# AN EVOLUTIONARY ENDEAVOUR: TEACHING SCHOLARLY WRITING TO LAW STUDENTS

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A few years back I designed a course, "Scholarly Writing for Law Students," largely as a result of my position as a Faculty Adviser to the *Brooklyn Journal of International Law.* In that capacity, I saw many students disappointed because they had not been selected by one of the school's journals. As many of us know, students often see that selection as an honor that will help them gain employment rather than as a forum to write a note. Thus, during much of my time consoling these students, I explained the greatest value of journal membership is the exposure to scholarly writing, and that was something that they could pursue in other ways.

Among the lessons scholarly writing can teach, and among scholarly writing's numerous benefits, is that students obtain a greater mastery of doctrine in a particular area and greater sophistication in thinking than provided by any final exam. It teaches students what it means to "really" know something, an experience that will be valuable to them once they are practitioners. They learn about the process of getting to know something deeply—a process that can be long, uncertain, and daunting. Getting them to the end of that process, while still in law school, is a gift, not the least because students learn how labor-intensive and evolutionary the process is.

Once I had won students over to my way of looking at the value of journal membership, they were all ready to write a note themselves, and of course their follow-up question was "Would you help me?" Initially, I worked with a series of students one by one to guide them through the process. Inevitably, I directed them to Elizabeth Fajans and Mary Falk's book, *Scholarly Writing for Law Students,*[1] and I spent a lot of time going over drafts and meeting

with students individually to discuss their ideas. Eventually I realized a more profitable environment for these budding scholars would be a scholarly writing seminar.

In thinking about how to structure this seminar, I reflected upon my experiences as a writer discussing my ideas with my colleagues. I learned a great deal about scholarly writing and analysis, not only by discussing my ideas with my colleagues, but also by listening to my colleagues discuss their ideas: in brown bags talks, faculty fora, and workshops. I saw my ideas and work evolve through discussion with others.

Accordingly, my course is very much modeled on what we all experience as writers and as faculty members when we come up with an idea: run it past some colleagues, perhaps do a workshop or a symposium, or shop it around again and again in a variety of fora. This experience treats the writing process as a collaborative and evolutionary endeavor. Although, as I will discuss, I add components just for students (classes on research, editing, structure, etc.), the basic premise and theme are encouraging students to develop their ideas by articulating them to others and allowing themselves to reflect upon those ideas as they listen to others' expressions of their ideas.

Here I will briefly outline the class design and its components and how collaboration aids each of the components. I will then briefly discuss how I think this model can be adapted to a seminar course in a doctrinal field.

## I. CLASS DESIGN

I designed the class as a year-long class limited to seven students. Although I did not intend the class to be limited to third-year students, it was in effect so limited by the scheduling priorities set by our registrar. This limitation benefited the class, and I recommend limiting the class to graduating students who have had the chance to explore as many writing and doctrinal experiences as possible. I did intentionally limit enrollment in two ways. First, journal students could not take the course. As I mentioned, I designed the course for students who otherwise would not have had a scholarly writing experience. Second, students had to have received a B or better average in their legal writing classes. I felt students needed strong writing foundations to be able to tackle a year-long writing project and to help their colleagues in this collaborative setting. Fortunately, our school has other writing semi-

nars for students at all levels; those seminars expose them to a variety of documents and provide close supervision. Students who did not have a B or better average in their first-year writing courses could demonstrate their ability to take the scholarly writing course if they had received a B or better average in writing courses taken after their first year.

## II. TOPIC DEVELOPMENT

Topic development was the obvious place to start, and I find that it is the most difficult step for students. In my experience, students start with a general idea or subject matter that interests them, but they do not know what they want to say about it. Alternatively, they know what they want to say, but it is unsuitable for a student note. For example, they want to say that "music should be free on the Internet" or "states should provide more services to the poor" or "war is a bad thing" or "war is a good thing." These initial thoughts may be interesting and may serve as springboards for serious notes, but they lack a legal focus and often lead students to writing editorials that lack legal analysis. I often tell them that if I wanted someone's editorial view of a subject I would ask my mother; what I need from them is legal analysis. In other words, students need to identify a legal problem, explain why it is a problem, venture a solution, and explain why the solution is viable.

To explain topic development, I have found I must explain what scholarly legal writing does. This is the hardest part of the course to teach in the collaborative setting, and I necessarily lecture for a good part of class. Fajans and Falk have an excellent section about this in their book, and I assign that.[2] Another useful resource is Eugene Volokh's *Academic Legal Writing.*[3] But I also assign introductions from a selection of good student notes. Subscribing to the view of "show don't tell," I find that if students can read the part of a paper that says "Part I will do this and Part II will do that and in Part III I argue," then they begin to get the idea of what a legal note is meant to do and as a result they begin to understand suitable topics. One of my favorite examples is the following:

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[2] *Id.* at ch. 2.

[3] Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (2d ed., Found. Press 2005).

The Note posits that analyzing personal jurisdiction in trademark Internet controversies by using a framework founded on physical contacts is inappropriate, because its uneven application to an electronic medium by the courts defeats the national uniformity policy of the Lanham Act. Part I provides an overview of the Internet. Part II examines trademark issues arising from Internet use. Part III examines the existing jurisdictional framework and the tests derived by the Supreme Court and surveys federal court decisions applying those tests to trademark issues and the Internet. Part IV reviews trademark legislative history and the national uniformity policy of trademark law that has been tested by court decisions and amended by Congress. Part V proposes a statutory solution to clarify personal jurisdiction in trademark controversies arising from the Internet and discusses the benefits and arguable disadvantages of a statutory enactment. This Note concludes that the policy of federal trademark law would best be served by an amendment to the Lanham Act expressly authorizing nationwide personal jurisdiction in infringement, dilution, unfair competition and false advertising controversies arising from electronic contacts on the Internet.[4]

The example is simple and clear. It shows students a note's constitutive parts while at the same time showing how helpful to the reader a clear roadmap will be. An example such as this also helps students understand the general structure of a note, and thus gives them a way to think about their topics in that structure.

With this background, I find that by the second week I can introduce a collaborative component, and I ask students to explain their proposals and topics to the class using this structure. I then ask the class to articulate the legal analysis they think the author needs given the topic proposal as stated. One may think it is too early in the process to try to pin down analytical approaches given that topics and theses will inevitably change; however, accepting change, accepting comments from colleagues, and embracing the evolutionary process are goals of the course. Any one who has written a piece of scholarship experiences this evolutionary phenomenon, often spurred by constructive criticism and collaboration. Additionally, having students articulate their ideas out loud and in public will be helpful later when they need to assess where they

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[4] Marguerite S. Dougherty, Student Author, *The Lanham Act: Keeping Pace with Technology*, 7 J.L. & Policy 455, 461 (1999).

started in their thoughts, where they ended, and how they got there.

## III. RESEARCH

Throughout the course, I take advantage of my colleagues here at Brooklyn Law School and their expertise. We have excellent research librarians here, and I ask them to provide some help to the students in starting their research. Because all of the students in the class are writing in different doctrinal areas, they are often on their own for research. I do ask them to complete research logs that I review, and we have a class on research techniques and proper attribution. Again, at this stage, the Fajans and Falk text is an invaluable resource.

Still, I found it useful to have some class discussion among the students about the problems they encounter while researching. Often students were able to help each other with research and sources even though they were working on very different topics. I suppose I should not have been surprised to see how eager they were to help each other with their projects, so much so that students would come in with sources for each other.

## IV. BACKGROUND EXPOSITION

Early in the semester, I had a class on background exposition to try to get them writing from the very beginning. I tell students that writing a note is like making a stew: it works well only if you cook it slowly. So you have to start cooking early and accept that you will need to taste it along the way, add things, stir, and be flexible. As we all know, it is hard to start cooking when you are not sure of the taste you want in the end and when you are afraid of making a mistake. Getting students started on describing the problem, the area of law, or the literature in the area of law and telling them not to work on an analysis section yet is a useful way to make sure that they start cooking. Again, in class, the students explain the background to their colleagues and their colleagues prod them for more explanation or alert them to problems with the stories they tell. Having the students write up their background sections early also allows me to get the students to work on editing each others' work while they are still in the middle of the writing process.

## V. EDITING

Editing, not surprisingly, is one of the most valuable parts of this course. I have the students edit the background sections of each others' papers. The task is much more valuable for the editor than the author. Lights flash on in the editors' heads when they look at their colleagues' papers. Suddenly they are struck by how annoying rambling musings become, how confusing gaps are, and how important roadmaps and topic sentences are. They also see what works. They may become convinced that using a hypothetical as a foil is useful, or that they really should delete the ten-page digression to which they were previously spiritually committed despite its limited relevance. Almost universally, the students took what they learned though editing someone else's work and applied it to their own papers.

Finally, time spent on writing and editing background sections gives students room to work through their theses in their minds before they start writing their analysis sections and become unnecessarily committed to underdeveloped and sometimes faulty reasoning simply because they have written down those analyses. For some reason, once students have words typed on paper, they never want to delete them. A useful trick is to convince them to create a separate document in which they can save material for later or come back to it.[5] Getting them to focus on background exposition and descriptive sections of the paper first while they think through their analysis more thoroughly saves a good deal of needless deletion later.

## VI. THESIS DEVELOPMENT AND ANALYSIS

Finally, thesis development and analysis benefit most from the collaborative process. At least four times throughout the course, students are required to present their theses to the class in various stages of development: during topic development (when really they have no thesis but they may think they have one), when discussing research, at a separate class on thesis development and analysis, and during their final presentations.

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[5] Fajans and Falk refer to a teacher who calls this psychological trick "the bone pile"—discarded ideas are saved at the end of the paper, or in a separate file, but can be retrieved if necessary. Fajans & Falk, *supra* n. 2, at 72 (citing Andrew P. Johnson, *A Short Guide to Academic Writing* 26–27 (U. Press Am. 2003)).

Requiring students to articulate their arguments out loud and defend them over time makes them clarify those arguments in their own minds and allows them to see how their arguments change. Often students think they have a brilliant idea but do not want to explain it to others until they are "done," whatever "done" means. This is a big mistake. Explaining an idea to others focuses any writer on the gaps in the analysis. Others will certainly focus on those gaps, as well we know. Thus, although students are often so committed to their first ideas that they are reluctant to change, they must learn that papers and ideas evolve—they do change. The process of writing is about that evolution. Again, students listening to these articulations learn as well because while listening they often think in terms of their own papers. This should not surprise us, as I am sure we have all had the experience of attending a faculty workshop and thinking of the presenter's project in terms of our own current projects. So too, students see the successful presentations as models for their own work, and when they diagnose problems in presentations, they apply those diagnostic skills to their own papers.

## VII. FINAL PRESENTATIONS

Finally the students present their fully formed papers, which of course are never fully formed; they learn, as we do, that you can work on these things forever. But there must be closure. Because in the past when I have taught this course the students have written on different subjects, I try to invite faculty members who teach or write in the field to each student's talk. It is a nice way of welcoming the students to a scholarly community and also allowing them (and me) to show off. It also is a time to discuss what needs to be done to get the paper ready for publication.[6]

## VIII. ADOPTING THE COLLABORATIVE MODEL FOR SEMINAR COURSES

I have taught this course as purely a legal writing course in the past, and I look forward to doing so again in the future. I have also thought about using this model as a way to teach a doctrinal

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[6] Incidentally, half the students who have taken the course have been published, often in other schools' journals, and some with multiple offers of publication.

seminar. In another article in this volume, Elizabeth Fajans discusses the Administrative Law Practicum that she and I have developed.[7] I think this scholarly writing model would work with administrative law or almost any course. My plan is to use it in another subject area that I teach, International Business Transactions, which covers a variety of unconnected subjects linked only by the fact that they are problems that are encountered by international business lawyers. I call it a "buffet course." There are many items on the buffet to choose from, and we move from one item to another. I think it lends itself to a seminar in which students can choose from a variety of loosely related issues and subjects on which to write.

I would structure the course by first identifying what buffet items on the menu of possibilities appeal to the students, for example international sales, foreign sovereign immunities, carriage of goods at sea, and the like. And I would thereafter design the syllabus to track the various student projects. The course would need more classroom hours than the legal writing course and would probably need just as much time meeting with the students and reviewing their papers; however, the collaborative components of the course will probably be even more useful, and natural connections will appear among the topics.

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[7] Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 Leg. Writing 215 (2006).