>50</sup>

48. Wallace, *supra* note 12, at 37.

49. Because certain genres have particular structures and strategies, students can use a master blueprint to determine “if they have excluded certain strategies typically associated with a certain structure.” Richard Beach, *Showing Students How to Assess: Demonstrating Techniques for Response in the Writing Conference*, in *Writing and Response: Theory, Practice, and Research*, ed. Chris M. Anson, 127, 140 (Urbana, 1989) [hereinafter *Writing and Response*].

50. Our paradigms come from, or are adapted from, Paul V. Anderson, *Technical Writing: A Reader-Centered Approach*, 3d ed., 261–73 (San Diego, 1987).

Comparative paradigms arise when the writer needs to justify one choice among competing alternatives and interests. A topic that involves, for example, balancing litigants' competing interests or choosing among different policies or jurisdictional approaches lends itself to one of two comparative paradigms.

The *alternating pattern* examines each point in terms of the alternatives. This pattern provides a clear point-by-point comparison, but it is harder to see each alternative as a whole.

Thesis Statement

Point One

Alternative A

Alternative B

Point Two

Alternative A

Alternative B

Point Three

Alternative A

Alternative B

Comparison and Evaluation of the Alternatives

The *divided pattern* is organized around the alternatives rather than the points. This pattern clearly outlines each alternative, but it is less clear about how the points match up.

Thesis Statement

Alternative A

Point One

Point Two

Point Three

Alternative B

Point One

Point Two

Point Three

Comparison and Evaluation of Alternatives

An alternating pattern similar to the one above was used in an article comparing states' stalking laws.<sup>51</sup>

- I. The nature of stalking laws
  - A. The California stalking law: the credible threat model
  - B. The Florida stalking law: the noncredible threat model
- II. Void for vagueness challenges
  - A. Void for vagueness issues when a credible threat is required
  - B. Void for vagueness issues when no credible threat is required

51. This example is adapted from Robert A. Guy, Jr., Note, The Nature and Constitutionality of Stalking Laws, 46 Vand. L. Rev. 991 (1993).

Had the author wished, he could have used a divided pattern.

- I. The credible threat model
  - A. The California stalking law
  - B. Void for vagueness issues
- II. The noncredible threat model
  - A. The Florida stalking law
  - B. Void for vagueness issues

The paradigm most common in legal scholarship is the *problem-solution pattern*.<sup>52</sup> This paradigm is useful if your student has identified a problem that could be solved by a new rule, exception, or modification.

- Identify and explain problem
- Announce and explain solution
- Explain how and why solution solves problem

The problem-solution paradigm is followed below in the outline of an article on the use of after-acquired evidence to defeat a discrimination victim's claim against her employer.<sup>53</sup>

- I. Introduction
- II. Mixed motives analysis: Mount Healthy and Price Waterhouse
- III. A surreal approach: defeating discrimination victims' legitimate claims [the problem]
  - A. A perceived lack of injury: an absolute defense
  - B. Real problems of an unreal defense
    1. Injured victims: employers' windfalls
    2. Causation: no proof of motivation or intent
    3. Struggling with the standard: "would not have hired" vs. "would have fired"
    4. Procedural pitfalls: shifting burdens and summary judgments
  - C. Undeserving plaintiffs and unclean hands
- IV. The Civil Rights Act of 1991: after-acquired evidence as a statutory defense
- V. Reclaiming reality: resolving the dilemma [the solution]
  - A. Reality revisited: limiting remedies, not liability
    1. Remedies—back pay
    2. Reinstatement and/or front pay, injunctive relief
    3. Attorney's fees
    4. Mount Healthy notions of injury

52. Cause and effect is another common paradigm used to explain the evolution of law or to predict developments. It looks like this.

Effect [status quo or result] is announced

Possible causes announced

Evidence presented on how causes lead to the effect

53. Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 Conn. L. Rev. 145, 145–46 (1993).

- B. Proposal: dealing with after-acquired evidence
  - 1. Single-motive cases
  - 2. Mixed-motive cases

#### VI. Conclusion

Sometimes one type of paradigm becomes embedded in another and the outline grows more complex. For example, a comparative paradigm may be used within a problem-solution paradigm to show why one solution is better than another.

Writing plans and paradigms save students from having to create organizational patterns that others have already perfected: in short, they save students from reinventing the wheel. By relieving writers of some organizational concerns, they enable writers to focus on substance instead.<sup>54</sup>

#### THE TEACHER'S ROLE

The first and best thing a teacher can do at the *Getting Started* stage in the writing process is to introduce students—even before they sit down to write—to some of the techniques for warming up that we have described above.<sup>55</sup>

Many of these techniques are directed at helping students to outline their papers. It is worth encouraging students in this enterprise since a clear organizational scheme relieves writers of their concerns about where to go next, and frees them to concentrate on the particulars of the moment. But one should remind students that most outlines need to be revised during the drafting process, as the writer rereads what he has written and discovers what there is still to say.<sup>56</sup>

Teachers should review outlines, paying attention to the thesis, to potential gaps in the argument, and to problems with consistency and logic. Large-scale organization should be checked to determine whether the sections are cleanly and logically divided and subdivided, i.e., to see whether each section is mutually exclusive, and whether the sections are in a logical order.

In addition, some teachers actively encourage students to produce zero drafts or sustained freewrites. As one composition teacher says,

the longer students can sustain a session of guided exploratory writing, the more likely they are to cut through the static that keeps clear sound from coming through. And they are often astounded to discover questions they can ask themselves that help them go deeper, stay on track, try a fruitful digression, articulate a central research question, jump into a completely different perspective.<sup>57</sup>

54. As we noted in an earlier article, any skill a writer has developed to the point of performing it automatically frees that writer to generate content instead of focusing on flow and topical coherence. See Fajans & Falk, *Against the Tyranny*, *supra* note 27, at 175 n.49 (citing Linda Flower, *Taking Thought: The Role of Conscious Processing in the Making of Meaning, in Thinking, Reasoning, and Writing*, eds. Elaine P. Maimon et al., 185, 191 (New York, 1989)).

55. For a more developed discussion of these techniques, see Fajans & Falk, *Scholarly Writing*, *supra* note 27.

56. See Scholes & Comley, *supra* note 15, at 18.

57. Wallace, *supra* note 12, at 36.

Teachers' expertise and distance from the project will help them to spot ideas worth pursuing. In fact, some teachers like to read early exploratory writing precisely because they believe students sometimes take the best things out—thinking those ideas inappropriate for the academy.<sup>58</sup> Teachers can also use these drafts to ask questions that encourage deeper probing of the issues, that steer students away from dead ends, and that help them to balance and prioritize their ideas. At this point, as in the earlier prewriting stages, the teacher's primary role is to provide exploratory feedback, feedback that encourages students to think through and rethink their problems. Descriptive feedback can also be useful for commenting on zero drafts: for example, "What I hear you saying here is . . ."<sup>59</sup>

#### D. Drafting and Revising

##### 1. Drafting

Before students sit down to write a full draft, they should do a short rhetorical analysis—i.e., consider the article's audience and purpose.<sup>60</sup> If students can determine how much information the reader has and how much he will need, they are more likely to make sensible drafting and revising decisions. But once possessed of a solid understanding of rhetorical context, the writer can no longer delay the task of producing a full first draft. There are a number of writing strategies students can use to move through that process of creation.

First, students should understand that they do not need to begin at the beginning: they do not need to write the introduction first. Instead, they can start with whatever they find easiest.<sup>61</sup> The summary of a decision or a background section is often a congenial place to take off. Once these sections are finished, students should go to the next easiest issue, and then the next. By the time they arrive at the really dreaded material, they will have done a lot of sorting and thinking, and the task may be easier.

Order-of-ease writing not only quiets some of a writer's angst, but also frequently results in a better introduction. It takes but a moment's reflection

58. *Id.* at 37. As Neumann notes,

Option-generation . . . depends on an uninhibited flow of association during which judgment is suspended and ideas that later evaluation shows to be sound arrive mixed together with ideas that eventually turn out to be wrong or even silly. Paradoxically, the critical judgment on which option-evaluation depends can impoverish option-generation, censoring sound ideas before their potential can be noticed.

Neumann, *supra* note 8, at 751.

59. This particular response—restating what another has just said or written—is known as "Rogerian reflection." Carl Rogers, a psychologist and encounter-group pioneer, used this technique to encourage his clients to clarify their thoughts. Writing teachers have taken up Rogers' own suggestion that the technique might have pedagogical applications. See, e.g., Dene Thomas & Gordon Thomas, The Use of Rogerian Reflection in Small-Group Writing Conferences, in *Writing and Response*, *supra* note 49, at 114.

60. See Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *Phil. & Rhetoric* 1 (1968).

61. Ray & Ramsfield, *supra* note 35, at 353.

to realize that it is difficult to state a thesis clearly and describe the organization of a paper before the paper itself is written. In fact, because conclusions are typically written last, when writers really know what they want to say, the thesis is often stated far more clearly there than in the introduction. So it often makes sense to begin with the end: turn the conclusion into the introduction and draft a new closing.

No matter what order students write in, footnotes should be sketched in at the first-full-draft stage. Despite the problems this causes at revision stages, recording sources as well as ideas for textual footnotes saves the writer from having to comb through sources a second time and ensures the ethical use of source matter.<sup>62</sup>

Sometimes beginning is not hard but, in the course of getting a draft on paper, a student bogs down rewriting one part when the real task is to get ideas out on the table.<sup>63</sup> This student should try “invisible” writing.<sup>64</sup> Instead of writing and rewriting one passage, instead of searching for just the right word, the writer just turns the computer screen off and forges ahead—being sure that her fingers are on the right keys. When well into the next idea, she turns the screen back on. Polishing is a necessary step in the writing process, but it should not be allowed to inhibit the initial drafting stage.

Another good drafting tip for maintaining momentum (often attributed to Hemingway) is to stop a writing session before you are stuck. If students stop when they know what they are going to say next, it is easier for them to begin the next session. One final tip is provided by the practice of writers who recopy the last page of the prior day’s writing as a way of getting a jump-start.

## 2. Revising

Students should be aware that full but very rough drafts are not usually submitted to a supervisor unless the supervisor has requested it.<sup>65</sup> Usually the first submitted draft is the writer’s second or third draft and has been considerably revised with the reader in mind. Teachers should be clear about how much reader-friendliness they expect from a first submitted draft.

Revising the first full draft requires the student to take some time off, to step back and try to get a sense of the big picture. The following techniques may help students gain perspective on their work.

62. Teachers should make sure that students understand the three basic functions of footnotes—to provide authority, attribution, or textual commentary. See Fajans & Falk, *Scholarly Writing*, *supra* note 27, at 87–99.
63. One of the biggest problems writers have is a tendency to want to get it right the first time around. This impossible goal places needless stress on the writer. Elbow & Belanoff, *supra* note 37, at 288–89.
64. See Sheridan Blau, *Thinking and the Liberation of Attention: The Uses of Free and Invisible Writing*, in *Nothing Begins with N*, *supra* note 25, at 72.
65. Like zero drafts and freewrites, these drafts may contain good ideas which are censored as students revise, and which some instructors may be interested in seeing. Others might expect more polished work.

First, after taking a substantial break, students should revise in stages, so that each area receives total attention.<sup>66</sup> To assess content and to generate content in early drafts, they should read their papers carefully, asking over and over: What is this all about? Am I saying it? What is wrong or missing?<sup>67</sup> Students should then play devil's advocate, asking more specific questions about the choice of content.<sup>68</sup>

- What is discussed in detail, and what is summarized? Is the balance appropriate?
- What is assumed? Is it all right to make these assumptions?
- What relevant topics were ignored? Does it matter?
- What topics seem peripheral, irrelevant?
- Are there internal inconsistencies? For example, do the article's introduction and conclusion reflect the same purpose? Should either or both be changed to reflect what the author actually did?
- Are there logical mistakes—problems with premises or reasoning?

From there, they should go to content development.

- Is there missing support? (Is authority needed? Are types of arguments overlooked—like factual, doctrinal, or policy arguments? Are opposing arguments dealt with?)<sup>69</sup>
- Are there missing links in reasoning?
- Are there missing footnotes? Should some footnotes go in the text? Should some text go into footnotes?

Next, students can do a topic sentence outline of the draft and then make further notes about content problems: discrepancies, ambiguities, gaps, and digressions.<sup>70</sup> Finally, they can use this outline to check for organizational problems, asking questions like the following.

- Is each part mutually exclusive? Are arguments intertwined or repeated?
- Is the sum of the parts equal to the whole? Are there missing steps in reasoning or missing arguments?<sup>71</sup>
- Are the parts in a logical order? Are steps out of order or discussions interrupted?

66. To revise, students need to be familiar with the stages of assessing—which, as Richard Beach says, involve “describing, judging, and selecting appropriate revisions.” Beach, *supra* note 49, at 129.

67. Elbow & Belanoff, *supra* note 37, at 102.

68. These content suggestions come from Charles Bazerman, *The Informed Writer: Using Sources in the Disciplines*, 4th ed., 203 (Boston, 1992), and Ray & Ramsfield, *supra* note 35, at 89.

69. Richard Beach tells students to determine if the support is sufficient, relevant, and specific. Beach, *supra* note 49, at 137.

70. Outlining a draft is often a useful way of gaining perspective on material. See Anne Enquist, *After the Fact Outlines: A Old Idea Put to New Use*, 6 Wash. Eng. J. 29 (1984).

71. Barbara Child articulates these first two organizational principles as central to the drafting of legal documents, but they strike us as fundamental to all expository writing. *Drafting Legal Documents: Principles and Practices*, 2d ed., 131 (St. Paul, 1992).



- Is there adequate metadiscourse? Introductory paragraphs and conclusions? Topic and transition sentences?

#### THE TEACHER'S ROLE

By the time a student submits a full draft, she has articulated a thesis and attempted to get out the supporting arguments. The teacher's primary role at this stage is to respond to the breadth, depth, development, originality, and credibility of those ideas. But the teacher can also begin to address the student's expression of ideas, especially if there are persistent problems on the sentence or paragraph level.<sup>72</sup>

Checking thesis and coverage requires teachers to use some of the same techniques that are described above. But although we can generate valuable descriptive and exploratory feedback by using these techniques, we also need to provide prescriptive feedback, concrete suggestions for rewriting. Like all our comments and criticisms, these must be carefully organized and expressed.

First, we must be meticulous about not substituting marginal comments and line-edits for global comments. Marginal comments rarely go to overarching concerns,<sup>73</sup> nor are they absorbed with the same ease as overall comments. Neither can we routinely substitute conversation for a comment sheet. Some of our finest perceptions are forgotten as soon as the student closes the office door. It is important to give our students a written assessment of their work, something they can take home to jog their memories.

Second, written comments should be organized, specific, and comprehensive; they should go to both form and content.<sup>74</sup> It is a good idea to work through papers systematically, using comment sheets with headings.<sup>75</sup> One

72. It is important, however, for students to be clear about the scale of the teacher's concerns so that a comment about syntax is not given the same weight as a comment about logic. Sommers, *supra* note 13, at 151. This is especially important because, left to their own devices, students tend to revise at the surface or lexical level only. George Hillocks, Jr., *Research on Written Composition: New Directions for Teaching* 41 (Urbana, 1986).

Nonetheless, errors that consistently interfere with communication should be flagged. First, diagnose the problem in the margin, and then explain how to correct it. You might want to illustrate the correction once or twice by rewriting the sentence. After this, diagnose the problem, but let the student fix it.

73. Marginal comments tend to be local, whereas big-picture comments play an important role in helping students to think and rethink their theses. "Terminal or initial comments . . . serve as the teacher's most general . . . comment on the work of the paper as a whole." Connors & Lunsford, *supra* note 11, at 209.

74. Although students report that directives and strategies that are not text-specific are unhelpful, a study on the commenting styles of thirty-five teachers revealed that most teachers' comments are not text-specific. Sommers, *supra* note 13, at 152-53. We must work on writing specific rather than general comments so that at the end of a critique a student understands "the themes theoretically and in terms of performance." Neumann, *supra* note 8, at 767.

75. Teachers should respond at the conceptual, structural, sentence, and lexical levels. See Nina D. Ziv, *The Effect of Teacher Comments on the Writing of Four College Freshmen*, in *New Directions in Composition Research*, eds. Richard Beach & Lillian S. Birdwell, 362 (New York, 1984).

section of the comment sheet can focus on the analysis, critiquing the thesis and its support.<sup>76</sup> The next section can assess the paper's large-scale organization: the division into parts and the order of parts. A further section concentrates on small-scale organization: the order of ideas in each part of the student's paper; the informativeness of headings, introductory paragraphs, and conclusions; and the efficacy of topic and transition sentences. A final section comments on paragraph unity and cohesion, syntax, diction, and mechanics.<sup>77</sup> Without this systematic breakdown, "[t]he processes of revising, editing, and proofreading are collapsed . . . , and the students' misunderstanding of the revision process as a rewording activity is reinforced by their teachers' comments."<sup>78</sup>

Written comments should be tactful as well as organized. When writing comments, there are two things teachers can do to protect students' feelings. First, we need to focus comments on the paper itself and on its readers' needs, not on the student's abilities and the teacher's reactions.<sup>79</sup> It is not helpful to write "Huh?" or "???" or "Says who?" Instead, we might try: "Your reader might be confused here without more information about . . . ." Similarly, "You end abruptly and inconclusively" can be more helpfully phrased, "This will be a more useful article if it ends with some suggestions about . . . ."

Second, we should always temper criticism with praise.<sup>80</sup> As one well-known writing teacher notes, writing is "an act of confidence."<sup>81</sup> Teachers who tell students what they did well create greater receptivity to criticism, dissipate antagonism, and convey professional standards.

Finally, we must encourage our students to see revision for what it is: not as dreary error-correction and surface-polishing, but rather as an exciting stage of the writing process in which ideas are expanded, restructured, and refined. As Scholes and Comley put it, "To refuse revision is to refuse thought itself."<sup>82</sup>

76. Connors and Lunsford's study shows teachers reluctant to pass "professional" judgment on student writing. Although willing to comment on weak argumentative strategies, teachers rarely argue or refute content. Connors & Lunsford, *supra* note 11, at 215. At the graduate level, this strikes us as remiss.

77. "Formal-error correction characterized teacher response through the twenties, thirties, and early forties. . . . By the middle fifties, however, educators [thought students] should get full-scale rhetorical comments." *Id.* at 204.

78. Sommers, *supra* note 13, at 151.

79. Ray & Ramsfield, *supra* note 35, at 89.

80. Although studies show that about 89 to 94 percent of teacher comments find fault while only 6 to 11 percent praise (Donald Daiker, Learning to Praise, *in* Writing and Response, *supra* note 49, at 103, 103-04), a 1972 study shows that students who receive praise write more, have more patience, and enjoy the activity more than students who receive only negative comments. C. W. Griffen, Theory of Responding to Student Writing: The State of the Art, 33 *C. Composition & Comm.* 296, 300 (1982) (citing Thomas C. Gee, Students' Response to Teacher Comments, 6 *Res. in Teaching Eng.* 212 (1972)).

81. Shaughnessy, *supra* note 3, at 85.

82. Scholes & Comley, *supra* note 15, at 19.

*E. Polishing the Final Draft*

In the last stage of the writing process, students revise their papers to make them responsive to the substantive critiques and large- and small-scale organizational concerns expressed in the teacher's comments. This may take one draft, or it may take more, but until these problems are solved, the student is not necessarily at the final stage of the process. A last draft is not always a final draft.

True final drafts are really just polished drafts, rewrites devoted to removing all the surface glitches that prevent the reader from having a smooth ride. In other words, the student's sole focus in the final draft should be on audience—on how clearly the already revised and refined ideas are being communicated to the reader. Here, too, students should be told to revise in stages so that each aspect of the writing task is systematically addressed.

Students should check again to be sure that they have provided their readers with enough signposts: informative headings, introductory paragraphs, topic and transition sentences, conclusions. (Checking their signposts, students should heed the teacher's credo: *Tell them what you are going to tell them. Then tell them. Then tell them what you told them.*)

Students next should examine paragraphs for unity and cohesion. Is there more than one idea in a paragraph? If so, divide it. Are sentences in the right order? If not, re-order. Are the connections between sentences clear? If not, use transition words and sentence dovetailing.<sup>83</sup> After this, students should correct errors in grammar, punctuation, diction, and tone. There should be time at this stage for the writer to consider style as well as correctness. A writing project is an opportunity to find and speak in one's own voice, an opportunity too often lost in last-minute rush or out of fear of seeming too personal.<sup>84</sup>

Finally, students need to proofread. Students of the computer generation tend to equate proofreading with spell-check, although spell-check doesn't pick up missing words, missing punctuation marks, or homophones. One good proofreading technique is to put a ruler or sheet of paper under each line so as to slow down the impatient eye.

At this point, not only is the student nearly done, but so is the teacher. If a conscientious student has received sufficient and appropriate feedback at earlier stages, there should be little the teacher needs to say about the final draft. Least is best here. Excellent. A.

**III. Some Further Suggestions**

In this article, we propose three basic ways in which, as supervisors of scholarly writing, we can both help our students and help new ideas about the

83. "Cohesion is often achieved when a new sentence opens with a brief reference to all or part of the prior sentence. In other words, you begin a sentence with old information and then move on to new information. This overlapping of ideas leads your reader gently into the new idea." Helene S. Shapo et al., *Writing and Analysis in the Law*, 3rd ed., 152 (Westbury, N.Y., 1995).

84. See Fajans & Falk, *Scholarly Writing*, *supra* note 27, ch. 7.

law see the light of day. First, we can—we must—get involved earlier, at the crucial stages of prewriting and writing-as-learning. Second, we need to teach strategies for invention and getting ideas out on paper. Third, we need to conform our guidance and our critiques to the stages of the writing process itself.

All the suggestions we have made thus far concern the interaction of individual teachers with individual students. But there may be other changes—curricular or institutional—that can also help nurture student scholarly writing. Several ideas seem worth pursuing.

First, if student writing projects, including “term” papers, were routinely of a year’s, not a semester’s, duration, the process might be more meaningful and the product more substantial. Most expert scholarly writers would have difficulty producing a piece of serious writing in one semester on a topic relatively new to them, yet we routinely expect students to produce an original and polished paper in three and a half months. Requiring two semesters of work for upper-class writing credit would undoubtedly be awkward, particularly for students writing papers for traditional one-semester courses, but it might be well worth the administrative and curricular flexibility entailed. At a minimum, the graduating-student-eleventh-hour-term-paper dilemma would present itself less often.<sup>85</sup> And most other kinds of writing projects—law review submissions, independent study projects, and writing connected with clinical experience—could easily be structured to require at least six months of work.

Another worthy experiment might be to offer a workshop, series of workshops, or mini-course on legal scholarship and on the process of scholarly writing. A first workshop might describe the writing process itself and teach brainstorming techniques. A second might focus on research strategies for scholarly writing. Another might familiarize students with the conventions of legal scholarship, with particular emphasis on footnotes and the ethical use of borrowed materials. Another might seek to head off writer’s block by teaching strategies for getting ideas out on paper and getting them organized. Finally, students uncomfortable with the mechanics of writing—grammar, usage, punctuation—could attend sessions focused on sentence-level revision. This mini-course on scholarly writing could be open to—or required of—all students beginning writing projects. Ideally, each workshop would be given at least once a semester and each could be taught by a different teacher or teaching assistant.<sup>86</sup>

One last strategy, peer writing groups, would involve teachers not as actors but as stage-managers. The conviction that writing is more usefully viewed in the classroom as process rather than product has changed the teacher’s role from judge to midwife. Teachers not only increasingly assist students at an

85. We refer, of course, to the decision whether to give upper-class writing credit (and thus permission to graduate) to a student who turns in an unacceptably rough or thin term paper too late to permit revision. Anecdotal evidence suggests that few of us prevent such students from graduating.

86. The workshops could also be videotaped so that students who missed a workshop or who want to review a workshop could watch at their convenience.

early stage, but also look for ways to give student writers responsibility for their own learning. Recent research suggests that for this purpose peer writing groups are an exceptional teaching/learning tool.<sup>87</sup> Writing groups contribute to important gains in critical thinking, revising and organizing skills, and confidence.<sup>88</sup> In addition, “[t]he social nature of writing groups promotes audience awareness, reduces alienation from language, introduces collaboration, and provides ready response to work in progress.”<sup>89</sup> Finally, talking about writing provides a transition for students uncomfortable about writing.

Peer writing groups can be introduced into the upper-class curriculum in a number of ways. Substantive seminars can be structured so that the teacher is the facilitator of student projects: the class, or at a minimum one component of it, is, in fact, “about” works in progress on interrelated topics.<sup>90</sup> Peer groups (with or without teaching assistants as facilitators) can also function with a minimum of teacher participation. In this model, teachers provide exploratory feedback as the writing projects progress; most descriptive and prescriptive feedback happens within the group. Writing groups can be composed of students from the same course, or they can be affinity groups—students writing papers and articles on securities law or intellectual property or white-collar crime.

Whatever their composition, peer writing groups should be small, with a maximum of ten students, and whether mentored or not, they should begin with instruction in the group process. Writers cannot simply be thrown together with instructions to talk about each other’s writing; they need to be prepared for this enterprise intellectually and socially.<sup>91</sup>

Conforming our supervision to the writing process, requiring “two-term” papers, and creating mini-courses and peer writing groups are some ways we

87. See Martin Nystrand & Deborah Brandt, *Response to Writing as a Context for Learning to Write*, in *Writing and Response*, *supra* note 49, at 209; see also Thomas & Thomas, *supra* note 59, at 115–16.

88. Nystrand & Brandt, *supra* note 87, at 210. One of the most significant benefits is to the student’s attitude toward revision. In peer writing groups, not only were revisions more effective, but students forged more positive attitudes toward revision, which they no longer viewed as mere “surface tidy-up for the evaluator,” but as a way to meet the reader’s needs. *Id.* at 209.

89. Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 *Mont. L. Rev.* 373, 406 (1991).

90. See Philip C. Kissam, *Seminar Papers*, 40 *J. Legal Educ.* 339, 340–41 (1990). Kissam argues for seminars that provide “quasi-clinical” legal education. Students “must engage in a project that involves research, thinking, and writing about a subject with complexities and contradictions.” But “the faculty member and student must avoid thinking about the seminar project as an exam in which the faculty member knows [the answers; rather] the faculty member and student must perceive the student’s project as [one] in which the student becomes the primary expert . . . .” *Id.* at 341.

91. See Burke, *supra* note 89, at 406. Burke offers suggestions on how to prepare students to participate as readers and as writers. *Id.* at 407–08. At Montana, she enlists the help of a psychologist from the university faculty to talk to students about small group dynamics. *Id.* at 391 n.67. One recent article reports good results from the use of “Rogerian reflection” in mentored writing groups, but the technique (essentially a form of descriptive feedback) could equally be taught to peer writing groups. See Thomas & Thomas, *supra* note 59.

can try to redeem upper-class writing in law school. As we become more familiar with the work of teachers, researchers, and theorists in the field of composition, we may well discover still other ways. As teachers of scholarly writing, we have much to learn. Before we conclude that the cold blue night of the computer screen is falling on the printed page, before we conclude that electronic literacy will eclipse print literacy, we might want to redouble our fight against the dying of the light.