

A BETTER BEGINNING: WHY AND HOW TO HELP  
NOVICE LEGAL WRITERS BUILD A SOLID  
FOUNDATION BY SHIFTING THEIR FOCUS FROM  
*PRODUCT TO PROCESS*

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INTRODUCTION

Several years ago, we set out to discover why early legal writing is so difficult for many beginning law students and what we can do as legal writing professors to improve the learning process for them. In a wide-ranging study of the early experiences of beginning legal writers, we confirmed our anecdotal observations that first-year law students were too confident about both their general writing strengths and their ability to learn legal analysis and legal writing.<sup>1</sup> In our prior article describing the study, we identified several key factors that contributed to this overconfidence,<sup>2</sup> and we illustrated how this overconfidence impeded students' progress in both legal analysis and legal writing.<sup>3</sup> In this follow-up article, we suggest strategies to better orient first-year students to law school learning and to help these students establish more manageable goals for early legal writing.

In August 2007, we surveyed 265 first-year law students at two diverse schools, which we designated School X and School Y, and asked a

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<sup>1</sup> Our study, its results, and our conclusions based upon the study are described in detail in a previous article. Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223, 273–82 (2010). Through our article, we explored the remarkably high level of confidence that many surveyed first-year law students exhibited in the early weeks of law school and reported on the seemingly inevitable plummet in their confidence that occurred as they realized just how difficult legal writing is. Our initial survey conducted in the first few weeks of law school revealed that only about 7% of students who responded were either “slightly” or “not at all” confident in their general writing ability, and less than 5% indicated that they were “not at all confident” about their ability to learn legal writing. *Id.* at 240.

<sup>2</sup> *Id.* at 277.

<sup>3</sup> *Id.* at 279–82 (linking the steep decline in student self-confidence after approximately eight weeks in law school to significant decreases in student performance in legal writing and other law school courses).

broad range of questions about their experiences and expectations as they entered law school.<sup>4</sup> When asked how confident they were about their general writing ability, students at both schools reported dramatically high levels of confidence.<sup>5</sup> More specifically, when asked about their confidence in their ability to learn legal writing, around 70% reported that they were either “confident” or “very confident.”<sup>6</sup> Remarkably, only about 5% said they were “not at all confident” in spite of their novice status as law students.<sup>7</sup>

We repeated this survey in August 2009 at School X with similar results.<sup>8</sup> When asked to rate their confidence in their ability to write, 62% percent of the respondents reported that they were “extremely confident” or “very confident”; an additional 32% were “moderately confident.”<sup>9</sup> When asked to rate their ability to learn legal writing, 56% of beginning law students said they were “very confident” or “confident”; again, only a few—7%—said they were “not at all confident.”<sup>10</sup>

Not surprisingly, when we surveyed these same students only two months into their first semester, they reported dramatically lower confidence in their ability to learn legal writing.<sup>11</sup> In October 2007, only 27% of the students at Schools X and Y were still “very confident,” with a substantial majority—62%—falling in the center of the traditional bell curve.<sup>12</sup> Similarly, in the October 2009 School X survey, only 17% said

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<sup>4</sup> See *id.* at 227–29 (describing the methodology and response to our surveys at School X and School Y); New Law Student Survey at School X (Aug. 2007) (survey and results on file with authors); New Law Student Survey at School Y (Aug. 2007) (survey and results on file with authors).

<sup>5</sup> Felsenburg & Graham, *supra* note 1, at 240 fig.9. We found these numbers surprising. Although the data generated by other survey questions suggested that many of the surveyed students had done significant writing as undergraduates, few of the students were ever evaluated on the *quality* of their writing. Instead, most of the students’ college writing assignments were seemingly evaluated based on their mastery of course content. See *id.* at 274–77 (discussing our findings and conclusions about the surveyed students’ writing experiences prior to law school).

<sup>6</sup> *Id.* at 240–41.

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

<sup>8</sup> New Law Student Survey at School X (Aug. 2009) (survey and results on file with authors).

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

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

<sup>11</sup> New Law Student Survey at School X (Oct. 2009) (survey and results on file with authors). Past research and findings of other leading scholars in this area seem to support our studies’ results concerning the tremendous decrease in self-confidence experienced by many first-year law students as the first semester of school progresses. See, e.g., Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEG. WRITING: J. LEGAL WRITING INST. 229, 241 (2002) (describing the noticeable decrease in self-efficacy among law students during the first year of school).

<sup>12</sup> Felsenburg & Graham, *supra* note 1, at 252–53.

they were “very confident” at this point in the semester, with a full 10% reporting that they were “not at all confident” in their ability to learn legal writing.<sup>13</sup>

Thus, through our study, we confirmed that many first-year law students are unprepared for the demands of learning legal analysis and legal writing and are deeply discouraged when they do not experience immediate success.<sup>14</sup> In fact, some students we surveyed had even become resentful and distrustful.<sup>15</sup> Scholars who study trends in law school learning have routinely commented that if first-year students are unable to rebound from early disappointment and frustration, their receptivity to the entire process of legal education may be reduced, often for the remainder of their law school career.<sup>16</sup>

As we have noted, the legal writing classroom is usually the place where law students are first introduced to the foundational process of

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<sup>13</sup> 2009 Survey at School X, *supra* note 11. Significantly, no respondents reported they were “extremely confident” in their legal writing abilities by this point in the semester. *Id.*

<sup>14</sup> Felsenburg & Graham, *supra* note 1, at 266, 280.

<sup>15</sup> *Id.* at 286. For example, when asked whether their experiences in the first eight weeks of law school had altered their views of their strengths as writers, many students responded affirmatively. Some of the responses conveyed deep frustration: “I feel like I don’t know anything anymore.”; “Law school has made me realize I’m horrible at writing like a lawyer.” *Id.* at 279. Similar frustration emerged in students’ responses to the companion question about whether their views of their weaknesses as writers had changed: “My apprehension about writing has been strengthened; my confidence has been shakened [sic].”; “YES! I can’t write simple!” *Id.* at 280, 289.

<sup>16</sup> In an important article about the need for effective law school orientation programs, Professor Paula Lustbader noted that “[t]he typical first-year [law school] classroom is a foreign experience for most students.” Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327, 344 (2008). Lustbader further keenly observed that many students, especially those with different learning styles or who come from diverse backgrounds, “have a harder time” and often “begin to doubt whether they are meant to be lawyers.” *Id.* Lustbader also emphasized the need for law schools to “confirm students’ self-confidence” from the beginning of the students’ experience, since “a lack of confidence or an inflated confidence can impair students’ motivation and academic performance.” *Id.* at 361. In the same vein, Ruth Ann McKinney has noted,

The task for educators who want to maximize our students’ performance becomes clear: increase the self-efficacy of our students in relation to a specific task necessary for their ultimate success and we will increase the chance that they will not only succeed, but will excel. Without any additional effort on our part, students will become more likely to seek help when they need it, take logical steps to accomplish their goals efficiently, try harder, experiment more, be persistent in the face of early failures, and be tolerant of constructive criticism.

McKinney, *supra* note 11, at 236.

legal analysis.<sup>17</sup> It follows then that the legal writing classroom is also usually the place where students receive their earliest feedback on how well they are learning to perform legal analysis.<sup>18</sup> Therefore, we believe it is of utmost importance that legal writing professors design “a better beginning” for their first-year students.

Part I of this Article discusses the importance of giving students a fuller, clearer orientation to the study of law in general. This orientation should emphasize the process of legal analysis as the foundation for all other law school learning. Part II suggests three specific ways that legal writing professors can design their courses and teaching practices to facilitate students’ receptivity to this process: (1) setting clear, realistic goals and objectives for the first semester of legal writing; (2) deliberately encouraging students to be more active metacognitive learners; and (3) providing more opportunities for students to pre-write and to “write to learn” before asking them to “write to teach” to a legal reader.

#### I. ORIENTING STUDENTS TO WHAT “LEARNING THE LAW” IS REALLY ABOUT

Perhaps the most important step in giving students a “better beginning” is to help them understand what it is that they will be learning in law school. We should assume that beginning law students are like most other “lay persons” when it comes to their understanding of what lawyers know and how they come to know it. Even well-educated, sophisticated lay persons often misunderstand the true nature of what lawyers must be able to do in practice. For example, the popular spy novelist Ken Follett once described the experience of a character with amnesia as follows: “Accessing the memory was not like opening the refrigerator, where you could see the contents at a glance. . . . *If he were a lawyer, would he be able to remember thousands of laws?*”<sup>19</sup> In other words, Follett seemingly believed, as do many other lay persons, that the work of a lawyer is simply to “remember thousands of laws.”

More recently, in a *New York Times* op-ed column, Nobel Prize-winning economist Paul Krugman explored how “technological progress is actually reducing the demand for highly educated workers.”<sup>20</sup> He specifically cited “the growing use of software to perform legal research,” stating that “[c]omputers, it turns out, can quickly *analyze* millions of

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<sup>17</sup> Felsenburg & Graham, *supra* note 1, at 224 (“Early legal writing classes often give students their first exposure to the key skills they must develop to succeed as law students and as lawyers.”).

<sup>18</sup> See McKinney, *supra* note 11, at 250–51 (describing how legal writing instructors have the rare opportunity to provide early feedback to students on their law school performance).

<sup>19</sup> KEN FOLLETT, *CODE TO ZERO 146* (2000) (emphasis added).

<sup>20</sup> Paul Krugman, Op-Ed., *Degrees and Dollars*, N.Y. TIMES, Mar. 7, 2011, at A21.

documents, cheaply performing a task that used to require armies of lawyers and paralegals.”<sup>21</sup> While it is true that computer software can now assist lawyers in managing documents, producing deposition summaries, and streamlining other data reviewing tasks, these are not the equivalent of legal analysis, as Krugman suggests. For the foreseeable future, it will still take a trained lawyer to identify legal issues, analyze relevant legal authorities, and predict or advocate a certain outcome—important skills traditionally learned in the law school classroom. Thus, even as sophisticated a lay person as Krugman demonstrates a fundamental misunderstanding of the nature of legal analysis.

As our earlier research revealed, many first-year law students also share this lay understanding of what law school will teach them. They often mistakenly equate “learning the law” with “learning laws.”<sup>22</sup> For example, in the August 2007 survey, we asked new law students to describe what they thought the study of law involved.<sup>23</sup> Here are a few illustrative responses: “Studying what the law is and how to work with it”; “I think it is studying . . . the laws that we will be required to work within”; “Being able to articulate laws and express their purpose”; “[L]earning what both federal and state laws are and how to apply those laws”; “Knowing rules and knowing how to research to find out rules if you do not know them.”<sup>24</sup>

We cannot fault our students for this misunderstanding. Law, after all, is unlike the other “learned professions” of medicine and the clergy.<sup>25</sup> A first-year medical student, for example, is likely very familiar with the work of a doctor and with the kinds of knowledge a doctor must have. Similarly, a first-year clergy student is likely very familiar with the work of a priest, rabbi, minister, or imam and with the kinds of knowledge those persons must have. In contrast, while beginning law students may have some basic familiarity with the work of lawyers, they may not be as familiar with the kinds of knowledge that lawyers must have to do that

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *See infra* notes 23–24.

<sup>23</sup> 2007 Survey at School X, *supra* note 4; 2007 Survey at School Y, *supra* note 4.

<sup>24</sup> Felsenburg & Graham, *supra* note 1, at 255, 260; *see also* 2007 Survey at School X, *supra* note 4.

<sup>25</sup> *See* Melissa H. Weresh, *I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 339 (2009) (“Law has historically been considered among the ‘learned professions,’ including medicine and the clergy.”) (citing Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 684 (2001–2002) (“Lawyers have derived great pleasure and pride in being members of one of the historic and learned professions along with the clergy and medicine, which have been traditionally regarded as professions throughout the centuries.”)).

work.<sup>26</sup> Brand new law students often mistakenly think that they will be studying specific laws in various subject areas and that once they “learn enough laws” they will be competent to practice law.<sup>27</sup>

Moreover, first-year law students often assume that in law school, they can be successful if they practice the same habits that led to their success as undergraduates.<sup>28</sup> Most likely, in many of their undergraduate courses, these students worked with definable bodies of knowledge and were assisted by expert teachers whose goal was the students’ mastery of the particular subject matter.<sup>29</sup> Thus, the students were typically asked in college to read and discuss the content of the subject area, to memorize the content of the subject area for examinations, or to write research papers identifying and commenting on the trends and themes of the subject area.<sup>30</sup>

For example, imagine that an undergraduate student majoring in English takes a course on American poetry. As part of the course, the student is asked to select a specific American poet and to write a research paper about that poet’s body of work. Imagine further that the student selects the poetry of Emily Dickinson as the subject of his paper. In his research, the student learns that Dickinson published exactly 597 poems that scholars have commonly divided into five categories,

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<sup>26</sup> See generally Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. LEGAL EDUC. 96, 100–01 (1994) (suggesting that law students struggle with the first-year curriculum because they have no experience with what lawyering entails in practice).

<sup>27</sup> See KENNEY F. HEGLAND, *INTRODUCTION TO THE STUDY AND PRACTICE OF LAW IN A NUTSHELL* 1–2 (5th ed. 2008) (noting that new law students often expect to “get to law school, . . . go to class, sit back and *learn* the law.”). Similarly, first-year law students we surveyed at School X and School Y believed that the study of law involved “studying laws,” studying “the rules used to govern societies,” and “learning, memorizing, and understanding definitions [sic] of . . . concepts and ideas.” 2007 Survey at School Y, *supra* note 4; 2007 Survey at School X, *supra* note 4.

<sup>28</sup> For instance, one student who responded to the August 2007 survey at School X stated that he believed the study of law entailed “[a] *mastery* of the basic skill required of the profession.” 2007 Survey at School X, *supra* note 4 (emphasis added); see also Anne Enquist, *Talking to Students About the Differences Between Undergraduate Writing and Legal Writing*, 13 PERSP. TEACHING LEGAL RES. AND WRITING 104, 104–05 (2005) (describing how novice legal writing students typically assume that their positive writing experiences as undergraduates will translate into immediate success in legal writing as first-year law students).

<sup>29</sup> In fact, the prevalent learning theory in many of their undergraduate courses was likely the “mastery learning” approach. This theory posits that “under appropriate instructional conditions virtually all students can learn well, that is, can ‘master,’ most of what they are taught.” James H. Block & Robert B. Burns, *Mastery Learning*, 4 REV. RES. EDUC. 3, 4 (1976).

<sup>30</sup> See generally HEGLAND, *supra* note 27, at 1–3 (discussing undergraduate study habits that will not be effective in law school).

including poems on Nature.<sup>31</sup> The student narrows his topic to the Nature poems, of which exactly 111 were published.<sup>32</sup> He then systematically reads each one of the 111 Nature poems as well as several commentaries on those poems by experts on Dickinson's poetry. At this point, the student is ready to begin writing his research paper, in which he demonstrates his knowledge of and his personal reactions to the Nature poems. Assuming he does a capable job, he will likely receive a high mark on the paper,<sup>33</sup> thus purportedly indicating his mastery of the Nature poems of Emily Dickinson. Further, the student's mastery is permanent in the sense that the body of knowledge is fixed—the content of Dickinson's Nature poems is never going to change.

Law students often mistakenly expect learning the law to be like learning the Nature poems of Emily Dickinson. They expect the law to be simply a new subject area that they will be able to read in full, understand, memorize, and recall, just as they have successfully done with many other subject areas they have encountered in their academic careers.<sup>34</sup> In short, they believe that by the end of law school, they will have been exposed to, and will have *mastered*, the contents of the law.

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<sup>31</sup> In one volume of Dickinson's complete poems, the categories are life, nature, love, time and eternity, and "the single hound." See *generally* POEMS OF EMILY DICKINSON (Louis Untermeyer ed., Heritage Press 1980) (1890) (listing these five categories in the volume's table of contents).

<sup>32</sup> COLLECTED POEMS OF EMILY DICKINSON ix–xii (Mabel Loomis Todd & T.W. Higginson eds., Avenel Books 1982) (1890).

<sup>33</sup> See Enquist, *supra* note 28, at 104–05. In this piece, which can be described as an "open letter" to new law students, Enquist articulated some of the writing habits of successful undergraduates that may not translate into legal writing success:

You got the 'A' by making the 'creative' point, by offering up the unusual insight, maybe even something that professor had not already thought about or read about. The unwritten rule that most successful undergrad writers have absorbed is that the secret to getting good grades on papers is to dress up your ideas; make them seem more sophisticated than they really are. In short, make simple things seem complex.

. . . .  
Over-quoting during one's undergrad days had the double benefit of bringing lots of expertise that the writer doesn't have into the writing all while adding length!

. . . .  
It is no secret that many undergrad writers pad their writing to meet the length requirements of assignments. . . . The longer the paper, the more likely it is to garner a high grade.

*Id.* Significantly, the qualities that likely earned students high grades on their undergraduate writing are not always synonymous with the qualities of good legal writing. *Id.* at 105.

<sup>34</sup> See 2007 Survey at School X, *supra* note 4 (illustrating that incoming law students often expect law school to be "[l]earning what the law is" and a "mastery of the basic skill required of the profession"); see also HEGLAND, *supra* note 27, at 1–2 (introducing new law students to the idea that law school learning "won't be the same old

Of course, the law is not a “content area” with a finite amount of material to be learned. Not even the most advanced torts scholar, for example, will or could ever “learn” the contents of every torts case.<sup>35</sup> And even if she could, there would be new cases and new statutes the next day, and the next, *ad infinitum*. The content of tort law (and indeed every other area of the law) will never be fixed.<sup>36</sup> Thus, when a first-year student undertakes to “learn torts,” she is soon forced to accept that no matter how diligently she works, she will never conquer the field of torts as she once did American poetry.

Broadly put, “learning the law” is really more about becoming comfortable with the *process* of analyzing and applying the law—in traditional phraseology, learning to “think like a lawyer”—than it is about learning the actual content of any particular laws or bodies of law.<sup>37</sup> New law students should be deliberately taught that “learning the law” is not going to be like learning other subject areas—that is, that they will never learn all of the law or *master* it.<sup>38</sup> They should also be deliberately taught to become comfortable with the inherent ambiguity of the law—that is, that arriving at a “right answer” or conclusion is not

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stuff” as college coursework because law school focuses uniquely on training students in analytical thinking).

<sup>35</sup> See Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936) (describing how the law has continued to develop with “ever accelerated speed” and “its content multiplied and refined” since the legal system first took root in the United States).

<sup>36</sup> See *id.*

<sup>37</sup> In her recent article about the knowledge required to learn law, Professor Michelle Harner described the “key analytical skills” of law students as “spotting and dissecting issues, identifying applicable tools and potential barriers, embracing ambiguity, and thinking creatively to resolve issues.” Michelle M. Harner, *The Value of “Thinking Like a Lawyer,”* 70 MD. L. REV. 390, 392 (2011). These skills, she said, “form a solid foundation from which a lawyer can excel and serve the interests of her clients.” *Id.*; see also GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 7 (1999) (“[T]he basic nature of education [is] not the transmission of knowledge, but the transformation of the learner. This view of education as transformation is consistent with the dominant conceptualization of legal education, which consistently identifies ‘thinking like a lawyer’ as a major goal of legal education.”).

<sup>38</sup> In a widely-cited 1985 article, Professors Jay M. Feinman and Marc Feldman argued in favor of the widespread adoption of mastery learning in legal education: “Mastery learning dictates that educational excellence be our goal, and it provides an approach to teaching and learning by which this goal can be attained.” Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 528 (1985). Moreover, they explicitly stated that “any subject matter [within the law school curriculum] is suitable for mastery.” *Id.* at 551. We certainly do not take issue with the overall goal of expecting and encouraging excellence in all students, and we recognize that certain “mastery learning” techniques can be useful in the law school classroom. However, we believe strongly that the process of legal analysis is not capable of being “mastered” in a single semester of law school, in three years of law school, or ever.

always possible or even expected as it may have been in college.<sup>39</sup> If students are not exposed to these truths very early on in law school, and if they do not embrace them, their confidence in their own learning abilities will likely take a drastic plunge.<sup>40</sup> We believe this plunge in confidence is entirely counterproductive to many students' early law school adjustment.

To achieve a recasting of students' expectations about law school, we should correctly describe the nature of law school learning beginning the moment that students enter their first law school class.<sup>41</sup> Legal writing professors are often uniquely situated to begin this early intervention. We are often the first law school professors our students meet. We typically spend significantly more time with students in the early weeks of law school than their other professors do, and it is usually our early feedback that first alerts them to the difficulties that they will face in adjusting to law school learning.<sup>42</sup>

Thus, to give our students the "better beginning" they need, we should emphasize from day one that the focus of law school learning, including learning legal writing, is on the *process* of legal analysis rather than on "learning laws." As professors, we should be intentional about conveying that the process of legal analysis is foundational to everything our students will ever learn in law school and everything they will ever

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<sup>39</sup> See, e.g., James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1695 (1991) (discussing how reaching a particular conclusion on a law school exam is not crucial).

<sup>40</sup> Lustbader, *supra* note 16, at 344–45 (“[T]he learning strategies needed to excel in law school are not like those from other academic settings. Many students are, figuratively, hit in the head with an apple when they realize that they must do much more critical thinking and learning on their own. Class time is no longer a lecture that clarifies readings. Rather, more often than not, class time obfuscates the readings. Thus, what worked for students in the past may not work as successfully for them in law school. . . . [L]aw students undergo unnecessary emotional distress and spend their time and energy just trying to figure out the basics.”). As one admittedly tongue-in-cheek commercial video for new law students notes, law school is “the intellectual equivalent of being in a boxing match with Mike Tyson.” ALL ABOUT: LAW SCHOOL (Ipsa Facto Films, Inc. 2005).

<sup>41</sup> See Feinman & Feldman, *supra* note 38, at 546. In recognizing as far back as 1985 the inadequacy of the present model of legal education in this regard, Professors Feinman and Feldman remarked, “The essence of the first year of law school is that students, through some mystical process, acquire the undefined skill of thinking like a lawyer.” *Id.*

<sup>42</sup> See McKinney, *supra* note 11, at 232 (“[O]f everyone in the legal academy . . . [legal writing professors] are in the best position to take a leadership role” in making “small (and large) changes in the law school classroom that would create potentially powerful results.”). Professor McKinney especially notes that legal writing professors are “already in the enviable position of being able to teach in small classrooms” and “have “significant one-on-one student contact.” *Id.* at 246.

do as lawyers.<sup>43</sup> We should also be candid about the fact that even the best students will find the process of legal analysis difficult to learn, will have to practice it constantly, and will never master it.<sup>44</sup> Once we successfully help our students adjust their expectations in this way, they will be more receptive to specific strategies designed to foster their early success as legal writers.

## II. THREE EARLY INTERVENTIONS

We recommend implementing three interventions in the legal writing classroom that are designed to enhance our students' early development as legal thinkers and writers. Because of the newness of the legal environment, the three specific interventions we recommend share a common theme: emphasizing the *writing process* over the *written product* by allowing time for students to practice and absorb the fundamentals of legal analysis in a more deliberate, step-by-step fashion. These interventions should be the focus of the first few weeks of legal writing instruction.

### A. Clear Communication of Course Goals and Objectives

As we have discussed, the law and, by extension, legal writing are not subjects that can be mastered. Thus, when articulating our goals and objectives for the first semester of legal writing, we should avoid using any language that suggests to our new students that mastery is the goal. Instead, we need to carefully choose our words to convey to our students that as novices in the law and in legal writing, they should not expect immediate success.<sup>45</sup>

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<sup>43</sup> DAVID S. ROMANTZ & KATHLEEN ELLIOT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL xiii (1998) (“[L]egal analysis [is] the fundamental skill required to survive, enjoy, and succeed in law school.”); *see also id.* at 4 (“The rules and principles of legal analysis . . . allow attorneys to fashion persuasive arguments on almost any legal issue.”).

<sup>44</sup> *See* Corinne Cooper, *Letter to a Young Law Student*, 35 TULSA L.J. 275, 282 (2000) (explaining to law students that law school is meant to teach the skill of legal analysis and that this skill is “never fully mastered”).

<sup>45</sup> The American Bar Association’s current emphasis on outcomes and assessments makes this a particularly opportune time for legal writing educators to reevaluate our goals and objectives and to revisit how we communicate them to our students. *See* Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, 2008 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS BAR REP. 54, available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf> (recommending that the current ABA Accreditation Standards be “re-examine[d] . . . and reframe[d] . . . to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures”); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 35, 40 (2007) (encouraging legal educators to “shift the focus of legal education from content to outcomes” and advising law schools to “describe the specific educational goals of each course . . . in terms of what

Especially where introductory legal writing course names do not include any reference to “analysis,” students will naturally expect that these courses will primarily be focused on learning the conventions of legal writing format and style.<sup>46</sup> As our study showed, many students were stunned to find that early legal writing was not about learning mechanics but rather about learning legal analysis—that is, identifying issues, understanding the law, and carefully applying the law to new facts.<sup>47</sup> Further, these students were frustrated by the fact that their professors would not give them a “fill-in-the-blank” template for legal analysis.<sup>48</sup> The results of our survey (and similar studies conducted by our colleagues) suggests that legal writing professors need to more clearly explain that effective legal writing depends far more on learning the process of legal analysis than on observing the particulars of format and style.<sup>49</sup>

At Wake Forest University School of Law, where we teach Legal Analysis, Writing, and Research, our most recent course description for the first-year legal writing course intentionally describes the objectives of the course very generally:

The Legal Analysis, Writing and Research course (LAWR) is designed to teach you how to think and communicate like a lawyer. Specifically, the course is designed to teach you *basic* legal analysis, writing and research skills. These skills are the “tools of the trade” for the legal profession, and you will continue to use and develop these skills throughout your academic and legal career.<sup>50</sup>

While this may be a fair statement of the general thrust of the course, the phrase “teach you how to” may actually serve to reinforce some students’ misplaced expectations that there is an easy, step-by-step

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students will know, understand, and be able to do, and what attributes they will develop” by completing the course).

<sup>46</sup> See Felsenburg & Graham, *supra* note 1, at 269 (noting through our study that novice legal writers “often viewed their task as simply reporting information, [and] many of them appeared to believe that their professor’s primary job was to teach them the ‘magic formula’ for conveying this information”).

<sup>47</sup> *Id.* at 271–72 (describing students’ responses in October 2007 to the question of whether their opinion of what legal writing involved had changed since August 2007).

<sup>48</sup> *Id.* at 270.

<sup>49</sup> Legal writing instructors need to be “clear and explicit in [going] about teaching students analytical skills.” Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 622 (2006). Venter noted that “precisely how legal writing teachers are to teach analysis and precisely how students learn to ‘do’ analysis, remains somewhat mysterious, both to faculty and, more importantly, to students themselves.” *Id.* at 623. In fact, “legal writing faculty have struggled to reach a consensus on how best to teach analysis, or even if they should teach it explicitly at all.” *Id.* at 624.

<sup>50</sup> Course Description for Legal Analysis, Writing and Research at Wake Forest Univ. Sch. of Law (2010–2011) (on file with authors).

approach to effective legal writing that we will show them and that they can master in the nine-month span of the course.

In fact, until recently, we used terminology on our course syllabi that likely created unrealistic expectations on the part of first-semester students at Wake Forest. In 2008, for example, we used the following language in describing our course objectives: “The primary goal of the Legal Research and Writing<sup>51</sup> course is to train you to be proficient (even excellent, perhaps!) legal researchers, analysts, and writers.”<sup>52</sup> Imagine a first-year student’s reaction upon reading this lofty statement of our course goals! It would be perfectly natural for a novice student, based on this misleading language, to expect to master the skills of effective legal writing by the end of the course.

However, as a result of our study,<sup>53</sup> by 2010, we had significantly revised our course goals and objectives to clarify to our students that legal writing is not a mastery subject, and that as novices, the students’ primary goal was to begin to understand the *process* of legal analysis.

The primary goal of the LAWR course is to help you advance from “novice” status as legal researchers, analysts, and writers to “advanced beginner” status. Analyzing, writing, and researching are basic “tools of the trade” for legal professionals, and our course objectives focus on these tools:

ANALYSIS: You will learn how to read various types of legal authorities (cases, statutes, etc.) efficiently and effectively, and you will learn strategies for taking notes on your reading. You will learn successful strategies for conducting sound legal analysis using various legal reasoning techniques. Legal analysis is a unique skill that requires careful reading and critical thinking. While you will probably not master legal analysis in this course (indeed, most lawyers never really stop “learning” legal analysis), this course will lay a solid foundation upon which you will continue to build your legal analysis skills throughout your life as a lawyer.

WRITING: You will learn the basic skills that are required to meet the needs and expectations of the legal professionals for whom you will be writing as a lawyer. We will begin by learning how to write an objective memorandum, which encompasses the key skill of writing about your analysis of a single argument. Then, we will build on that key skill throughout the remainder of the year. In the second semester, we will move to persuasive writing. Throughout the year,

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<sup>51</sup> In 2010, in a step toward emphasizing the importance of legal analysis to the students’ education, Wake Forest University School of Law changed the name of the first-year legal writing course from “Legal Research and Writing” to “Legal Analysis, Writing, & Research.”

<sup>52</sup> Syllabus for Legal Research & Writing at Wake Forest Univ. Sch. of Law (Fall 2008) (on file with authors).

<sup>53</sup> See *supra* notes 1–3 and accompanying text.

you will also learn basic methods of legal citation, and you will be exposed to several common formats for legal documents.<sup>54</sup>

While there is still room for improvement even in this language (e.g., by eliminating the “you will learn” language), this revised course syllabus we implemented at least correctly acknowledges the following: that the students are novices; that they will not “learn how to” do legal writing (much less master it) in their first year; and that legal analysis is the foundation and the starting point for everything they will learn about legal writing.

In sum, the specific words we use to describe our goals and objectives are important for first-year students and should be chosen with great care. We should use words that acknowledge our students’ novice status, such as “beginning,” “introduction,” “basic,” and “novice.” We should use words that emphasize how foundational legal analysis is to good legal writing, such as “analysis” and “process.” And we should use words that reflect the need for hard work and constant practice in learning how to perform legal analysis, such as “practice,” “build on,” and maybe even “grapple with.” Such language will reinforce to new law students that the first semester of legal writing is more about *learning for themselves* than about *writing for someone else*; it is more about *process* than *product*; it is more about *beginning* than *finishing*.

#### *B. Encouraging Students to Be More Active Metacognitive Learners*

Keeping in mind our students’ novice status and the fact that the process of legal analysis is the foundation for all law school learning, we should deliberately support and encourage students to consciously be metacognitive learners—that is, to “manage and control their [own] processes of learning.”<sup>55</sup> There is a growing body of advanced scholarship about what metacognition is and how law students can benefit from it.<sup>56</sup> Put simply, metacognition is “thinking about thinking.”<sup>57</sup>

In the law school context, the student who expects to be a passive vessel for knowledge supplied by expert teachers is less likely to be successful than the student who carefully monitors her own learning

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<sup>54</sup> Syllabus for Legal Analysis, Writing, & Research at Wake Forest Univ. Sch. of Law (Fall 2010) (on file with authors).

<sup>55</sup> Donna Bain Butler, *Use Metacognitive Strategies to Promote Learning and Advance Writing Proficiency*, THE SECOND DRAFT, Spring 2011, at 18, 18.

<sup>56</sup> 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); Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33 (2006); Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007).

<sup>57</sup> Butler, *supra* note 55, at 21 n.1.

process.<sup>58</sup> Novice law students are “unable to use . . . knowledge effectively because [they] will not know the structure of the discourse, the order in which to present ideas, when to emphasize different concepts, and what information [they need] to make explicit versus what information is understood implicitly.”<sup>59</sup> Thus, to be successful, law students should be explicitly told early on to use metacognitive strategies (i.e., to not take shortcuts, to test themselves with their own questions, to read every word assigned slowly, to skip nothing, to take initiative to understand what they are reading, to know why they are outlining, to review as they go, to know the limits of study aids, etc.).<sup>60</sup> If they practice these principles, they will build a more solid foundation for legal learning by participating actively in their own learning processes.

In the context of legal writing, metacognition further emphasizes the focus “on students’ writing *processes*, rather than focusing on students’ writing *product*,” thereby helping students “develop professional proficiency in writing.”<sup>61</sup> More specifically, metacognitive strategies for early legal writers enable them to engage in “*self-regulation*,” a term that “refers to learners’ ability to make adjustments in their own learning processes in response to their perception of feedback regarding their current status of learning.”<sup>62</sup>

One might assume that most beginning law students already possess considerable metacognitive skills based simply on the fact that they have done well in their previous academic endeavors.<sup>63</sup> However,

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<sup>58</sup> See HEGLAND, *supra* note 27, at 2 (“When you get to class, professors assume you understand the cases; their job is to put you to work. You won’t passively take notes; you’ll actively analyze the cases, testing their coherence, exposing their assumptions, and pondering their implications.”).

<sup>59</sup> Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 327 (1997).

<sup>60</sup> Jennifer S. Bard & Brett Gardner, 30 Ways for First Year Law Students to Achieve Success 9–14 (Aug. 25, 2010) (unpublished manuscript) (on file with authors); see also MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 100–04 (2009) (advocating the use of guided journaling, online class journals, and a variety of other exercises designed for the purpose of “getting students to take their metacognitive pulse”). Rather than simply expecting these successful learning habits to develop automatically in our students, we must be clear in our expectations as professors in order for our students to reach their optimum potential. *Id.* at 32–33.

<sup>61</sup> Butler, *supra* note 55, at 18 (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> Students admitted to law school have typically excelled in their undergraduate work. See Felsenburg & Graham, *supra* note 1, at 266 n.85 (noting in our own study that most law students we surveyed had above-average undergraduate GPAs and had been at or near the top of their classes throughout their educational experiences); see also ANDREW J. McCLURG, *1L OF A RIDE: A WELL-TRAVELED PROFESSOR’S ROADMAP TO SUCCESS IN THE*

our study suggested that on past major writing projects, many beginning law students had not routinely engaged in the kinds of strategies that would facilitate true metacognitive learning.<sup>64</sup> Thus, it is critical that we incorporate into our first-year legal writing courses devices that require our students to consciously engage in metacognition.

Legal writing professors have already recognized the need to teach students metacognitive techniques.<sup>65</sup> Examples of such techniques include the private memo,<sup>66</sup> student portfolios,<sup>67</sup> and self-editing checklists.<sup>68</sup> Most of these techniques, however, come into play at some point *during the production of a written product*—at the drafting, writing, rewriting, and/or editing stages. Our review of the existing literature suggests that the use of metacognitive strategies to help students *learn the process of legal analysis* is not nearly as common.<sup>69</sup> As a result, we propose two interventions that could promote metacognition at an earlier stage in the legal writing course.

### 1. Using Examples More Carefully

One common indicator that many students are not consciously using metacognition in early legal writing is their constant and fervent pleas for examples of successful legal memoranda and briefs.<sup>70</sup> Of course, most

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FIRST YEAR OF LAW SCHOOL 29 (2009) (noting the nature of law students generally as “high achievers” who have “performed well academically their entire lives”).

<sup>64</sup> See *infra* note 69 and accompanying text.

<sup>65</sup> See *supra* note 56.

<sup>66</sup> Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 894 (1991).

<sup>67</sup> Steven J. Johansen, “What Were You Thinking?”: *Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123, 123–25 (1998).

<sup>68</sup> See, e.g., MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 135–44 (3d ed. 2010); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (front & back inside covers) (6th ed. 2009); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 135–36, 797 (5th ed. 2010). These checklists, however, are designed for use after the student has *completed a substantial draft* of the written product. See, e.g., BEAZLEY, *supra*, at 135 (advocating use of her self-graded draft technique after a student has already “complet[ed] a good draft of [her] document”); NEUMANN, *supra*, at front cover (“While rewriting your work to turn it into a final draft, consider these questions and the ones on the inside back cover.”) (emphasis added).

<sup>69</sup> See, e.g., Butler, *supra* note 55, at 18–21. Butler suggests that students need “self-regulating checklists to guide and enhance their thinking and performance: for *pre-writing*, for drafting, and for revising.” *Id.* at 21 (emphasis added).

<sup>70</sup> See Felsenburg & Graham, *supra* note 1, at 269–71 (documenting several surveyed students’ requests for examples). One student wrote, “I wish that we had some real-world examples of what our writing should look like that had been vetted by the professor to be sure that they adhered to the standards that she sets.” *Id.* at 270.

legal writing professors provide such examples, and students can benefit at some point from seeing how an objective memo or a brief should look; however, the temptation for beginning law students is to use these examples as “go-bys,” thus skipping the crucial metacognitive process. Students want to be shown “how to do” legal analysis and then reproduce what they are shown.<sup>71</sup> They do not realize, though, that what appears to be the best example memo in the world analyzing whether a home invasion constitutes “burglary” under the relevant statute and case law is completely useless in analyzing whether the “last clear chance” to avoid an automobile accident is a valid defense to a tort in a given jurisdiction.

Therefore, in keeping with the goal of encouraging metacognition, legal writing professors should be very transparent when providing students with examples of finished memos, briefs, etc. We should tell our students up front that there is no “fill-in-the-blank” method for legal analysis; thus, while the examples may be helpful in illustrating the general content and format of a document, they will not be helpful at all in analyzing the specific issues raised by the assignment they are working on currently in their course.<sup>72</sup>

One way to satisfy our students’ desire to see examples of finished legal memos without sacrificing their engagement in the metacognitive process is to actively use an example memo to illustrate the *process* that the author used in developing her analysis of the issues in the example memo.<sup>73</sup> In class, students could be asked to deconstruct the analytical process the writer used to (1) arrive at the narrow issue; (2) identify and articulate the applicable rule; (3) identify the determinative facts the writer emphasized in her analysis and why; and so on. This kind of critical deconstruction will help students focus on the analytical *process* the example-writer used separately from the actual written *product* itself. This exercise has the additional benefit of helping students recognize that legal analysis is issue-specific and fact-specific and must

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<sup>71</sup> Beginning law students are expert mimics and teacher-learners. They have mastered the use of examples and forms, and they are nearly professionals at teasing out what the teacher is looking for and doing it exactly that way. *See id.*

<sup>72</sup> If we use samples carelessly, however, we run the risk that “students will try to artificially and mindlessly force their analysis into the form they see in the sample.” Judith B. Tracy, “*I See and I Remember; I Do and Understand*”: *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 *TOURO L. REV.* 297, 314 (2005).

<sup>73</sup> Felsenburg & Graham, *supra* note 1, at 271. One student noted that “[r]eading others’ work seemed merely to offer a template. It didn’t aid in how one puts their [sic] own ideas together and transcribes them.” *Id.*

be performed anew on every issue raised in every legal writing assignment.<sup>74</sup>

## 2. Helping Students See Pre-Writing as Crucial to Learning Legal Analysis

Another way to help beginning first-year law students change their focus from the written *product* to the *process* of legal analysis is to concentrate more heavily on pre-writing<sup>75</sup> as a metacognitive component of learning. In an early article encouraging more focus on the *process* of writing rather than the *product*, scholar Natalie Markman recommended,

More teachers of legal writing should make a clear and conscious choice to get themselves and their students to engage in writing as a process, rather than discussing format and analysis in class and then awaiting a final product or perhaps one draft when the deadline arrives. This involvement would result in more fruitful interaction among teacher, student, and the written work. Assignments should allow for revision, interchange, and thinking aloud. Writing teachers could forgo a lengthy memorandum or brief for several shorter documents to allow students to work on more drafts within the same limited amount of time, and to see writing as a process rather than just an end product. Teachers could condense lecture material into fewer class sessions and meet with each student more frequently to discuss the writing process. Ongoing teaching of analysis and expression would replace after-the-fact evaluation. Students would benefit by becoming more critical and effective legal writers.<sup>76</sup>

On early assignments, law students are unlikely to recognize the importance of pre-writing steps to assess their own analytical process and the validity of their analysis of an issue before they begin drafting. In all likelihood, the majority of our law students did not habitually engage in significant pre-writing activities as undergraduates.<sup>77</sup> In addition, pre-writing can be very challenging for students to learn. Jill

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<sup>74</sup> This is not to say that the examples could not also be used later to show good legal writing format and style, but we suggest waiting to use examples in this way until students are more experienced in legal analysis.

<sup>75</sup> “Pre-writing” is a term, borrowed from composition theory, that denotes a stage in the writing process.” Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 ME. L. REV. 239, 284 (2004).

<sup>76</sup> Natalie A. Markman, *Bringing Journalism Pedagogy into the Legal Writing Class*, 43 J. LEGAL EDUC. 551, 560 (1993).

<sup>77</sup> In our August 2007 survey, we asked students at School X how often they had done certain tasks as part of their writing process on major products. Felsenburg & Graham, *supra* note 1, at 301. About 14% of the respondents said they only “sometimes” did background reading, and more than 24% of the respondents said they only “sometimes” outlined. In contrast, when it came to post-writing tasks, the figures were higher. Almost 71% said they “always” proofread, and almost half said they “always” attended to formatting requirements. New Law Student Survey at School X (Aug. 2007), *supra* note 4.

Ramsfield, a noted legal writing scholar, captured this well in describing her own writing process:

Here is something I know now that I wish I had known a lot earlier: how absorbing and demanding is the prewriting process. It takes about ten times longer than you think, requires excellent note-taking, patience, and careful connection among ideas. Never think you will remember something you've read; mark it, color-code it, and record it well enough to connect it to new ideas you are having as you read further.<sup>78</sup>

Even students who do think about pre-writing likely have only a limited understanding of what true pre-writing entails. This is perhaps because most of the legal writing textbooks that discuss pre-writing typically include only brief descriptions of the pre-writing stage—one to three pages at most—as part of an emphasis on the recursive nature of the entire writing process.<sup>79</sup> And these descriptions focus very little on *how* students can pre-write effectively as a means of developing their analysis. They focus instead on such tasks as organizing and outlining, which we believe are really early steps in the *writing* process rather than in the *pre-writing* process.<sup>80</sup> Organizing and outlining are tasks that presuppose at least a working understanding of the issues and the applicable rules and some effort to work through the analysis.<sup>81</sup>

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<sup>78</sup> Linda H. Edwards, *A Writing Life*, 61 MERCER L. REV. 867, 891 (2010) (quoting Jill Ramsfield, Professor of Law and Director of the Legal Research and Writing Program at the University of Hawai'i).

<sup>79</sup> See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 10 (6th ed. 2011); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 212–13 (4th ed. 2010); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 212–14 (4th ed. 2004). For example, in his highly respected textbook, Professor Charles Calleros describes “pre-writing” in the first few pages of the book:

[T]his process of “pre-writing” may take the form of refining the issues that you intend to research, taking your research notes in an organized manner, and developing your analysis of the law as your research proceeds. The most important stage of pre-writing, however, is the process of organizing the points that you wish to express after you have completed your research. If you take this step seriously, you can develop an outline as a means of clarifying your analysis.

CALLEROS, *supra*, at 10. Thus, while recognizing the need to take some steps before beginning to draft, Professor Calleros and most other authors quickly move from the thinking stage directly to outlining, which we believe is part of the writing process itself and not part of pre-writing at all.

<sup>80</sup> CALLEROS, *supra* note 79, at 201–02 (showing outlining as the main part of the pre-writing process); DERNBACH, *supra* note 79, at 213 (encouraging students to start writing as soon as possible); PRATT, *supra* note 79, at 212–14 (including outlining in the pre-writing process).

<sup>81</sup> For example, Professor Pratt’s textbook, by its very organization, recognizes that the student must understand cases and statutes (chapters 4 & 5) and must perform the steps of legal analysis (chapter 6) before proceeding to organizing the analysis (chapter 7). PRATT, *supra* note 79, at ix.

From our research and study, it appears that the pre-writing process is too often given short shrift in the legal writing classroom. Legal writing professors can help students become better metacognitive learners by deliberately planning assignments to allow significant time for true pre-writing, which we believe is best defined as “[t]he stage in the legal writing process where the assignment is organized, researched, and *analyzed*.”<sup>82</sup> Pre-writing should be a process in itself, consisting of a number of recursive steps: (1) thinking through the analysis; (2) giving oneself the freedom to explore connections between ideas and to speculate about alternative approaches; and (3) accepting that the law is not always going to provide a “right answer” but only a “best answer” under the circumstances and facts of the problem.<sup>83</sup> We need to teach our students that it is okay—and in fact desirable—to spend some time literally or figuratively looking out the window and simply exploring the analytical possibilities broadly before deciding what their written memos should say.

We recognize that there are various exercises that are already used effectively to teach analytical skills to law students.<sup>84</sup> However, we suspect that these exercises are often used in a scattershot way, as opposed to a systematic way that facilitates pre-writing skills. While students might learn something useful from each individual exercise, they struggle to apply what they learn from one exercise to the next slightly more difficult task. Thus, the exercises do not help them marshal their own metacognitive resources as they learn the process of legal analysis. Consequently, when they come to a “bump” in the “analytical road,” they often begin to question their ability to use their

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<sup>82</sup> WILLIAM H. PUTMAN, *LEGAL ANALYSIS AND WRITING* 297 (3d ed. 2009) (emphasis added).

<sup>83</sup> Kirsten K. Davis, *Take the Lime and the Apple and Mix ‘Em All Up*, *THE SECOND DRAFT*, Aug. 2005, at 13, 13 (providing examples of exercises that professors can use early in the semester to teach students that “law school is not about answers but about embracing the ambiguities of the law, analyzing all possibilities that arise in those ambiguities, and making arguments in those zones of uncertainty”).

<sup>84</sup> For example, several legal writing professors use a variation of “the fruit exercise” to teach analogy. *See id.* (describing an exercise using students’ knowledge about apples, limes, and potatoes to “introduce students to issue analysis, rule synthesis, analogy and distinction, and the hierarchy of authority”); *see also* Lurene Contento, *Back to Basics: Retro Visual Exercises That Promote Active Learning*, *THE SECOND DRAFT*, Spring 2008, at 5, 5 (describing a “rule scramble” exercise to help students learn to “separate the irrelevant from the relevant and organize rules into a clear, coherent narrative”); Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 *DUQ. L. REV.* 273, 276 (2010) (describing an exercise to “introduce fundamental legal concepts such as stare decisis, the common law process, and the process of predictive legal analysis, in an easily accessible, non-legal context”).

new knowledge and skills to get over the bump.<sup>85</sup> By spending more time on the pre-writing process and approaching pre-writing in a more structured way, legal writing professors can help students see the early weeks of legal writing as a time of experimentation and growth as legal analysts and not as a time of frustration and failure as legal writers.

### *C. Graduated Assignments Emphasizing Process over Product*

The current norm in many legal writing programs is to require students to produce a full-scale objective memorandum very early in the first semester. While the complexity of the requirement may vary,<sup>86</sup> the goal of such an assignment, by its very nature, is to communicate legal analysis to a sophisticated legal reader—in other words, the goal is “writing to teach.”<sup>87</sup> This lofty goal seems to us to fly in the face of the students’ novice status; it asks them to communicate legal analysis to an outside audience before they have had adequate practice in *performing* legal analysis. We believe that a better practice is to graduate the assignments in the first semester to allow students time to pre-write and to draft—to “write to learn”<sup>88</sup>—before we ask them to take any steps toward the production of a full-scale objective memo.

By analogy, when teaching a novice to play tennis, the instructor would not begin by asking her to play a complete match and then telling

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<sup>85</sup> See Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 LAW & PSYCHOL. REV. 57, 78 (2009). Christensen explained that many law students can be characterized as “helpless” learners. That is, when they “bumped up against difficulty,” they “quickly [began] questioning their ability (and . . . quickly lost hope of future success).” *Id.* at 78. Christensen contrasted these “helpless” learners with goal-oriented learners, who, upon encountering difficulty, “began issuing instructions to themselves on how they could improve their performance.” *Id.*

<sup>86</sup> Some are closed while others are open; some are on a single issue while others are multi-issue problems; some involve a statute while others involve only common law, etc.

<sup>87</sup> CALLEROS, *supra* note 79, at 208.

<sup>88</sup> See Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 1, 20–22 (2000). As originally conceived, the “writing to learn” theory assumed:

[W]riting is a unique mode of learning because some of its underlying strategies promote learning in ways that other forms of communication do not. For example, unlike talking, listening, or reading, writing is, almost simultaneously, enactive (we learn by doing), iconic (we learn by depiction in an image), and representational or symbolic (we learn by restatement in words). . . .

. . . Moreover, writing is self-paced; it “allows for—indeed, encourages—the shuttling among past, present, and future,” a process which, through analysis and synthesis, results in the production of meaning.

*Id.* at 2–3 (quoting Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122, 127 (1977)).

her everything she did wrong. He would begin by teaching her the most basic skills of the sport—how to hold the racquet, where to stand on the court, how to prepare for a forehand return, how to toss the ball for a serve, etc. To help her learn the basics of a forehand return, he would have her hit ball after ball after ball. And he would recognize that even after several lessons, she will not be ready to play a game of tennis, let alone a match. Asking a first-year law student to write a complete objective memo after only a few weeks of instruction seems to us to be like asking a novice tennis player to play a match in the U.S. Open.

Our counterparts in the medical school setting have seemingly recognized the need for novice students to progress through increasingly complex stages as they move toward application of their new skills. Medical schools therefore use the familiar “see one, do one, teach one” method.<sup>89</sup> This method for acquiring medical skills is “based on a three-step process: visualize, perform and [demonstrate].”<sup>90</sup> Students are first *shown how* to perform a skill correctly, then they *practice* doing the skill themselves, and only then are they asked to *teach* the skill to another student. For example, medical students would watch someone put on a splint, then practice putting on a splint, and finally teach a fellow student how to put on a splint.<sup>91</sup> This model works well for “educating professionals in settings where theory and skill necessarily coincide.”<sup>92</sup>

A recent article explores the advantages of introducing the “see one, do one, teach one” model into the legal classroom.<sup>93</sup> The authors posit that this model could help law schools transform their curricula and better prepare students to enter law practice.<sup>94</sup> Specifically, they suggest that law professors use examples more effectively (the “see one”), assign in-class writing or drafting exercises (the “do one”), and use guided, peer review sessions (the “teach one”) to reinforce students’ learning.<sup>95</sup>

We agree that each of these strategies—using examples, writing in class, and peer reviewing—can serve law students well, but in the first few weeks of law school, they may be premature. Just as medical students must know the basics of anatomy and physiology before they can learn from “seeing one” (an arm being splinted properly, for example), beginning legal writers must know the basics of legal analysis

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<sup>89</sup> Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 362 (2010).

<sup>90</sup> *Id.* at 363; *see also* JOSEPH SEGEN, CONCISE DICTIONARY OF MODERN MEDICINE 604 (2006).

<sup>91</sup> Coughlin et al., *supra* note 89, at 363.

<sup>92</sup> *Id.* Surely this is applicable to the legal profession.

<sup>93</sup> *Id.* at 378.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 379–80, 395–96, 404–05.

before they can learn from “seeing one” (a well-written example memo). In fact, we think that the most beneficial approach to early legal writing would actually be “do many, see some, and [only then] teach one.” Under this approach, “do many” means practicing the steps of legal analysis over and over, with no intended audience other than the student himself. “See some” means using example memos specifically to illustrate the *process* the authors used in developing their analyses, emphasizing that the analyses in the examples cannot serve as a “template” for future assignments. “Teach one”—which should not occur until well into the semester, when the law student is a more skilled analyst—means writing a full objective memo to communicate an original analysis to an educated legal reader.

Delaying the assignment of a full-scale objective memo is necessary, we think, because of the complexity of the task. This complexity has been captured by Laurel Currie Oates, a leading scholar and teacher in the legal writing field, who wrote,

The structure of memos and briefs forces students to think in a particular way. Students learn to set out the rules first, examples of how those rules have been applied in other cases second, the arguments third, and their conclusion last. In addition, in writing the memo, students are forced to assume a number of different roles. In setting out the rules and cases, they act as a reporter; in determining what each side is likely to argue, they act as an analyst; in predicting how the court is likely to rule, they engage in evaluation; and in advising the attorney about the next step, they become a strategist. In each instance, instead of simply telling what they know, the students are being required to monitor their comprehension, assess the importance of various pieces of information, recognize structures, and make connections between pieces of new information and between new information and previously acquired knowledge, all of which are acts that can result in knowledge transformation.<sup>96</sup>

In light of the complexity of this task, asking our students to write an objective memo in the first two months of law school when they are not yet skilled at reading and understanding cases, at identifying and articulating rules, or at analyzing how rules apply to new fact patterns, may unwittingly set them up for disappointment and perhaps even failure.<sup>97</sup> We believe that early writing assignments should be for the students’ own benefit, to help them learn the process of legal analysis. Students should not have to worry in the first weeks of a legal writing course about how to communicate their analysis to an outside reader. Put another way, the intended audience of our students’ early work should be the students themselves.

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<sup>96</sup> Oates, *supra* note 88, at 21–22.

<sup>97</sup> *See supra* note 15 and accompanying text.

For example, one early exercise might focus strictly on issue formulation. We use just such an exercise as an early, in-class collaboration exercise. Students are given a fictional statute. The statute uses some legalese but may be paraphrased as follows: “It is illegal for a vehicle such as an automobile to go through a red light.”<sup>98</sup> We then pose a hypothetical in which, as a case of first impression, a bicycle-rider has been ticketed for running a red light, and we ask students to identify the issue. The seasoned lawyer would immediately recognize that the issue is whether the statute applies to bicycles, which depends, of course, on whether a bicycle is “a vehicle such as an automobile.” However, it usually takes our novice students an entire class period to arrive at this fairly straightforward issue. We then build on this exercise by giving students a series of similar problems and simply asking them to write the issues.<sup>99</sup> Then later, after the objective memo is introduced, we build on this exercise by teaching students that when communicating a specific issue to a reader, they should add key facts (such as how many wheels the bicycle has, etc.) to make the issue more useful and understandable to the reader.

Likewise, we should allow time in our course schedule for students to work specifically on rule formulation—not in the context of a particular memo assignment, but in a broader sense. For example, we build on the issue formulation exercise by giving students two, short, fictional cases—one about a moped and one about a toy scooter—and asking them to formulate the rules of each case.<sup>100</sup> The rules in these fictional cases are not complex (e.g., “The child’s toy scooter is not a vehicle such as an automobile because . . .”). Yet we find it is difficult for students to articulate even these carefully crafted, deliberately simplified rules from deliberately simplified cases.

Many legal writing professors are likely already using exercises like these in the early weeks of the first semester; however, we suspect that many of us are spending too little time on these individual components before assigning a full-scale memo. For example, after just two weeks of legal writing instruction, we had typically asked our students to write a complete objective memo—Issue, Short Answer, Statement of Facts, Discussion, and Conclusion—analyzing whether a Segway® is a vehicle

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<sup>98</sup> The fictional statute is cited in two fictional cases the students have been given to use in assignments throughout the semester. *See infra* note 101.

<sup>99</sup> Assignments such as this one could easily be done as “pair and share” assignments for peer learning in class. For example, after working through how to formulate the bicycle issue, the students could work together to formulate similar issues about airplanes or baby carriages or motorized wheelchairs. These exercises would not require grading or even reviewing by the professor, but would provide excellent pre-writing tools for a formal memo assignment about yet another type of conveyance.

<sup>100</sup> *See infra* note 101.

such as an automobile and using the two simple cases as precedent.<sup>101</sup> This had required us to introduce our students to the IRAC<sup>102</sup> structure, as well as to legal citation and legal writing style—all without a thorough foundation in the process of legal analysis.<sup>103</sup>

This fall, on the other hand, we structured our courses so that for at least the first half of the semester, our students did not have to submit any writing in memo format.<sup>104</sup> In fact, we did not make any writing assignments (other than case briefs) until we had spent more than two weeks discussing rule identification and practicing both rule-based reasoning and analogical reasoning.<sup>105</sup> In the first writing assignment, we asked students simply to write down the steps they went through in analyzing the legal issue presented in the assignment.<sup>106</sup> We did not specify any particular format, so some students used a bullet format, others an outline format, and still others a narrative format. This allowed them to focus solely on the analytical process without having to worry about the writing style or format that an outside reader would expect.

We were then able to effectively introduce the memo format using the analysis that our students had just written. We drafted a sample memo, and we talked with our students about how *communicating* the analysis to an outside reader differed from *conducting* the analysis.<sup>107</sup> Our students thus learned the distinction between writing to learn and

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<sup>101</sup> Assignment 1, Legal Analysis, Writing, and Research, Wake Forest Univ. Sch. of Law (Aug. 2010) (on file with authors).

<sup>102</sup> See Felsenburg & Graham, *supra* note 1, at 258 n.61 (explaining the structural paradigm of IRAC (and its variants) and its use as a legal writing model); see also BARRY FRIEDMAN & JOHN C.P. GOLDBERG, OPEN BOOK: SUCCEEDING ON EXAMS FROM THE FIRST DAY OF LAW SCHOOL 26–33 (2011) (offering a helpful explanation of the IRAC framework for analysis to beginning law students).

<sup>103</sup> The IRAC/CRAC paradigm is useful when students are ready to communicate legal analysis to a legal reader, but it can be a hindrance to learning basic analysis if it is introduced too early:

Because most students see CREAC and its ilk as a formula they can plug in to write a memo, they fail to see the big picture of what is required for sound, lawyerly analysis. Students then fail to understand that “legal reasoning is a dynamic, iterative process which must be adapted to the needs of a particular legal problem.” They also fail to understand that “legal reasoning involves the structured manipulation and utilization of information, not the information itself.”

Venter, *supra* note 49, at 624–25 (quoting Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. MEM. L. REV. 1, 2 (1998)).

<sup>104</sup> Syllabus for Legal Analysis, Writing, & Research at Wake Forest Univ. Sch. of Law (Fall 2011) (on file with authors).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

writing to communicate.<sup>108</sup> Our students' first actual writing for an outside reader was not due until about seven weeks into the semester,<sup>109</sup> and we did see better results on that assignment, as compared to previous years' assignments, for having allowed them to focus primarily on analysis for the first few weeks. Our approach is just one example of how early assignments could be redesigned to give novice legal writers more time to develop as legal learners.

#### CONCLUSION

In this Article, we have urged legal writing professors to take a more deliberate approach to their early writing instruction in three ways: (1) by setting and communicating clearer, more realistic goals regarding our students' early progress; (2) by deliberately encouraging our students to use their metacognitive skills, especially at the pre-writing stage; and (3) by slowing down the pace of early assignments to allow students to become familiar with and practice legal analysis without the pressure of producing a finished memo intended to educate a sophisticated legal reader. We believe that each of these strategies will help our students reshape their understanding of the foundation of legal education by focusing them on the *process* of legal analysis rather than on the resulting written *product*. By avoiding the temptation to ask first-year law students to do "too much too soon," we can help them avoid the seemingly inevitable and damaging loss of self-confidence that affects so many of them, thus giving our students the "better beginning" they need.

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<sup>108</sup> Oates, *supra* note 88, at 1.

<sup>109</sup> And that was only the discussion section; not until the final assignment of the semester, due in mid-November, were students asked to follow full memo format. Fall 2011 Syllabus for Legal Analysis, Writing, & Research, *supra* note 104.