Law Talk: Speaking, Writing, and Entering the Discourse of Law

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> What students do when working collaboratively on their writing is not write or edit or, least of all, read proof. What they do is converse. They talk about the subject and about the assignment. They talk through the writer's understanding of the subject . . . . Most of all they converse about and as a part of writing . . . . In short, they learn, by practicing it in this orderly way, the normal discourse of the academic community.[1]

I. INTRODUCTION

What is the normal discourse of the academic community of law, a community that exists to produce professionals in the field of law practice and not necessarily to replenish the ranks of law scholars? The practice of law requires lawyers to work collaboratively and collectively — to define issues, create documents, negotiate, and resolve legal disputes. It requires lawyers to discuss their writing with their target audience as well as with their colleagues. Law professors regularly present scholarly work to an audience of peers for their reaction. But law school, even in writing courses, rarely offers students opportunities to experience or to model this crucial part of the normal discourse of law. This article examines how legal education generally, and legal research and writing teachers, in particular, can more effectively bring students into the discourse of the community of law, a discourse that relies on conversation about writing, by enabling students to talk with each other about their writing.

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1. Kenneth Bruffee, *Collaborative Learning and the "Conversation of Mankind,"* 46 C. ENG. 635 (1984) *reprinted in* CROSS-TALK IN COMP THEORY 393, 403-04 (Victor Villanueva, Jr. ed. 1997) [hereinafter "CROSS-TALK"].

Traditional legal pedagogy teaches through speech but evaluates through written analysis, without attending to the significant differences between these means of communication and learning.[2] Many thoughtful people in several fields have explored the relationship between speech and writing[3] — what it is and how it affects learning and teaching — but there has been surprisingly little discussion of these issues in the context of law school teaching.[4] The absence of such discussion is especially striking because of the dissonance inherent in the classroom focus on oral discussions of reading and the evaluation based on written examinations.[5] What teacher of the law has not been frustrated by the students who are great in class — i.e., who contribute articulately to oral class discussions — but whose writing is disappointingly weak? Of course a variety of students fit into this loose category, from those who have great oral presence and easily talk about the forest, but whose writing shows an inability to analyze how the trees make up the forest, to students who are merely competent writers, but whose oral contributions are consistently insightful and articulate. Also, there are the weak writers who turn out to be stellar at oral argument, a particular kind of conversation about the law.

The relationship between speech and writing has been a major issue in composition in the second half of the 20th century; examination of that relationship has created efforts to revolutionize the way writing is learned and taught. Composition itself has learned from and absorbed explorations of this topic in linguistics, cognitive psychology, and learning theory.[6] Composition theorists

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2. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105 (1998).

3. Much of the research for this article has been in the field of composition, which in turn explores speech and writing in the context of linguistics, learning theory and cognitive psychology, in particular. *See, e.g.*, Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. (1977) *reprinted in* CROSS-TALK 7, 9, 12 (discussing the differences between writing and "verbal languaging processes"); Nancy Sommers, *Revision Strategies of Student Writers and Experienced Adult Writers*, 31 C. COMPOSITION & COMM. (1980) *reprinted in* CROSS-TALK 43; Walter J. Ong, S.J., *The Writer's Audience Is Always a Fiction*, *reprinted in* CROSS-TALK 55.

4. Among the few are Eichhorn, *supra* note 2; Kellen McClendon, *The Convergence of Thinking, Talking, and Writing: A Theory for Improving Writing*, 38 DUQ. L. REV. 21 (1999); and Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987).

5. *See, e.g.* Kissam, *supra* note 4, at 139.

6. Martin Nystrand, Stuart Greene, and Jeffrey Wiemelt trace the parallel histories of modern composition theory, literary criticism and linguistics, noting that all three fields have moved from formalism and a focus on text alone to "reconceptualize writing and reading as

generally agree that speech and writing are distinct,[7] except that the traditionalists still view writing as merely the transcription of thought.[8] Also, generally, agreement exists that many writing difficulties arise from those differences. Students are comfortable with speaking because they learn to speak naturally, simply by living in an environment of spoken language.[9] Writing, in contrast, is learned through study.[10]

Although there is much disagreement on the nature or value of the process of writing and how orality fits into it,[11] current composition theorists all rely in varying ways on talking about writing to understand the writing process and to develop writers.[12] How these theorists view the relationship between audience, writer, and text deeply affects and is influenced by the theorist's view of the speech/writing relationship. This article will: review how the primary trends in composition theory deal with the relationship between speech and writing, and how that relationship affects and informs the teaching of writing; explore the specific discourse community that law students find themselves in;[13] and propose

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dynamic processes of constructing meaning." Martin Nystrand, et al., *Where Did Composition Studies Come From?* 10 WRITTEN COMMUNICATION 267, 285 (1993). They credit cognitive psychology and psycholinguistics as providing the "intellectual seed for conceptions of writing and reading as cognitive processes." *Id.* at 283. "The net effect of the Cambridge revolution was nothing less that the validation of the role of mind in shaping human experience." *Id.*

7. *See, e.g.*, Emig, *supra* note 3, at 9-10; James Britton, *Spectator Role and the Beginnings of Writing, reprinted in* CROSS-TALK 129; Ong, *supra* note 3, at 57; Lisa Ede and Andrea Lundsford, *Audience Addressed/ Audience Invoked: The Role of Audience in Composition Theory and Pedagogy, reprinted in* CROSS-TALK 77.

8. Linguists too have traditionally viewed writing as the stepchild to speech, the true language. "Historically linguists have considered speech as the primary form of language and writing as secondary. Reading and writing are parasitic on listening and speaking." Joseph H. Danks and Laurel End, *Processing Strategies for Reading and Listening, reprinted in* COMPREHENDING ORAL AND WRITTEN LANGUAGE 271 (Rosalind Horowitz, et al. eds., 1987).

9. *See* Peter Elbow, *Interchanges: Responses to Bartholomae and Elbow, reprinted in* CROSS-TALK 501, 507.

10. *See* Emig, *supra* note 3, at 9.

11. *Compare* Ong, *supra* note 3, at 55, *with* Ede and Lundsford, *supra* note 7, at 77 (debating the reality of audience presence and absence and its effect on writing); *compare* Bruffee, *supra* note 1, at 393 *with* Greg Myers, *Reality, Consensus, and Reform in the Rhetoric of Composition Teaching, reprinted in* CROSS-TALK 415 (contrasting views of the potential for coercion in collaborative student work).

12. *See infra* notes 19-80 and accompanying text.

13. It is unfair to lump legal academia and law practice together as one discourse community. Although the two overlap significantly, there is much tension between the two that highlights differences in their discourses. *See* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998). For the purposes of this article, I cling to the assumption that one purpose, at least, of legal academia is to empower law students with the intellectual

ways to change the polarity of the law school writing class so that students can ease their entry into the new discourse community of law through talking with each other about their writing.

Theoretical work done in the field of composition is instructive because legal research and writing ("LRW") is so closely related to the larger study and teaching of composition. LRW's view of itself as an academic community and its pedagogy has largely followed the developments of composition as an identified community.[14] But law school has singular characteristics too — it is a specific discourse community, though not a monolithic one.[15] Much of the fundamental task of LRW is to enable students to learn that new discourse and to become members of both the academic and practice legal communities. LRW, more explicitly than many other law school classes, specifically aims to have students become members of the broader community of law, outside the law school. The audience for the students' work in LRW is fairly specific — the partner who assigned the research project, the judge who will read

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rigor and analytical ability to identify, research, analyze and solve legal problems as practicing lawyers; that is, to enable them to join the discourse community of law beyond law school.

14. *See* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999); Elizabeth Fajans and Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Theresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L. J. 1089 (1986); Christopher Rideout and Jill Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994). *See* Mike Rose, *The Language of Exclusion: Writing Instruction at the University, reprinted in* CROSS-TALK 525, 526. Rose's brief description of the history and status of undergraduate writing courses within the university shows similarity with the history and status of legal writing within the legal academy. Rose argues that writing courses should not be seen as remedial but as part of an "enabling discipline," bringing students into the academic discourse community. *Id.* at 543. This message has been echoed repeatedly by legal writing scholars arguing for a vision of LRW as not remedial but central to the law curriculum in bringing students into the new discourse community of law. *See* Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067 (1999). *Compare* Susan Miller, *The Feminization of Composition*, THE POLITICS OF WRITING INSTRUCTION, 39-53 (Richard Bullock and John Trimbur, eds. 1991) *with* Maureen Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997).

15. Students in introductory undergraduate composition courses are typically novices in the general academic community, which itself comprises numerous discrete discourse communities. Composition's task is to engage the novices in academic discourse generally and to enable them to learn how to join new discourse communities as their studies take them in different directions. LRW, in contrast, is focused more particularly on the discourse communities of legal academia and legal practice. It shares this role closely with the other standard first year law courses that all aim to teach students to "think like a lawyer." There is also a significant emphasis in composition theory on not only so called basic undergraduates, but on secondary and elementary education. However the similarities of history, status, role and pedagogy of composition and LRW remain striking.

the brief, the client who will receive the letter. But the audience is a fiction; the students know they are writing for the professor, and the partner or judge is imagined, not actual.[16] Much of the students' struggle is to learn what need not be said to this imagined audience.[17] Law students lack experience as readers of the law; their ability to invoke the audience for their legal writing is limited by their lack of experience as members of that audience. This article will explore why that experience is important, and suggest ways to rework the classroom to use the oral skills students already possess[18] to help them work together to experience their writing as situated in a discourse community, the community of law.

II. Composition Theory: Speech and Writing

In the second half of the twentieth century, composition underwent a revolution of its theoretical base. This revolution attacks the traditional view of writing and composition pedagogy, often referred to as the current-traditional paradigm,[19] which focused only on the end product, concerning itself primarily with

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16. Ong emphasizes that:

> the spoken word is part of present actuality and has its meaning established by the total situation in which it comes into being. Context for the spoken word is simply present, centered in the person speaking and the one or ones to whom he addresses himself and to whom he is related existentially in terms of the circumambient actuality.

Ong, *supra* note 3, at 57. In contrast, the writer's audience is absent and writing "normally calls for some kind of withdrawal." *Id.* at 58. Lisa Ede and Andrea Lundsford propose an "enriched conception of audience" grounded in the understanding that, while:

> it is the writer who, as writer and reader of his or her own text, one guided by a sense of purpose and by the particularities of a specific rhetorical situation, establishes the range of potential roles an audience may play. (Readers may, of course, accept or reject the role or roles the writer wishes them to adopt in responding to a text.).

Ede and Lundsford, *supra* note 7, at 89. Within the rubrics of addressed audience, "those actual or real-life people who read a discourse," and the invoked audience, "the audience called up or imagined by the writer," are numerous possible roles including self, friend, colleague, critic, future audience, past audience, mass audience, and anomalous audience. *Id.* at 78, 89.

17. *See* Ong, *supra* note 3, at 61-62 (discussing what Ong calls the "you-me" relationship of writing in which the reader knows much of the context of the text).

18. There are also plenty of quiet students who are excellent writers. The primary focus is not on this group, though I hope to explore here how all students — from quiet, weak writers to strong oralists with good writing skills — will develop their analytical skills by conversing about their writing and the writing of their peers in the role of both writer and audience.

19. *See* Fajans and Falk, *supra* note 14, at 173.

correct form and the elimination of grammatical error.[20] Elizabeth Fajans and Mary Falk describe the current-traditional paradigm as holding truth to be independent of language, and that writing itself is invention that cannot be taught.[21] The traditional writing class, if it existed at all, taught form, not substance, and the transcription of ideas, not the creation of them.

Composition came of age as a discipline only recently, in the 1970's.[22] The revolution in composition theory grew out of what C.H. Knoblauch and Lil Brannon describe as:

> the epistemological crisis of the seventeenth century, when ancient faith in the probity and completeness of traditional lore about the world gave way before a newly skeptical habit of mind, a preference for empirical, "scientific" investigations of experience, a recognition of the open-ended, but always ultimately limited, character of human knowledge, and a new dependence on discourse for shaping and extending that knowledge.[23]

Discourse, and writing in particular, is no longer considered merely to be a means of transcribing knowledge that is provided in lumps by the teacher. Instead:

> Unlike the ancient intellectual world, which it has permanently displaced, this new world features a perpetual search for knowledge, where learning is an endless adventure in making sense out of experience, an exploratory effort in which all human beings are both teachers and students, making and sharing meanings through the natural capacities for symbolic representation that define their humanity. It is a world founded on this perpetual search, not on the authoritarian premises and unassailable dogmas of antiquity, not on the passive veneration of conventional wisdom or the declarations of privileged ministers of the truth. And it is a world in which discourse — writing as well as other modes of symbolic action — constitutes simultaneously the means of learning and the shape of knowledge, so that creating discourse is equivalent to the process of coming to know, whether it happens in physics

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20. *Id.*

21. *Id.*

22. *See* STEPHEN M. NORTH, *Preface to* THE MAKING OF KNOWLEDGE IN COMPOSITION: PORTRAIT OF AN EMERGING FIELD (1987).

23. C.H. KNOBLAUCH AND LIL BRANNON, RHETORICAL TRADITIONS AND THE TEACHING OF WRITING 51 (1984).

> laboratories or law courts, legislative assemblies or corporate board rooms, the academic offices of historians and literary critics, the artist's garret or the stage — or in writing classrooms full of eager minds whose nourishment is serious intellectual effort, not ceremonial exercises.[24]

This fundamental change in the view of knowledge and the role of discourse in creating knowledge mirrors fundamental changes in other fields too — in linguistics, literary theory, even science and mathematics.[25] Writing is no longer viewed as the mere transcription of thought, but rather as an active way of making meaning, constitutive in James Boyd White's words.[26]

This revolution consists of several threads with conflicting views on pedagogy and theory of composition; however, all of the threads share the common concern about perceived differences between writing and speech, and how those differences affect teaching and learning writing. Modern composition theory is filled with explorations of those differences. Janet Emig relies on the recognition that "written speech is a separate linguistic function; differing from oral speech in both structure and mode of functioning."[27] Nancy Sommers argues that writing is fundamentally different than speech because of the possibility of revision.[28] Speech can be repetitive with the speaker reiterating or restating points in reaction to the immediate audience response, but the repetition builds on what is said; it does not negate what has been spoken. Contrarily, in writing, the writer retains the power to change the writing before the audience relates to it. Kenneth Bruffee describes writing as a "technologically displaced form of conversation."[29] He avers: "If thought is internalized public and social talk, then writing of all kinds is internalized social talk made public and social again. If thought is internalized conversation, then writing is internalized conversation re-externalized."[30] The

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24. *Id.* at 51-52.

25. *See* Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1547-49 (cataloguing scholarship in a variety of disciplines which examine rhetorical conventions and the meaning of knowledge).

26. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 22-48 (1985).

27. Emig, *supra* note 3, at 9, *citing* LEV VYGOTSKY, Thought and Language (Eugenia Hanfmann and Gertrude Vakar, trans., Cambridge: The M.I.T. Press, 1962).

28. Sommers, *supra* note 3, at 45 (explaining that "[t]he spoken word cannot be revised. The possibility of revision distinguishes the written text from speech.")

29. Bruffee, *supra* note 1, at 400.

30. *Id.*

interrelatedness of speech and writing is most interesting in how the immediacy of speech within the discourse can be used to help a writer effectively make those revisions.

Closely related to the exploration of the relationship between speech and writing is the debate on the role of the audience in writing. An obvious difference between speech and writing is that one speaks to a present audience, but one writes for or to an absent one. Ong, focusing on the absence of a present audience for the writer notes:

> Except for a small corps of highly trained writers, most persons could get into written form few if any of the complicated and nuanced meanings they regularly convey orally. One reason is evident: the spoken word is part of present actuality and has its meaning established by the total situation in which it comes into being. Context of the spoken word is simply present, centered in the person speaking and the one or ones to whom he addresses himself and to whom he is related existentially in terms of the circumambient actuality. But the meaning caught in writing comes provided with no such present circumambient actuality . . . the person to whom the writer addresses himself normally is not present at all.[31]

The present audience for speech, then, allows the speaker nuance, context and reframing in immediate response to the audience's reaction, but what is said cannot really be not unsaid or removed from that present audience's experience. In contrast, writing is more concrete and slower, and can be more complex than natural speech. The writer can anticipate audience response and change the writing at will. But to change, that is, to revise effectively, the writer must be able to envision that audience.

Lisa Ede and Andrea Lundsford call for a more nuanced view of audience itself, distinguishing between the addressed audience that "refers to those actual or real-life people who read a discourse," and the invoked audience "called up or imagined by the writer."[32] Ede and Lundsford stress that the writer, "guided by a sense of purpose and by the particularities of a specific rhetorical situation, establishes the range of potential roles an audience may play" — self, friend, colleague, critic, mass audience, future audience, past

31. Ong, *supra* note 3, at 57.
32. Ede and Lundsford, *supra* note 7, at 78.

audience, anomalous audience.[33] The reader may, of course, reject those roles. The Ede and Lundsford model "emphasizes the creative, dynamic duality of the process of reading and writing, whereby writers create readers and readers create writers. In the meeting of these two lies meaning, lies communication."[34] Students who are comfortable with the ease and immediacy of speech may feel quite challenged by the task of invoking an absent audience, especially when they are also new to the discourse community and uncertain about the roles the audience may be willing to accept.

Modern composition theory is also replete with metaphors of talk; the discussions of writing are full of references to conversation, voice, hearing, and audience.[35] Such language shows that the field is still in transition of thinking of writing as different from and equal to speech as "true" language. Throughout each modern thread, talking about writing consistently arises, either as a pedagogical technique for developing writing or as a means of studying the composition process.[36]

This article is not intended to summarize the entire burgeoning field of composition theory, but only to trace the main threads of the process revolution as they relate to the tension and possible synergy between speech and writing.[37] It is important for law, and for LRW in particular, to deepen our understanding of these different schools of thought. "Process" is usually discussed without attending sufficiently to its varied meanings. "Process" in

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33. *Id.* at 89. *See supra* note 16.

34. *Id.* at 93.

35. *See, e.g.* Peter Elbow, *Being A Writer vs. Being an Academic: A Conflict in Goals*, *reprinted in* CROSS-TALK 489, 498 (noting that "the basic sub-text in a writer's text is likely to be 'listen to me . . . .' "); Bruffee, *supra* note 1, at 400 (stating that "writing is a technologically displaced form of conversation"); John Trimbur, *Consensus and Difference in Collaborative Learning*, 51 C. ENG. 602 (1989) *reprinted in* CROSS-TALK 439, 447 (discussing the challenges brought by "marginalized voices, the resistance and contestation both within and outside the conversation . . .").

36. *See, e.g.* PETER ELBOW, WRITING WITH POWER, 20-25, 181-216 (1981) (discussing the uses of sharing writing and talking to audiences); Sondra Perl, *The Composing Processes of Unskilled College Writers*, *reprinted in* CROSS-TALK at 17, 18 (studying the composition process by directing subjects "to externalize their thinking processes as much as possible" during their observed composing sessions); Linda Flower and John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365 (1981) *reprinted in* CROSS-TALK at 251, 255 (using a protocol for studying the writing process that requires the writers to "compose out loud near an unobtrusive tape recorder . . . [to] think out loud . . . [and] to verbalize everything that goes through their minds as they write . . . .").

37. For a better understanding than can be provided here see NORTH, *supra* note 22; JOSEPH HARRIS, A TEACHING SUBJECT: COMPOSITION SINCE 1966 (1997); and the essays in CROSS-TALK.

composition is not a monolithic concept, but involves sharp debates about whether writing should be inner-directed, focused on the voice or process of the individual writer, or outer-directed, with the writer's context and discourse community as primary concerns.[38] LRW scholars have just begun to explore these differences in schools of thought and have often, out of necessity, had to simplify the debates within composition theories because the complexities are too much to grapple with in the context of the LRW problem addressed.[39]

Composition theorists have chided its practitioners and classroom teachers for being slow to change their pedagogy to reflect a modern base.[40] Current-traditional pedagogy[41] treats writing as means of transmission, focusing the writing teacher on surface errors and form in the writing product, not on the process of writing, the writer's relationship to the reader, the text, or the context of writing.[42] The audience is merely the consumer of the thoughts and ideas transmitted through error-free prose. This view of composition has been rejected by modern theorists of all stripes, though theorists argue that it still holds sway in the classroom.[43] In

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38. *Compare* Linda Flower, *Cognition, Context, and Theory Building, reprinted in* CROSS-TALK at 701 *with* Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need to Know About Writing*, 3(3) PRE/TEXT 213 (1982) *reprinted in* CROSS-TALK at 365 (debating the validity and utility of process theory and the more outer-directed constructivist approach).

39. Even the best LRW scholars have just begun to explore these differences. For example, Linda Berger's article, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, *supra* note 14, and Elizabeth Fajans' and Mary Falk's *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEG. EDUC. 342, 345, 349-50 (1996), both use aspects from different schools of composition theory without much discussion of the conflicts between these schools. But more detailed analysis has been provided by those same scholars in *Against the Tyranny of the Paraphrase: Talking Back to Text*, *supra* note 14. *See also* Rideout and Ramsfield, *supra* note 14, and Jessie Grearson, *Teaching the Transitions*, 4 LEGAL WRITING 57 (1998).

40. *See* KNOBLAUCH AND BRANNON, *supra* note 23, at 22-47; James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories, in* THE WRITING TEACHER'S SOURCEBOOK 47 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988) *reprinted in* CROSS-TALK, *supra* note 1, at 238-39; NORTH, *supra* note 22, at 27.

41. *See supra* note 19 and accompanying text.

42. *See* Robert Zoellner, *Talk-Write: A Behavioral Pedagogy for Composition*, 30 COLL. ENGL. 267, 269 (1969).

43. It is difficult to present this theoretical school affirmatively because it has virtually no current scholarly supporters, though many of its critics still argue that much of composition teaching remains embedded in current-traditional notions with its focus on surface form, error, and formulaic recipes for writing genres. I found no one who was a clear proponent of the "old school" among the essays read in researching this article. Knoblauch and Berlin both stress that, as of the early 1990's at least, this paradigm still dominated composition classrooms and textbooks. *See* KNOBLAUCH AND BRANNON, *supra* note

Joseph Harris's words: "An old model of teaching centered on the transmission of skills (composition) and knowledge (literature) gave way to a *growth model* focusing on the experiences of students and how these are shaped by their uses of language."[44] Modern theorists in contrast view language as "not so much to be studied as used."[45] The current-traditional school views texts as univocal and autonomous, standing alone and meaningful independent of the text's context or of its writer's intent or background;[46] it focuses instruction on the end product. Writing is seen as transcription, not as an integral part of the thinking process or a means of learning.

The current-traditional school has no concern with the differences between speech and writing.[47] Its classic pedagogy is to assign a series of papers of different genres and topics, each evaluated by the teacher with an emphasis on errors of form. Typically, the current-traditional model offers little talking even between student and professor about the writing process. Perhaps the student will have a postmortem conference to discuss what went wrong with an already completed project, but teacher involvement in the writing process does not occur. There is no room for students to talk to each other about their writing.[48] The

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23, at 22-47; Berlin, *supra* note 40, at 238-39. Stephen North explains this phenomenon much more sympathetically in his discussion of practitioner lore, pointing out that the low status of composition teachers has left them overworked and underpaid with little time for reading, much less writing theory. Instead, as a collegial community, teachers share their institutional experience and build their pedagogy through shared stories. The accumulated wisdom is often repetitive. North uses the image of architecture:

> I like to think of [practitioner lore] in architectural terms, The House of Lore, as it were: rambling, to my mind delightful old manse, wings branching off from wing, addition tacked to addition, in all sorts of materials — brick, wood, canvas, sheet metal, cardboard — with turrets and gables, minarets and spires, spiral staircases, rope ladders, pitons, dungeons, secret passageways — all seemingly random, yet all connected. Each generation of Practitioners inherits this pile from the one before, is ushered around some of what there is, and then, in its turn, adds on its own touches.

NORTH, *supra* note 22, at 27. But, North notes, "naturally, the structure is huge, sprawling. There are, after all, no provisions for tearing any of it down." *Id.* The typical composition teacher, like the typical LRW teacher, is at the bottom of her academic food chain, is usually without support or opportunity for scholarship. It is no surprise then that newer theories have not fully penetrated the pedagogy of composition or entirely that of legal writing either.

44. HARRIS, *supra* note 37, at 1.

45. *Id.* at 8.

46. *See* Nystrand, *supra* note 6, at 277-78. "For any given text, readers sought a stable, singular, and universal core meaning – a public and objective truth – inscribed, as it were, in the text itself." *Id.* at 275.

47. Fajans and Falk, *supra* note 14, at 173.

48. *See* Zoellner, *supra* note 42.

current-traditional emphasis on text product leaves little concern for either writer intent or the social context of writing. The audience role is simply that of a recipient of error-free text that transmits the preconceived idea of the writer.[49]

Three main threads have developed in response to the limitations of the current-traditional paradigm, each attempting to reach a more thorough understanding of the relationships between writer, text, and reader. Joseph Harris identifies these main threads by their primary metaphors — voice, process, and community.[50]

Voice is the metaphor of the expressivists who view writing primarily in terms of the writer's intent. Their theory and pedagogy focuses on fluency, voice, and personal writing. Student-centered, it makes extensive pedagogical use of conversations between the writer and her fellow students. Joseph Harris, in describing this school, compares two writing classrooms.[51] In one, the writer reads her text aloud to a small group of fellow students. They converse about the text, her intent, and how her writing meets that intent.[52] In the second classroom, the text alone is available for discussion and the author is unidentified, though present in the room; the discussion focuses on the assignment and how the text meets its requirements.[53] Harris notes that the expressivist method of the first classroom:

> links writing closely to speech. It brings readers and writers face to face, dissolving the gaps in space and time that usually separate them, and makes the subject of their talk not so much the writer's text as what she *wants* to say. The text is thus seen as a kind of imperfect extension of its author.[54]

The audience role is limited however. The audience is present only for the writer's benefit: to let her know how her writing was received, but not to challenge her ideas. The expressivists have little interest in using talk to advance writing for the audience. Instead, they are heavy on metaphors of speech — inner voice,

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49. Ironically the current-traditional school relies most heavily on a world view that values speech over writing. Privileging oral expression seems only to aid the denigration of the value of writing and writing instruction, and to hinder using oral expression to develop writing. *See* Eichhorn, *supra* note 2. *See supra* notes 42-43 and accompanying text.

50. HARRIS, *supra* note 37, at 23, 53, and 97.

51. *Id.* at 23.

52. *Id.*

53. *Id.*

54. *Id.*

voice as power, and speaking authentically.[55] The major emphasis is for the writer to express herself; talking to others about her writing is done for the writer's benefit. There is little concern with reader response or writer responsibility for that response. James A. Berlin describes expressivists as Platonic, believing truth to be the writer's truth: "All believe in the existence of verifiable truths and find them, as does Plato, in private experience, divorced from the impersonal data of sense experience. All also urge the interaction between writer and reader, a feature that leads to another point of similarity with Platonic rhetoric — the dialectic."[56] The writer engages with the class but the purpose of that dialogue is "to get rid of what is untrue to the private vision of the writer, what is in a word, inauthentic."[57] Her purpose is not to adjust to the audience but to use the dialogue "to get rid of what is false to the self, what is insincere and untrue to the individual's own sense of things . . . ."[58] The audience matters most as source of information for the writer.

Process has come to identify and define those theorists whose focus is on understanding the elements of the process of writing. The process school has focused on what writers do as they write, and tries to identify the steps writers take as they move from idea to finished text. Process and the theorists associated with it[59] have strong roots in cognitive psychology. Process theorists have studied composition in order to model it. They see the composition process as somewhat recursive but moving in loops, from writer-based to reader-based. But, most importantly, process theorists see writing as a cognitive problem of the writer's mind, and not so much as a social process involving the context of the writing.[60] Patricia Bizzell associates both the process theorists and the expressivists as inner-directed, focusing on the writer's voice and process, rather than on the context of her writing or the community in which she writes.[61]

The process researchers heavily use speech as a study tool, i.e., as means of exploring the recursive process of writing in their

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55. *See, e.g.* ELBOW, *supra* note 36, at 282-83 (discussing the importance of voice in writing and the connection between voice and sincerity and power in writing).

56. Berlin, *supra* note 40, at 240.

57. *Id.* at 240-41.

58. *Id.* at 241.

59. *See, e.g.* Flower, *supra* note 38; Emig, *supra* note 3; Perl, *supra* note 36, Rose, *supra* note 14.

60. *See* Bizzell, *supra* note 38, at 366-70.

61. *Id.*

attempts to scientifically examine the writing process to determine its universal components. Researchers most often have subjects in the study discuss their process and their composition choices as they write.[62] Process theorists rely extensively on psychology and development theories of Jean Piaget and Lev Vygotsky.

Process theorists and researchers have been critiqued for failing to weigh social context adequately.[63] Linda Flower, a lead theorist of process, responds that context and cognition must be considered together as interactive and mutually influential on the writing process.[64] Knoblauch and Brannon see risk in using process language in ways, they argue, that tend to cover up or mask old rhetorical approaches. Prescriptive formulas requiring composition stages — prewriting, writing, revising — are not really approaches different from a focus on error in the end product, if the context of the teaching remains that a fixed body of knowledge of writing is transmitted from teacher to student. Knoblauch and Brannon argue instead for a view of teaching that recognizes the innate human capacity for making meaning through writing and, rather than criticizing the form of the student's writing, instead focuses on the student's intent in the writing and how the writing does and does not express that intent. The law's reliance on form — both rules requiring particular forms or styles for documents and the wide reliance on formulas for the organization of analysis — from case briefing "rules" to LRW formulas like Neumann's paradigm and IRAC,[65] are dangerously seductive in this respect. It is easy to forget to emphasize the importance of writing as a process of making meaning, that the dialogue of analysis exists to construct meaning of the law for the reader, and that the text and the reader both exist within an environment that affects how the reader makes meaning of, and reacts to, the text. Organizational formulas and guides are just techniques; tools like grammar and spelling, that allow effective communication of meaning. Jessie Grearson

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62. *See e.g.*, Flower and Hayes, *supra* note 36, at 255 (using think aloud protocols to record "what is going on in the writer's mind during the act of composing itself."); Sommers, *supra* note 3, at 43 (using interviews to discuss revision process); Perl, *supra* note 36, at 17 (using interviews and composing out loud protocols).

63. *See* Bizzell, *supra* note 38; KNOBLAUCH & BRANNON, *supra* note 23, at 98-115.

64. *See* Flower, *supra* note 38, at 701.

65. *See* Richard K. Neumann, Jr., LEGAL REASONING AND LEGAL WRITING (3rd ed. 1998), at 90 (providing an excellent guide to organizing analysis, termed the paradigm). IRAC, standing for Issue, Rule, Analysis, Conclusion, is another tool for organization of legal analysis. Its usefulness and limitations were explored in a series of short articles in *The Second Draft*, Volume 10, November 1995.

similarly cautions LRW teachers to avoid the trap of thinking of process as universal and standardized, especially where the process model is based on assumptions that may conflict with the cultural experiences of non-Western students,[66] of women, or of students from other marginalized communities.[67]

Community, representing the social constructivist theorists and their emphasis on the context of writing and the writer's discourse community with its social needs and purposes, has the most obvious resonance for LRW.[68] Every time a student sits down to write for us, he has to invent the university for the occasion, or a branch of it, like history, anthropology, economics, or English (or law). The student has to learn to speak our language, to speak as we do, to try on the peculiar ways of knowing, selecting, evaluating, reporting, concluding, and arguing that define the discourse of our community.[69]

The role of the teacher is to empower the students to become members of the discourse communities of academia, not because academic discourse is superior to the student's personal voice, but because effective writing is writing that is situated within the community expectations of the audience. Social constructivists have enormous interest in the relationship of writer, reader, and text. They consistently emphasize the place of those elements, the discourse community in which the writing and reading occur. David Bartholomae defines the problem of audience awareness as a "problem of power and finesse."[70] For social-constructivists, the audience has an active role in making meaning of texts. Berlin calls this New Rhetoric or Epistemic Rhetoric:

> For the New Rhetoric, knowledge is not simply a static entity available for retrieval. Truth is dynamic and dialectical, the

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66. She notes that even the most basic assumption of Linda Flower and John Hayes' model, that writers move from writer-based to reader-based prose, is not shared by some Asian cultures which are "reader-responsible;" that is, the reader is responsible for working to understand the product. The writer is not obligated to ease the reader's task in the way that Western culture values. *See* Grearson, *supra* note 39, at 66.

67. Grearson notes the irony in insisting that each student going through standard stages of the writing process will result in disempowering them by means of a theory that was intended to individualize instruction. *Id.* at 64.

68. *See e.g.*, Bizzell, *supra* note 38; David Bartholomae, *Inventing the University, in* WHEN A WRITER CAN'T WRITE 134 (Mike Rose ed. 1985) *reprinted in* CROSS-TALK at 589; Andrea Lundsford, *Cognitive Development and the Basic Writer, reprinted in* CROSS-TALK at 277, 280.

69. Bartholomae, *supra* note 68, at 589.

70. *Id.* at 595.

> result of a process involving the interaction of opposing elements. It is a relation that is created, not pre-existent and waiting to be discovered. The basic elements of the dialectic are the elements that make up the communication process — writer (speaker), audience, reality, language. Communication is always basic to the epistemology underlying the New Rhetoric because truth is always truth for someone standing in relation to others in a linguistically circumscribed situation. The elements of the communication process thus do not simply proved a convenient way of talking about rhetoric. They form the elements that go into the very shaping of knowledge.[71]

The unequal power relationships inherent in most legal writing contexts make these theoretical approaches informative and useful for legal writing teachers. Law students need to understand the context of their writing, including the power relationships between the writer and the audience.

The social constructivists also place major emphasis on collaborative learning and peer review, both of which have significant oral components and some concern about coercive effect of group work.[72] Andrea Lundsford advocates pedagogy that promotes learning by doing rather than by studying rules or principles of composition. She advocates small group workshops with all class members as active participants. "Class time should be spent writing, reading what has been written aloud to the group/audience and talking about that writing."[73] Lundsford also emphasizes the importance of learning writing by writing — for example, writing complete essays throughout the course rather than beginning with components that build to the whole.[74] Ann Bertoff stresses the importance of the writer's dialogue with the class, and with herself, to build her understanding of the discourse community she is entering and to "model that constant movement from the particular to the general and back again which . . . is the defining characteristic of concept formation."[75]

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71. Berlin, *supra* note 40, at 242.

72. *See* Myers, *supra* note 11, at 415.

73. *See* Lundsford, *supra* note 68, at 280.

74. *Id.* at 285.

75. Ann E. Bertoff, *Is Teaching Still Possible? Writing, Meaning, and Higher Order Reasoning, reprinted in* CROSS-TALK 307, 318. *See also* Bruffee, *supra* note 1, at 397 (relying on Stanley Fish, Vygotsky, and Michael Oakeshott, and emphasizing that "reflective thought is public or social conversation internalized" in arguing that students cannot develop that internal voice without understanding the conversation of the community).

Social constructivists themselves have been criticized for overemphasizing the community as exclusive, making the teacher once again the gatekeeper with power to exclude. Grearson, in arguing for a synthesis of process and social construction, stresses that we must remember the construction part of the theory; the discourse community is a constructed entity, one of many possibly overlapping communities, which borders are permeable and fluid, not fixed.[76] Its existence and composition is and should remain open to challenge, and not simply accepted as the *norm* that students must bend to.

Despite their differences,[77] all three modern challenges to the current-traditional paradigm care deeply about conversation about writing, but use conversation in very different ways. The expressivists converse about writing to help writer develop her voice; the cognitivists converse to understand and explain the steps in the writing process; and the social constructivists converse to situate the writer within the discourse community. These three schools each have some value for LRW as we develop a deeper theoretical base for our teaching. Law students frequently have limited experience in writing and in experiencing their voice and intent as writers. Although law is not a field that is usually thought of as friendly to individual voice,[78] students with little writing experience need some opportunity to learn their intent through writing. Certainly the pedagogical techniques developed by expressivists, including free writing, can be enormously useful to students who are uncomfortable with using writing to generate ideas and to work out the analysis of issues.[79] Process theory can also inform our pedagogy.[80] Students who have primarily

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76. Grearson, *supra* note 39, at 70.

77. *See* James Berlin, *Rhetoric and Ideology in the Writing Class*, *reprinted in* CROSS-TALK at 679, 692 (grouping the expressivists and process (psychological-epistemic) schools together as focused on the individual but noting the political differences among the social-epistemic rhetoricians). Bizzell and Flower both call for interactive theories that include both the cognitive process of the writer and the community of the writing. *See* Bizzell, *supra* note 38, 365; Flower, *supra* note 38, at 701 (calling for an "integrated theoretical vision which can explain how context cues cognition, which in its turn mediates and interprets the particular world that context provides.").

78. *See* Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (discussing how teaching law as a language marginalizes and mutes individual, particularly female, voices).

79. *See* Fajans and Falk, *Comments Worth Making*, *supra* note 39, at 351; Elbow, *supra* note 9, at 506.

80. *See e.g.*, Fajans and Falk, *supra* note 14 at 33; Rideout and Ramsfield, *supra* note 14, at 51-52; Jo Anne Durako, et al., *From Product to Process: Evolution of a Legal Writing*

experienced the current-traditional paradigm in their pre-law school writing experience may not even conceive of writing as a process or as a way to make meaning. The idea of writing as a recursive process, moving from writer-based to reader-based is an important metaphor for students to use to reenvision the role and purpose of writing in analysis. However, it is the social constructivist theorists who have the most to offer LRW in thinking about ways to use conversation about writing to broaden students' understanding of legal analysis.

III. LAW SCHOOL AS A DISCOURSE COMMUNITY

Law school differs from other academic communities in several and specific ways important to the relationship between speech and writing. Students are often drawn to law because they possess prowess in speech.[81] Law school, however, is a pseudo-oral environment. The verbal student may take comfort at first because law classes typically consist of Socratic dialogue with few written assignments (aside from the dreaded writing course), but that comfort is illusory. Evaluation and success in nearly all classes depends on the student's writing.[82] Indeed, the traditional Langdellian pedagogy assumes at its core that students will, without instruction, make the transition from oral analysis to written analysis. However, traditional doctrinal law classes make no explicit effort to assist students with this transition.[83] Law is at least as much a writing profession as it is a talking profession.[84] In fact, most lawyers spend much more time writing than they do on formal argument or trial work. That realization and her deeper understanding of what lawyers do, assuming she gets that

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Program, 58 U. PITT. L. REV. 719 (1997).

81. Each year during conferences with first year students, some express doubt about whether they should be in law school. When asked why she came to law school, the student typically replies that her family, friends or teachers told her she was meant to be a lawyer because she was articulate, a good arguer, great on her feet.

82. *See* Eichhorn, *supra* note 2, at 1243; Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861 (1995).

83. Many other scholars have criticized this lack and offered insights in how to recast the pedagogy of doctrinal classes to address it. *See, e.g.* Kissam, *supra* note 4; Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL EDUC. 401 (1997); Carol MacCrehane Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997).

84. *See* A.B.A. Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum* (Chicago 1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (named the "MacCrate Report" for Robert MacCrate, Chairperson of the Taskforce)) at 332.

understanding from her academic experience, can be terrifying for the student who came to law school to be Perry Mason.

The theoretical debates about audience are also particularly interesting for law school and the law generally because the legal audience is more clearly defined — judge, client, opposing counsel, opposing party, other party to contract, professor — than, for example, the audience for a poem. The audience usually does not comport with Ong's fictionalized readership. However, in law practice, that audience is very much present. Lawyers not only spend much of their time writing; they spend vast amounts of time conversing about their writing or another lawyer's writing. A lawyer's life consists of talking about written analysis, in conferences with supervisors, in meetings with clients, in settlement and mediation conferences, in oral argument. Law school rarely models this reality. Most writing that students do is individual, not collaborative. Moreover, they have few if any opportunities to present or even discuss their written analysis with anyone other than their writing professors. Even in seminar courses, the students typically present their papers only after completion. None of these situations gives the student experience in presenting her written analysis to a typical law audience — someone higher in the professional hierarchy with greater knowledge about the general discourse community, but less knowledge about the specific subject of the writing.[85] Moreover, the student receives no experience in being the audience, as in reading legal writing for resolving a problem.

But that is the very struggle for students: as novices learning the law, they are faced with a known audience that is more familiar with the conventions than they are.[86] A crucial part of that struggle

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85. The one exception may be clinical courses that include writing. *See* Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 660 (1993); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1 (1998).

86. To join a disciplinary community is, in part, to master a body of knowledge.

> But that knowledge does not exist 'out there,' independent of those who control it, just waiting to be acquired. Knowledge belongs to groups of people who have some shared stake in exploring, preserving, and expanding it. The outsider must acquire knowledge from insiders, usually through some form of an apprenticeship. Perhaps we should not, but we draw institutional boundaries around knowledge by locating it in communities defined by experts and by those novices who are trying to learn what experts know.

Joseph M. Williams and Gregory G. Colomb, *The University of Chicago, Chapter 5 of* PROGRAMS THAT WORK: MODELS AND METHODS FOR WRITING ACROSS THE CURRICULUM 101 (Toby

to join the community is to know what does not have to be said but will be assumed by the audience in that community:[87]

> A text is explicit not because it says everything all by itself but rather because it strikes a careful balance between what needs to be said and what may be assumed. The writer's problem is not just being explicit; the writer's problem is knowing what to be explicit about.[88]

Joseph Williams has noted the common tendency of beginning legal writers to include "self-evident banality" in their early writing efforts.[89] Novices typically reiterate the assignment and describe the steps they took in researching it, instead of providing the result of those efforts — the analysis they developed:[90]

> The typical novice does not know what to take for granted, what to remain silent about, because she has not been specifically instructed in that matter, an impossible task under any circumstances, and because she has not yet read enough legal texts to establish a body of knowledge that would allow her to recognize what is absent in the texts that she is reading.[91]

And just how can we do that impossible[92] task better than we do it now? Students who are strong orally rely on direct audience response from the professor and from their classmates for context and clues as to how their analysis is understood. How can they better analyze legal issues without the audience present? How can they develop the ability to have internalized conversations with themselves about their analysis and their writing? How can they

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Fulwiler and Art Young, eds., 1990).

87. *See* Martin Nystrand, *The Role of Context in Written Communication*, *reprinted in* COMPREHENDING ORAL AND WRITTEN LANGUAGE 197 (Rosalind Horowitz and S. Jay Samuels eds., 1987) [hereinafter "Horowitz"].

> These gradations of admissible ignorance vary from one level of scholarly writing to another, and since individual readers vary in knowledge and competence, the degree to which they must fictionalize themselves to match the level of this or that reading will vary. Knowledge of the degrees of admissible ignorance for readers is absolutely essential if one is to publish successfully.

Ong, *supra* note 3, at 72.

88. *See* Nystrand, *supra* note 87, at 197.

89. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models for Growth and Development*, 1 LEGAL WRITING J. 20 (1991).

90. *Id.* at 21.

91. *Id.* at 20.

92. Taking on the seemingly impossible is hardly new to LRW. *See* Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298 (1980).

enter into this discourse of law, the written and oral conversation expected in this new knowledge community? Bruffee says that:

> our task [as writing teachers] must involve engaging students in conversation among themselves at as many points in both the writing and the reading process as possible, and that we should contrive to ensure that students' conversation about what they read and write is similar in as many ways as possible to the way we would like them eventually to read and write. The way they talk with each other determines the way they will think and the way they will write.[93]

This sounds like the classic description of the Socratic method pedagogy — engaging the students through probing questions about their reading to teach them to "think like lawyers." But, actually, most lawyers engaged in the normal discourse of the law community converse about writing or research. That conversation is not separated from the writing process as it is in traditional Socratic pedagogy.

The typical law school classroom bears facial similarities to the usual ways that lawyers converse about writing, such as a memo conference between partner and associate. The hierarchy is clear — one person has the power, the authority, and control; the other is the supplicant, the worker, the evaluated. The roles and activity are superficially similar: the boss/professor assigns, the associate/student performs; the boss/teacher asks questions and the associate/student answers. In a way, both are collaborative: boss and associate work together to solve a problem, as do the teacher and student in the learning process. But in the classroom, the professor knows the specific issue, the analysis, and the topic of discussion much more fully and intimately than the student; the partner will not waste resources by assigning a research project if she already knows the answer. But, unlike a situation in legal practice, the student knows that the professor knows the "answer." She intuitively recognizes that the professor will know what she is trying to say, and she expects the teacher to work to understand her. Thus, the student's problem is learning to invoke and imagine the true audience — the partner or other consumer of written legal analysis, not the professor.

The student also must learn that the interplay between writing and conversation is more dialectical in the practice world than in

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93. Bruffee, *supra* note 1, at 400.

the academic one — from the assignment through researching and writing the memo to a conference or other discussion of the writing, lawyers talk about their work. Rarely do lawyers write without discussing their writing project with someone. LRW is, or should be, the bridge between these contrasting experiences. It must give students the experience not only of writing, but of presenting that writing to others, reading the legal writing of others, and talking about it.

LRW teaches analysis, thinking on paper, constructing legal knowledge through writing, and, fundamentally, bringing the novices into the community of law. LRW teachers are concerned with "the problematic and the complex in the law, not the simple and orderly."[94] We are among the experts helping new law students to learn what need not be said. LRW aims to empower students to be capable of finding the law, reading the law, understanding the law, analyzing the law, applying the law, and challenging the law — in essence, to make meaning of the law. Beginning law students face an enormous transition to this new discourse community in which writing is now a major part of their professional work.[95] This writing has several distinctive characteristics that are unfamiliar to most new law students. Its purpose is communicative, to provide a succinct but complete analysis of a legal issue to someone else. That analysis is usually provided to a skeptical audience, trained to look for flaws, who must be persuaded that the analysis is accurate and valuable. The writer's job is to find what is required by "the law" often while trying to change, mold, avert or diminish the impact of the existing legal rules on the new situation.

Take the common genre used to introduce LRW, the objective

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94. WHITE, *supra* note 26, at 52. Professor White advised entering law students that:

> For it is in the main only when things seem or threaten not to work in such easy and direct ways that lawyers are called upon to act. Our primary field of concern is the problematic and complex in the law, not the simple and orderly. Let me suggest that you regard the law, not as a set of rules to be memorized, but as an *activity*, as something that people do with their minds and with each other as they act in relation both to a body of authoritative legal material and to the circumstances and events of the actual world. The law is a set of social and intellectual practices that defines a universe or culture in which you will learn to function.

Id. at 51-52.

95. *See* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (June 1997) (focusing on the transition faced by international students while exploring the challenges even domestic novice law students face in adapting to the unfamiliar rhetorical expectations of the new discourse community of law school).

office memo.[96] Students struggle to learn that they must: (1) do the work of synthesis and analysis rather than merely report research; (2) in enough detail, anticipate and answer the suspicious reader's questions while allowing the reader to have enough information to trust and follow the analysis; but (3) not so much unnecessary information that the reader's time is wasted. To engage effectively in this process, the student must understand the law well enough to: recognize and define the issue; research it properly; understand the interplay of authority and how it relates to this issue; understand what is legally significant and insignificant; convey all essentials but no irrelevancies; be definitive; and be open to other interpretations. Patrick Hartwell, in discussing different meanings of grammar, calls the grammar rules taught in school "COIK" — clear only if known.[97] Students can write legal analysis well once they can write legal analysis well. So if students only understand these tasks and how to accomplish them once they already understand them and how to accomplish them, how do we help them get to that place of understanding?

Progressive LRW pedagogy focuses on the writing process and frequent teacher intervention in the process as the best way to teach LRW. We talk about the context of and audience for the writing. We work with students as they write and explore the research options, issue definition, and analytical issues in class. We meet with students individually before they rewrite assignments. We talk with students about their writing, and we help them talk with each other about the projects they are all working on. But we do not yet give them much experience as a legal writing audience, or even in talking to a realistic audience, like the busy lawyer or judge for whom the memo or brief is written, who knows the law generally but is not familiar with the substance specifically related

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96. One could easily question the value of using this particular form to teach written legal analysis. Many lawyers do not write such memos, which are mostly a creature of the multi-lawyer firm. But even those who do not actually write memos for someone else must still go through the analytical process embodied in the formal memo. The form is not purely artificial, like the five paragraph theme so heavily criticized by progressive composition theorists. The memo remains a useful way to teach new lawyers how to have the internal conversation with themselves about the law.

97. Patrick Hartwell, *Grammar, Grammars and the Teaching of Grammar*, *reprinted in* CROSS-TALK at 199. Hartwell actually calls such rules "incantations" that are opaque to readers who are not already "print literate," and reviews experimental studies that have shown "no correlation between the ability to state the rule [of grammar on use of articles] and the ability to apply it correctly . . . ." *Id.* at 198. The clearest connection to use of correct grammar is the level of print literacy of the writer, not the ability to articulate the rules justifying the grammar choices of the writer.

to the piece of writing. To enter the discourse of law, students need to experience being the legal writing audience. Furthermore, they need to model the discourse community within their law school experience, and collaborate to talk about their writing, its intent, how it met that intent and how it failed. In short, we need to expand the classroom structure to include opportunities for students to respond to the work of others, as lawyers would, and to communicate directly with their readers.

One major source of confusion for novice legal writers is understanding why their memos must be repetitive in some respects, but so lean in others. Students must learn that many of the conventions of memo or brief writing that require repetition — the Question Presented, the Brief Answer and the introductory sections of the memo — exist for the convenience of the reader, who also wants the actual legal analysis succinctly stated. They have to learn what the legal audience expects — that legal writers are generally obligated to do the work for the reader. The students must grasp that they write to ease the reader's job. These conventions are new for many students with limited writing backgrounds, or whose undergraduate or past writing experiences were much more reader responsible.

Students must understand the environment in which their writing exists to comprehend how and why the discourse is constructed. The law community as it now exists is hierarchical. Legal writers write within that hierarchy — for a judge, for a boss, for a professor.[98] The focus here is not on defending that hierarchy, which I have devoted much of my professional energy to challenging, but on the reality students face — not an idealized community, but the discourse community they must learn to deal with.[99]

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98. Both the expressivists, in their emphasis on individual voice, and the social constructivists have called for challenges to the hegemony of tradition and dominant voices with the academy. *See* Elbow, *supra* note 35, at 489; Trimbur, *supra* note 35, at 439. Many within the legal academy have echoed this concern — and have addressed how the conventions of the law stifled the voices of marginalized students. Such students face even more pressure to conform. *See* Stanchi, *supra* note 78. As much as I agree with these critiques, I am not at the moment concerned with the normative view of the community but how to help students, especially marginalized ones, work within it.

99. They must understand the law community to work within it and to change it.

> Students discover that they are constantly in dialectical relationships with, in conflict with, alienated from, their environments and that these environments are affected by social, political, and economic circumstances and events. Personal lives must contend with social, political, and economic situations. For Freire, the more students are aware of the dialectic, the more they can affect changes in their selves and in their

Students need to be the audience and read the legal writing of lawyers, beyond opinions and statutes, on topics they are not working on. They need to invent the discourse community of law within the writing classroom.[100] The key insight that developed social constructivist theory out of the process movement was recognition of the importance of environment to the text — that the writer works within a community, not as a single independent being. Peer work is different than what we currently provide students. Peer work should not entirely replace current pedagogy, but be included in it to help develop the students' grasp of the community in which they write and work.

The social constructivist composition theorists see great value in group work, but not as much in the group response to writing.[101] The basic writing class "should comprise small workshop groups in which all members are active participants, apprentice-writers who are 'exercising their competence' as they learn *how* to write well. Class time should be spent writing, reading what has been written aloud to the groups/audience, and talking about that writing."[102] Students need the experience of practicing competence.[103]

> environments. In short, the more the dialectic is recognized as such, the greater the chance for lessening alienation.

Victor Villanueva, Jr., *Talking About Selves and Schools: On Voice, Voices, and Other Voices*, *reprinted in* CROSS-TALK at 475, 477. *See also* Myers, *supra* note 11; Trimbur, *supra* note 35. As Jessie Grearson's critique states, the community and its conventions should not simply be accepted. Also, accept that one must understand the world in order to change it. Lisa Delpit argues that writing teachers must recognize the need for students to first get through the gatekeeping points – like first year composition or legal research and writing. "[T]o act as if power does not exist is to ensure that the power status quo remains the same. To imply . . . that it doesn't matter how you talk or how you write is to ensure their ultimate failure." Lisa Delpit, *The Silenced Dialogue: Power and Pedagogy in Educating Other People's Children*, 58 HARV. EDUC. REV. 280 (1988) *reprinted in* CROSS-TALK at 568, 580. Delpit addressed the risks in overemphasizing process and voice without concomitantly recognizing that the product also matters. Her concerns ring true for law teaching as well.

100. Bartholomae, *supra* note 68, at 589.

101. *See* Lunsford, *supra* note 68, at 277. The expressivists also emphasize workshops and group conversation about writing. They, especially Peter Elbow, advocate writing workshops where the writer reads her work and the workshop group responds. The group acts as a sounding board, not an evaluating body. The writer is free to incorporate or reject the suggestions and responses. The goal and intended benefit is to make the classroom less hierarchical — less focused on the teacher and more nurturing of individual voice and expression. *See* ELBOW, *supra* note 36, at 255-77.

102. *See* Lundsford, *supra* note 68, at 280.

103. The emphasis on group consensus has led to debate about consensus functioning as coercion. *See* Myers, *supra* note 11. Myers criticizes Kenneth Bruffee in particular for not sufficiently attending to the potential coercion of consensus where the group is most likely to reproduce the existing ideology of the discourse community. It is useful to keep that debate in mind, to model the community self-consciously with the realization that we are

Social constructivist theory can be seen in application in the pedagogy of the writing program at the University of Chicago, described by Joseph Williams and Gregory Colomb, which uses small groups as the principal pedagogy for enabling students to enter the new discourse communities of the academia.[104] The students read each other's papers and afterwards discuss whether the writing was clear or confusing.[105] Within the group, the writer talks to the audience about her intent in the paper — what was her point, where it is in the paper, and how the papers make the desired point.[106] The small groups also focus on how to appropriately talk about the subject of the writing as serious students of that subject, i.e., as members of the discourse community concerned with that subject.[107] This pedagogy is based on two key theories: first, that knowledge communities exist, and that "[t]o join a disciplinary community is, in part, to master as body of knowledge . . . [which] belongs to groups of people who have some shared stake in exploring, preserving, and expanding it;"[108] and second, that writers new to a knowledge community will usually exhibit writing behavior that can be viewed as "immature." Williams and Colomb emphasize that the key is the writer's lack of experience with the new knowledge community, not simply the lack of experience as a writer, and students need to understand that they can expect their writing to temporarily deteriorate every time they make the transition to a new knowledge or discourse community. The papers of even experienced writers who are new to a discourse community will tend to be overly concrete: they will restate the language and organization of the assignment; summarize instead of analyze or synthesize the material; say explicitly what is ordinarily left unsaid; imitate the most obvious stylistic features of the new field; and "replicate the author's act of discovery — giving a narrative of the writer's thinking" instead of providing the analysis resulting from that thinking.[109] The instruction provided by the University of Chicago writing program is intended "to anticipate

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understanding the community, not accepting it as unchallengeable or not in need of change.

104. *See* Williams and Columb, *supra* note 86.

105. *Id.* at 92.

106. *Id.* at 93.

107. The Chicago writing program is used for students across the University, from first year undergraduates to professional students, including law students.

108. *Id.* at 101.

109. Fajan's and Falk's exploration of students' need for more experience in critical reading shares these concerns about the depth of the writing. *See* Fajans and Falk, *supra* note 14, at 169.

and accommodate the *entirely predictable* forms of behavior that novices display, not once as 'novice writers' but as writers who now and then happen to be novices."[110]

Robert Zoellner's 1969 article *Talk-Write: A Behavioral Pedagogy for Composition*[111] comprised nearly an entire issue of the preeminent composition journal with a then groundbreaking approach to conversation between students to facilitate the development of their writing. Zoellner's work is no longer at the forefront of composition theory[112] but his approach is still interesting, especially in the context of law school. Zoellner used behavioralist psychology to contrast the traditional composition pedagogy with Skinnerian experiments with rats. This may not be a very palatable metaphor, though some law students undoubtedly feel it rings true for them. The important message Zoellner took from the behavioralists is the need for "shaping." In experiments, the rats learn by being rewarded for each step they take towards the task — e.g., going to the right side of cage, going near the lever, hitting the lever. Zoellner unfavorably compares the current-traditional attitude toward product to rewarding the rat for hitting the bull's-eye without any guidance. Zoellner's suggestions focus on using speech to assist students in developing their composing process, that is, in shaping their work and abilities to hit the bull's-eye. Specifically, Zoellner advocated students using their comfort with the known — speaking — to develop their abilities with the less known — writing. He specifically recommended that students talk out their writing projects in pairs, in conferences with the professor, by dictating their thoughts, by reading aloud as part of the revision process, and by having someone else read the work out loud to assist in revision. At their core, Zoellner's techniques again help the students to converse in order to learn how to internalize the conversion of the new discourse community in writing.

LRW scholars have also advocated the use of group work through small discussion groups, peer editing, and collaborative research, for example, but typically within the class group, so that all of the participants are working on the same substantive writing assignment. LRW scholars have also examined ways to encourage

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110. *See* Williams and Columb, *supra* note 86, at 108.

111. Robert Zoellner, *Talk-Write: A Behavioral Pedagogy for Composition*, 30 C. ENG. 267 (1969).

112. Although I stumbled on to his article through an internet search, I found not one citation to it in the composition theorists of the last decade.

students to be more reflective about their work by speaking about it.[113] Elizabeth Fajans and Mary Falk recommend a read-aloud protocol for upper level writing classes that includes a significant focus on critical reading.[114] The students tape their uncensored reactions to the text they are reading and share these reactions.

One limitation of both group work within the class and individual reflection is that neither approximates or invokes the actual audience for legal work. The invoked audience for a memo is the supervisor who assigned it (with the client lurking in the background). We ask the students to think about the purposes of the memo — why it is constructed in this form, who it is for, what the recipient will do with it. However, we do not often give students the actual experience of talking directly to someone in that role, i.e., the busy lawyer who knows the general conventions of the law but is not familiar with this particular issue, or even being in that role themselves.[115] Within the class the students share familiarity, albeit as novices, with the issue. They lack a familiarity with the conventions. To better understand and own the conventions, they need to use them. Peer group work could be used to develop appreciation for the audience both by talking directly to the audience and experiencing being the audience.[116]

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113. *See, e.g.*, Durako, et al., *supra* note 80, at 731 (suggesting peer evaluation within the class group).

114. *See* Fajans and Falk, *supra* note 14, at 190-93.

115. David Bartholomae addresses this issue:

> The problem of audience awareness, then, is a problem of power and finesse. It cannot be addressed, as it is in most classroom exercises, by giving students privilege and denying the situation of the classroom – usually, that is, by having students write to an outsider, someone excluded from their privileged circle: "Write about 'To His Coy Mistress,' not for your teacher but for the students in your class"; "Describe Pittsburgh to someone who has never been there". . . . Exercises such as these allow students to imagine the needs and goals of a reader, and they bring those needs and goals forward as a dominant constraint in the construction of an essay. And they argue, implicitly, what is generally true about writing — that it is an act of aggression disguised as an act of charity. What these assignments fail to address is the central problem of academic writing, where a student must assume the right of speaking to someone who knows more about baseball or "To His Coy Mistress" than the student does, a reader for whom the general commonplaces and the readily available utterances about a subject are inadequate.

Bartholomae, *supra* note 68, at 595.

116. Gary Blasi, in urging exploration of the relevance of cognitive science to lawyering expertise, notes that:

> a person with an engaged, active stance and the perspective of a problem-solver inside the problem situation acquires an understanding quite different from that of a person with a passive stance and the perspective of an observer. It is not only that an engaged problem-solver learns more from both instruction and experience but also that she learns something quite different.

This way the students will become active, "situated" learners, rather than limited to the more passive role of observer.[117] Several LRW scholars have suggested approaches that could provide students with some of the experience to develop an appreciation for the audience. Teresa Godwin Phelps suggests that students write for each other; student B writes an opinion letter based on Student A's memo.[118] Fajans and Falk recommend peer writing groups for upper level law students engaged in scholarly writing.[119]

How can these ideas be better incorporated into LRW pedagogy to use conversation about writing to help students join the legal discourse community? Several possibilities come to mind. First, students could model the reality of law practice by orally presenting their written analysis to an audience of peers who are working on a different problem. The presenters would also hear the presentations of the audience about the audience's memos. The two groups of students would be at a similar level of knowledge and comfort with the conventions, but would not be familiar with the substance of each others' memos. Because the audience will be present and available for conversation, the students will be able to use the immediacy of speech to talk about the text its purpose, and the way it reads to the reader and writer. They can discuss what is missing, the questions raised but not answered, and text unnecessary for the audience. This experience should be much richer than the more common pedagogical technique of reading and discussing sample legal documents without the writer participating the conversation.

First, the presenting students would benefit from having to articulate their framing of the issues and their analysis to some one at their level in law, but unfamiliar with the specific subject of the memo. Second, the students in the audience would benefit by seeing the ways in which the memo did and did not provide its

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Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 359 (1995). Blasi highlights that this insight underlies even the case method approach of active student involvement in case analysis in contrast with lectures. *Id.* If our goal is to deepen the students' ability to invoke and understand the audience, experience at being the audience and in talking directly to the audience will situate the student as an active learner in this regard.

117. *Id.*

118. *See* Phelps, *supra* note 14, at 1100. Phelps' article was the first scholarly call for LRW to move from the current-traditional pedagogy to that of the New Rhetoric.

119. *See* Fajans and Falk, *supra* note 39. Their suggestion implicitly would include students who were not equally familiar with the substance in the group if it comprised students working on different journal articles, but there is no detailed discussion of this aspect of group work.

readers with necessary information. The exercise could follow the specific techniques that Zoellner and others advocate. The two groups of students should exchange their written work for review before the discussion. Pairs or small groups of students should meet and present their work to each other, with audience members taking notes and writing questions, and the participating students talking through the audience's responses and concerns. However, this process would require a significant time commitment to be valuable. The students should exchange their written work before the oral presentation, which should run like a conversation. Written feedback before the conversation should focus on the reader's questions to be raised in the discussion, e.g., what did you mean here? Why is this case so important? Do the facts of these cases matter? The idea is to model a reader-writer conference on the memo, like a meeting with the assigning supervisor, a pre-trial conference, or a client meeting.[120]

When would this exercise be most useful? One of the concepts shared by all three threads of modern composition theorists and by progressive LRW pedagogy is the importance of focusing on the process of writing and not exclusively on the end product. Students will have the richest experience in conversing about their writing when they are still in the process of working out their written analysis. Postmortem examinations of the final drafts are not going to engage students in the same way that talking about on going work will. At Temple University, the students research and write three memos during their first semester. Ideally, they should have the opportunity to talk about their work during the writing processes for both the second and the third memos. Because the second memo is not rewritten, the students are usually loathe to return to it once they have completed the project. They would benefit most from presenting their analysis and hearing the reader's response to it shortly before they turn in their final drafts. The students are most engaged in the third memo, on which their grades are based. This is also the most complex analytically and most ambiguous legally.

Last semester while working on this article, I tried to put this idea into use in my first year LRW class, with the help of a fellow LRW professor, Kathy Stanchi. We arranged for our two classes, working on different memo assignments, to meet together when

120. These techniques enable the "shaping" and modeling that Zoellner and Williams recommend.

they turned in the second of their three memos. We then paired them up randomly and asked them to read each other's memos and ask questions. First, we asked them to first read only the Question Presented and Brief Answer, and discuss what they understood the memo to say, just from those sections. Then, they were to read the entire memo and discuss it more fully. The pairs were actively engaged throughout the hour we had available for the exercise. Professor Stanchi and I and our two teaching assistants circulated through the room to help with the individual discussions. The experiment was a modest success, at least for the students that found it engaging. One student commented that it made her realize, finally, the purpose of a roadmap paragraph. Many students had trouble with the concept though, and confused the role of reader with that of editor. I frequently overheard comments like, "I like how you wrote your Brief Answer but I thought the second point in the memo was too long." They focused less on how the writing was to be used and more on how well it read to them. Two major limitations of this experiment were: (1) that we used the final version of the second memo, which the students were done with; and (2) we were not able to structure the discussion so that the students had time to read their colleagues' memos ahead of time.

I offered an second, optional session during the drafting period for the final memo for which ten students signed up. For this session, the students self-selected — in choosing to participate and signing up with a selected partner from the other section. This session still had the constraint of on-the-spot reading, but the participants nonetheless found the session quite valuable. All five pairs were actively engaged for the full hour; they were able to focus more on their roles as readers instead of acting as editors. The anecdotal reaction was extremely positive, though of course there is no way to tell if the session actually changed any participant's grade outcome.

Students or others may resist this idea because they do not see their peers as useful to them. What do other first year students know that could be helpful? They are not lawyers or even higher in the hierarchy of law school. Kenneth Bruffee addresses this concern in his essay supporting collaborative learning.[121] He relates the writing process to internalized conversation and the need for writing teachers engage students:

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121. Bruffee, *supra* note 1, at 400.

> in conversation among themselves at as many points in both the writing and the reading process as possible, and . . . [to] contrive to ensure that students' conversation about what they read and write is similar in as many ways as possible to the way we would like them eventually to read and write.[122]

Students need to practice being members of a knowledge community. "A community of knowledgeable peers is a group of people who accept, and whose work is guided by, the same paradigms and the same code of values and assumptions."[123] Like Williams and Colomb, Bruffee argues for the importance of practicing participation in the community the student seeks to enter and for collaborative learning as a way of illustrating to students "how knowledge is generated, how it changes and grows."[124] Bruffee argues that learning is a social process; writing courses must demonstrate to students that "they know something only when they can explain it in writing to the satisfaction of the community of their knowledgeable peers."[125] Williams also argues that students learn from seeing how other students dealt with the same writing problem.[126] Fellow first year students will not have the experience of accomplished lawyers, but they will be able to usefully converse about how their writing efforts succeed or fail in reaching them as readers. It is critical, however, that the students see their role as readers, consumers of the writing, and not as editors or evaluators. Students are understandably unwilling to fully accept evaluation of their work from a fellow novice. Nonetheless, they do benefit from hearing how the reader understood their meaning.

Another way of invoking the typical audience would be to have first year students present their analysis to a professor or upper level student who does not know the issue — i .e., the professor or teaching assistant from another class. We give students a taste of this at oral argument but that comes very late in the first year. Presentation to a professor, higher in the academic hierarchy than the student, would model a closer approximation to the real audience for most legal writing than would peer work. A professor could give immediate feedback akin to that which a supervisor or

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122. *Id.* at 400.
123. *Id.* at 401.
124. *Id.* at 407.
125. *Id.* at 412.
126. *See* Williams and Columb, *supra* note 86, at 92.

judge would likely provide. LRW professors generally have practice backgrounds and can adopt this role with authority. However, the disadvantages for the professors are the increased time burdens — reading yet another round of drafts and participating in the presentations — though one's own students would benefit from one's colleagues' willingness to spend the effort. The other major limitation to this technique is that students would not obtain any experience in being the audience.

Another possibility is to begin with the students as readers, not of cases, but of legal writing. At the outset of the LRW class, we can give them an effective memo and ask them to take some action based on the memo, for example, by advising the client about settling or about proceeding with the case based on the research set forth in the memo. We can explore how the memo gives them the information necessary for them to take action, even though they know nothing else about the case or the law. At Temple, we integrate research and writing from the beginning because we recognize that students learn analysis best by going through the full process of defining issues, researching them, developing and conveying the results of their research, their legal analysis, in the written form that meets the expectations of the typical legal reader. If this first sample memo is written by the teaching assistant who can then participate in the discussion as the writer, students will have the opportunity, even at this early stage, to model the discourse of the community in which they are entering. They can grasp more easily the purpose of the writing and the attitude of the reader towards it. We should not fear that the students are not yet ready for this experience; they need to model the discourse of the community in order to learn it.[127] Early non-expert efforts to do this have enormous value even if the students lack the expertise they will gain later in the year and in later life.

IV. Conclusion

LRW is particularly well suited to these teaching exercises because we all experience the dissonance between some students' oral prowess and their written performance more immediately than do our doctrinal colleagues. We are more immediately motivated to work with the students than perhaps is possible for those who are disappointed by their students' exam performance only after the course is completed. LRW professors almost uniformly have

127. *See* Bruffee *supra* note 1, at 403-04.

practice experience and can effectively assume the role of supervisor, judge, or opposing counsel to give the students an actual audience to address. We have an ethos of collegiality that will encourage us to collaborate in this manner just as we value collaborative learning for students. The relatively small class size for LRW makes it possible to employ such techniques that are simply too cumbersome to use in large doctrinal classes.

These techniques, or others that incorporate talking about writing, will enable students to present analysis orally, to explain their writing choices verbally, to converse with the reader, to have a conversation with the audience, and to move the audience from the invoked to the addressed. Using orality to help students experience being the audience for their legal writing and to give them the opportunity to talk through their analysis with a present audience should lessen the dissonance that orally adept students experience in law school. To function as legal professionals, they must be able to ask themselves the skeptical questions they will get when they confer with their supervisors. Building in conversation about writing should help students better understand and develop their ability to have the effective internalized conversations that are essential to good legal writing and analysis.