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## Legal Writing: A Doctrinal Course

Symposium Keynote Address

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Legal writing instruction in American law schools has come a long way. Although scattered experiential courses and co-curricular activities have existed since legal education moved into a university setting,<sup>2</sup> the modern era of skills education began in the 1950s and 1960s, with the creation of live-client clinics at many law schools.<sup>3</sup> Early legal writing programs soon followed, moving into the main stream of curricular reform during the 1980s and 1990s.<sup>4</sup> As these new courses and new instructors moved into the academy, the language of legal education naturally changed. Law faculties found themselves wanting to describe these new additions to the curriculum and the new teachers hired to teach them. For law faculties, the need for new language arose from the presumed need to distinguish their own “traditional” courses from these new offerings and to distinguish themselves from these new teachers.<sup>5</sup>

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<sup>1</sup> E. L. Cord Foundation Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I would like to thank Elizabeth Megale, who conceived and brought to fruition this symposium, and the other panelists, Ken Chestek, Lucy Jewel, Teri McMurtrey-Chubb, and Chris Rideout. It is an honor to be included among you. Many thanks also to Matthew Wright for his excellent help with research. This keynote address is dedicated to Professor Teresa Godwin Phelps, who has been, for more years than I care to calculate, a pivotal influence on the development of legal writing and its doctrine. She has been an inspiration and mentor to me and to countless others. On behalf of a grateful discipline, thank you, Terry.

<sup>2</sup> William P. Quigley, *Introduction to Clinical Teaching For the New Clinical Law Professor: A View From the First Floor*, 28 AKRON L. REV. 463, 467-68 (1995).

<sup>3</sup> Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939 (1997); Cheri Wyron Levin, *The Doctor Is In: Prescriptions For Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157, 160-63 (2008); Quigley, *supra* note 2, at 465-471.

<sup>4</sup> Levin, *supra* note 3, at 158-160; Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 984 (2002); Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 284-86 (2007). Marjorie Dick Rombauer was one of the earliest advocates for the addition of legal writing programs. See Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538 (1973). For a sense of the situation in the early 1990s, see Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994).

<sup>5</sup> A desire to categorize may but does not necessarily imply problematic objectives. A faculty wishing to evaluate the depth of its offerings of different kinds of educational experiences would certainly need to identify those different kinds of experiences. But objectives can be mixed, complicated, and unconscious. For instance, as Lisa Eichhorn has written convincingly, this

To refer to courses like legal writing, clinics, client counseling, negotiations, externships, and trial practice, law faculties used terms like “skills” courses, “experiential” courses, “lawyering” courses, or “practice” courses. Sometimes courses in the other category—that is, courses like contracts, torts, tax, wills, and civil procedure—were described as “traditional” or “regular,” but before long, the most commonly used term was “substantive.” As the years went by, however, some law faculties learned more about the content of skills courses and came to a greater respect for both the courses and the teachers. Today the term “substantive” is heard less often in discussions of law school curricula, largely because describing non-skills courses as “substantive” incorrectly implies that skills courses have little substance.<sup>6</sup>

A number of newer terms have arisen to replace the word “substantive,” but perhaps the most common is “doctrinal.” Is “doctrinal” a better option? This paper explores the meaning of the term and finds that legal writing does, indeed, have its own doctrine. The paper therefore suggests avoiding the term “doctrinal” when it is used to distinguish legal writing from other courses. It also explores how the story of legal writing’s creation has limited early views of legal writing’s doctrine and makes some suggestions for addressing those limitations as the discipline matures.

### **Defining “Doctrinal”**

When law faculties say that contracts, civil procedure, and evidence are doctrinal courses and other courses are not, what do they mean by the word “doctrinal”? We might begin by checking a dictionary definition. According to Merriam-Webster, the word “doctrine” refers to:

1. something that is taught
2. a principle or position or the body of principles in a branch of knowledge or system of belief
3. a principle of law established through past decisions
4. a statement of fundamental government policy especially in international relations
5. a military principle or set of strategies.<sup>7</sup>

The first two definitions are the oldest.<sup>8</sup> They are broad, clearly including any material taught in a university and especially including a body or system of teachings relating to a

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presumed need to distinguish among courses and teachers may be rooted in the ancient, embedded but erroneous speech/writing hierarchy. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105 (1998).

<sup>6</sup> While some in the academy avoid the term “substantive” to describe non-skills courses, one certainly does still hear the term used in curricular discussions. To the extent that it is still used, the points made in this paper about the term “doctrinal” apply with even greater force to the term “substantive,” a term that implies that other courses have little or no substance.

<sup>7</sup> “doctrine.” *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com/dictionary/doctrine> (last accessed April 30, 2013).

particular subject. Under these definitions, it would seem that the term would apply to all courses taught in the law school, including legal writing, negotiation, and trial practice.

The age of the definition is not the only relevant consideration, however. The third definition applies specifically to law, arguably providing a definition specific to the relevant discourse community. Definition three defines “doctrine” in a legal context as referring to a legal principle established through past decisions, such as “the doctrine of equal protection.”

Once again we notice a problem. Used in this sense, “doctrine” refers to principles of law primarily created and defined judicially, by case law. For instance, we refer to “the doctrine of equal protection” but not to “the doctrine of burglary.” If the term is used in this third sense, the category would exclude courses like sales, secured transactions, evidence, or civil procedure, all of which are primarily statutory. Possibly, the modern trend of increased “statutorification”<sup>9</sup> had not yet been noticed when “skills” courses first entered the typical law school curriculum, but even then, courses like civil procedure and evidence were staples of every law school curriculum. Today, the common law has been said to be in “rapid retreat.”<sup>10</sup> It would seem, then, that using “doctrinal” in the third sense was inaccurate from the start and has become even more inaccurate over the years.

Perhaps the third definition has shifted by common usage within the discourse community – shifted in a way not reflected in the dictionary definition. As principles of law have become increasingly statutory,<sup>11</sup> the on-the-ground meaning of “doctrinal” in a law school setting may have broadened to downplay the statutory/case law distinction. If so, curricular discussions may be using the term to refer to courses that teach legal principles of any kind. Indeed, this possibility seems likely enough that we should take seriously this broadened version of the third definition. So with all these possible meanings on the table, it is time to ask whether legal writing is a “doctrinal” course.

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<sup>8</sup> “order of senses” *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com/help/dictnotes/def.htm> (last accessed April 30, 2013). The word “doctrine” originated in the late 14th century from the Old French word “doctore” (12th century), meaning “teaching” and from the Latin word “doctrina,” meaning “teaching, body of teachings, learning.” “doctrine.” Online Etymology Dictionary 2012. <http://etymonline.com/?term=doctrine> (last accessed April 30, 2013).

<sup>9</sup> “The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.” GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (Harvard Univ. Press 1982). Daniel A Farber and Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1991); H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 CORNELL J. L. & PUB. POL’Y 89 (1998); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545 (2007).

<sup>10</sup> Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. L. J. 765 (2004).

<sup>11</sup> See *supra* notes 9-10 and accompanying text.

## Is Legal Writing Doctrinal?

Even assuming the modified version of the narrowest definition, legal writing courses are doctrinal – that is, they teach principles of law. Beginning first with the meaning of “doctrine” closest to its application in torts or trusts, legal writing courses teach the same kind of principles of law that are taught in courses commonly called “doctrinal.” In typical first-year legal writing courses, four or more major assignments will be given, each of which requires students to analyze one or several legal questions. These legal questions often are chosen specifically to avoid duplicating issues covered in other first-year courses, partly in order to expose students to an area of law they are not already studying and may not have a chance to study before they graduate.

Further, the depth of doctrinal coverage of these legal principles is significantly greater than the depth of coverage of a similar legal question in torts, contracts, or property. When I teach Property or Wills, Trusts, and Estates, a specific legal question is generally covered in the casebook with an average of two heavily edited cases from different jurisdictions and a few note cases which students rarely look up and read. Syllabus constraints prevent spending more than one or two class days on most subjects. For instance, the Dukeminier property text<sup>12</sup> covers the entire concept of gifts – all three elements of it -- using two edited cases, one of which dates from 1898.<sup>13</sup>

In a typical first-year legal writing course, however, each major assignment requires students to read ten-to-fifteen cases on the same subject from the same jurisdiction. Not only must the cases be read, but they must be read far more carefully than my Property students read their edited cases. These legal writing students are significantly more accountable for their reading of the cases, for they must choose the most important, justify those choices, and write an analysis of the law they have distilled from the cases. They must synthesize multiple cases and find analogies and distinctions among them. They must explain those similarities and differences in writing. They must identify the relevant policy concerns that might inform the ways the cases would apply to a particular fact scenario. In short, they must write what, in my Property class, could be a final examination question, but they must do it much better and at a much deeper level.<sup>14</sup>

In addition to teaching the doctrine governing particular legal issues, legal writing courses teach legal doctrines specific to the course. These include (1) the meaning and application of standards of appellate review; (2) a wealth of other legal methods topics;<sup>15</sup> (3)

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<sup>12</sup> Jesse DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, AND MICHAEL SCHILL, PROPERTY (7<sup>th</sup> ed. Wolters Kluwer Law & Business 2010).

<sup>13</sup> *Id.* at 164-184.

<sup>14</sup> Eichhorn, *supra* note 5, at 120. In fact, one could make a good case that the typical first-year legal writing course is more similar to contracts and torts than it is to clinic courses, negotiation courses, or externships.

<sup>15</sup> Legal methods concepts include such topics as holdings, dicta, *stare decisis*, the precedential weights of various kinds of authorities, or what kinds of extra-record facts an appellate court can

complicated questions of civil and appellate procedure;<sup>16</sup> (4) the ethical requirements that apply to predictive and persuasive writing;<sup>17</sup> and (5) principles of statutory construction. All of these legal topics are taught in the typical first-year legal writing course, and for some of them, the legal writing course is the only place they typically appear in the law school curriculum.<sup>18</sup>

The remainder of a first-year legal writing course clearly meets the broader, older, and first-listed definition of “doctrine”: a body or system of teachings relating to a particular subject. In addition to matters of citation and style, these courses teach a very specific body of information about such matters as (1) the core forms of legal reasoning;<sup>19</sup> (2) sources and methods of legal research; (3) particular organizational paradigms for analysis and argument; (4) particular formats for analogies and disanalogies; (5) the components of particular documents, including the substantive requirements for those components; (6) informal rules and principles of persuasion applicable to fact statements; and (7) customs and principles of persuasion for engaging in counterargument. Most of these vital subjects appear nowhere else in the typical law school curriculum. Together, they certainly constitute a body of teachings relating to the subject of legal writing.

The typical first-year legal writing course, then, is “doctrinal” in all senses of the word. It teaches the law governing particular legal issues, often providing the students’ only exposure to the law governing those issues and in more depth than in other doctrinal courses. It teaches the body of law applicable to legal issues generally (the principles of legal method). It teaches a particular body of law applicable to predictive and persuasive analysis, which includes topics like civil procedure – topics that certainly are considered “doctrinal” when taught in another course. Finally, it teaches a well-recognized body of ideas applicable to the subject of the course: the content and communication of written and oral legal analysis.

The inaccuracy of thinking that legal writing courses are not “doctrinal” may be an understandable mistake, occasioned in part by history and in part by mistaken impressions of the

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consider. These legal methods concepts function as both as “metadoctrines” and as doctrine. For instance, as Colin Starger has shown, *stare decisis* in the United States Supreme Court is applied according to competing legal tests for when the Court can overrule its own precedents. Colin Starger, *The Dialectic of the Stare Decisis Doctrine*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* (C.J. Peters ed., forthcoming 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2251556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251556).

<sup>16</sup> Procedural topics include the substantive implications of motions to dismiss, motions for summary judgment, and appeals from those trial court events.

<sup>17</sup> Ethical issues include the law pertaining to prohibitions on false statements of law or fact, prohibitions on frivolous arguments, or requirements for disclosure of certain kinds of adverse material.

<sup>18</sup> See Richard B. Cappalli, *The Disappearance of Legal Method*, 70 *TEMPLE L. REV.* 393, 398-405 (1997).

<sup>19</sup> Forms of legal reasoning include rule-based reasoning, analogical and disanalogical reasoning, policy-based reasoning, and narrative. LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 55-63 (3<sup>rd</sup> ed. Wolters Kluwer Law & Bus. 2011).

course.<sup>20</sup> As far back as the 1950s and 1960s, many law schools required courses in what was called “Legal Method”: courses that taught the principles and analytical processes of the American common law system and of statutory creation and interpretation.<sup>21</sup> These courses, appropriately, were considered doctrinal. Beginning in the 1970s, however, legal methods courses began to wane.<sup>22</sup> With the advent of increasing competition for precious credits in the first year, law faculty began to take the position that legal methods courses were unnecessary because the concepts were taught “pervasively,” within torts, contracts, criminal law, and other required courses.<sup>23</sup> By the 1980s and 1990s, when many law schools added required first-year legal writing courses,<sup>24</sup> many free-standing legal methods courses had been eliminated.<sup>25</sup> Thus, it did not seem intuitively obvious to law school faculties that legal writing courses were the heirs apparent of doctrinal legal method coverage, material thought to be covered sufficiently, though invisibly, in other courses.<sup>26</sup>

Hiring decisions provide evidence of this perceived gap between legal methods courses and legal writing courses. Legal methods courses had been taught by tenured and tenure-track faculty. New legal writing courses, however, were staffed with third-year law students, practicing lawyers, or new law graduates in positions with a one or two-year cap.<sup>27</sup> Clearly, law faculties in that era viewed legal writing courses as something other than “doctrinal.”<sup>28</sup> Tenured and tenure-track faculty members – who held the microphone in discussions of legal education – envisioned writing courses as little more than remedial grammar, citation form, an introduction to basic research sources, and perhaps a quick overview of the components of two kinds of legal documents.<sup>29</sup> Many faculty members believed that writing was “inherent and unteachable”<sup>30</sup> – a

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<sup>20</sup> See generally Rideout & Ramsfield, *supra* note 4. For a more comprehensive analysis of the historical roots of these misimpressions, see Eichhorn, *supra* note 5.

<sup>21</sup> Cappalli, *supra* note 18, at 396. Some of today’s legal writing courses carry the title “Legal Method,” but those courses are not the more abstract and theoretical versions of legal method that predated many legal writing courses. When the term “legal method” is used as a course title here, it refers to courses that used materials such as the famous “Hart and Sachs materials,” subsequently published as HENRY M. HART, JR. & ALBERT M SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Foundation Press 1994) (William N. Eskridge, Jr. & Philip P. Frickey, eds.).

<sup>22</sup> Cappalli, *supra* note 18, at 405-412.

<sup>23</sup> *Id.*

<sup>24</sup> Pollman, *supra* note 4, at 894-895.

<sup>25</sup> Cappalli, *supra* note 18, at 405-412.

<sup>26</sup> *Id.*

<sup>27</sup> Rombauer, *supra* note 4, at 543-544.

<sup>28</sup> Law faculties in those days sometimes objected to legal writing course descriptions that claimed to teach legal reasoning. In response, in 1980, Professors Marjorie Rombauer and Norman Brand successfully petitioned the American Association of Law Schools (AALS) to change the section name from “Legal Writing and Research” to “Legal Writing, Reasoning and Research.” [http://wiki.lwionline.org/index.php/AALS\\_Newsletters](http://wiki.lwionline.org/index.php/AALS_Newsletters)

<sup>29</sup> See generally Eichhorn, *supra* note 5, at 115-16; Rideout & Ramsfield, *supra* note 4. In fact, early versions of the course may have been created to fit this limited vision. See Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539-

skill a student either possessed or did not. Naturally, if a subject is unteachable, it cannot be thought to be “doctrinal” in any sense of the word.

Soon it became apparent to those actually teaching the course that students could not learn to write a thorough legal analysis or make a persuasive legal argument without understanding more about legal methods and legal reasoning than they could learn from haphazard exposure in their other courses.<sup>31</sup> They realized that the primary subject matter of the course was and had to be legal thinking,<sup>32</sup> including the doctrines and legal requirements<sup>33</sup> that apply to that thinking.

In those early years, however, legal writing teachers were not included in mainstream conversations about legal education, so the initial impressions of legal writing courses and the language used to describe them were created by people who did not teach the course and who did not generally talk with those who did. Understandably, the prevailing “non-doctrinal” impressions became firmly entrenched in the language of legal education. An accurate

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543 (1972-1972); *see generally* Patrick J. Rohan, *Some Basic Assumptions and Limitations of Current Curriculum Planning*, 16 J. LEGAL EDUC. 289, 290 (1964); *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) (Report, AALS Committee on Curriculum, Karl Llewellyn, chair). This limited view may have been encouraged by the “formalist” or “current traditional” model of writing, which emphasized the formal features of particular writing products, especially clarity and accuracy. The formalist model assumed that thinking preceded writing and that writing was simply the expression of preformed thoughts. Rideout & Ramsfield, *supra* note 4, at 49; Pollman *supra* note 4, at 896-899. Credit hour allocations reflected this limited view as well. While legal methods courses routinely carried three credits, most legal writing courses carried only one or two credits. Rombauer, *supra* note 4, at 550.

<sup>30</sup> Pollman, *supra* note 4, at 894. *See also* Rideout & Ramsfield, *supra* note 4, at 43.

<sup>31</sup> In a 1970 survey of those teaching legal writing courses, “a large percentage of the teachers (70%) no longer regarded improvement of basic writing—teaching grammar or basic composition—as a primary objective of their courses. . . . Only 11% of the respondents indicated that they conducted any class devoted substantially to instruction in basic writing. Only 14% required students to purchase or use materials devoted to instruction in grammar.” Rombauer, *supra* note 4, at 552; *See also, i.g.*, Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005); Weresh, *supra* note 4, at 286.

<sup>32</sup> “Indeed, today’s legal writing courses owe more to Llewellyn’s *Elements of Law* than to Strunk and White’s *Elements of Style*.” Eichhorn, *supra* note 5, at 119. The writing model undergirding the integral relationship between thinking and writing is that of modern legal rhetoric, the view that language creates meaning rather than simply expressing it. Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 58 (2000); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 173-174 (1993); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SOUTHWESTERN L. J. 1089 (1986); Pollman, *supra* note 4, at 900-905 (tracing the model back to Jacques Derrida and Hans-Georg Gadamer).

<sup>33</sup> Cappalli, *supra* note 18; Starger, *supra* note 15 (showing that legal methods concepts like *stare decisis* operate both as “meta-rules” and as rules of law).



understanding of the content of the course has taken some time to develop among faculty members who do not teach it. Today, however, many of the voices in conversations about legal education have a more accurate understanding. The time has come to recognize that legal writing courses are and should be considered “doctrinal” according to each meaning of the term.

### Why “Doctrines” Matters

According to the classical model of categories, membership in a category is defined by the presence or absence of the defining characteristic(s).<sup>34</sup> If a particular category is labeled “doctrinal,” the courses included in the category will be viewed as possessing “doctrine” while non-members of the category will be viewed as possessing no “doctrine.” As is surely obvious, in an academic setting, courses perceived as having no doctrine (no ideas, no body of learning) automatically receive reduced respect. They will tend to be allotted fewer credits. The courses might not be graded in the same way as are other courses. Other faculty members will be tempted to communicate to students that those courses are less important than their own. The faculty who teach those courses will be marginalized. The subject’s scholarship and other contributions to legal education will be devalued. To anyone familiar with the history of legal writing in the academy, this description should sound painfully familiar.<sup>35</sup>

But there are even more important reasons to recognize the doctrine of legal writing, for doctrine plays a crucial role in discipline-building. Doctrine defines the discipline’s scholarship and therefore what counts as disciplinary knowledge and what does not.<sup>36</sup> Operational views of legal writing doctrine are sometimes very limited, with significant potential consequences both for the discipline and for the professional development of those who teach in the field. For example, tenure committees sometimes debate whether a legal writing professor can or should

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<sup>34</sup> ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 43 (Harvard Univ. Press 2000); Mark L. Johnson, *Mind, Metaphor, Law*, 58 *MERCER L. REV.* 845, 847-848; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 69 (Univ. of Chicago Press 2001). The classical model has been persuasively criticized as being inaccurate. Amsterdam & Bruner, at 19-53; Johnson, at 848-852; Winter, at 69-103. Nonetheless, the classical model is the model most people still assume when dealing with the language of categories. Amsterdam & Bruner, at 43; Johnson, at 848; Winter, at 75. Thus, its limitations still operate powerfully in human thinking.

<sup>35</sup> Eichhorn *supra* note 5, at 112-117.

<sup>36</sup> “Evaluation is a process in which an individual work of scholarship is judged against a set of agreed-upon criteria to determine the work’s validity or value. This process plays a crucial role in every academic discipline. Whatever the criteria for excellence or truth or value, intellectual efforts must be evaluated by other scholars to determine whether they meet these criteria. As such, the evaluative process serves two primary purposes. First, it defines the boundaries of the discipline, determining what counts as knowledge and what does not. Second, it governs ordinary debates within the discipline. When scholars seek to affirm or refute a particular idea, they generally do so by evaluating other scholars’ works.” Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 *CALIF. L. REV.* 889, 891-892 (1992).

write scholarship about a “legal writing topic.”<sup>37</sup> Inside the discipline, we sometimes question whether a legal writing professor should write about a “*non*-legal-writing topic.” These external and internal discussions are subject to the same confusion, not realizing that any topic that includes an exegesis of language, an exploration of legal reasoning or legal philosophy, or an analysis of a particular legal argument *is* a legal writing topic.

As doctrine defines what counts as disciplinary knowledge, it simultaneously creates the shared language necessary to continue the exploration of that knowledge.<sup>38</sup> Thus, the future of a discipline’s knowledge depends fundamentally both on its existing doctrine and on the shared language that doctrine creates.

Further, doctrine substantively impacts debates within the discipline. It privileges the positions commonly accepted by the inherited doctrine and requires other ideas to justify themselves at a much higher standard. For example, an article arguing that all facts mentioned in a brief need not be recited in the fact statement will be met with greater skepticism than an article taking the opposite view. An article advocating using “I” or “we” in an appellate brief would be met with more skepticism than an article arguing that using the first-person is improper. In both cases, the heretical article would have to meet a much higher bar to win disciplinary respect, let alone acceptance. Doctrine places a heavy thumb on the scales of knowledge development, welcoming the explication of ideas already accepted and resisting ideas contrary to existing doctrine.

Finally, doctrine steers scholars toward exploration of certain subjects and away from others. For example, only in recent years have legal writing professors seriously begun exploring interdisciplinary topics, such as cognitive science, narrative theory, or metaphor theory. This important new scholarship began as a result of expanding the breadth of what is considered legal writing doctrine.<sup>39</sup> Legal writing scholars still do not tend to write about legal methods concepts despite the inclusion of those subjects in legal writing courses.<sup>40</sup> Nor have legal writing scholars tended to write about legal theory, despite the uncontested fact that jurisprudential views undergird every kind of analytical method or persuasive argument a lawyer can use.<sup>41</sup>

These implications of legal writing’s doctrine are more than theoretical. They determine what we teach our students every time we prepare a syllabus -- what subjects we will cover and

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<sup>37</sup> External groups like tenure committees sometimes advise tenure candidates not to write about a “legal writing topic,” largely because they do not understand the breadth of legal writing doctrine and therefore the wide scope of potential legal writing topics. Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 J. LEGAL WRIT. 3, 18-42 (2005).

<sup>38</sup> Pollman, *supra* note 4, at 914.

<sup>39</sup> Of course, there is a chicken-and-egg phenomenon operating here. Some initial work must be done in order to expand the discipline’s doctrine. Then the newly-expanded doctrine encourages full-blown development of those new areas of knowledge.

<sup>40</sup> Pollman & Edwards, *supra* note 37, at 10-12.

<sup>41</sup> LINDA H. EDWARDS, *supra* note 19, at 227-243.

what we will teach about those subjects. Therefore, we should be prepared to evaluate the doctrine we have developed more or less unconsciously over the years. As Frederick Schauer has written:

All disciplines . . . should find it useful to engage in serious self-reflection and self-criticism. Without it, the contingent methods and perspectives of the discipline begin to seem inevitable, making the exploration of alternatives less possible and the understanding of the discipline itself less rich. When a discipline challenges its own understandings, it takes a step towards deeper appreciation of those understandings themselves. Because [a certain set of ideas is] the norm, there is a risk of forgetting that [those ideas are] contingent and not inevitable.<sup>42</sup>

So how is legal writing's doctrine doing?

### **A Midcourse Look at Legal Writing Doctrine**

The story of legal writing's development is familiar: Lawyers were thought to write badly, so law faculties created legal writing courses. These new courses were under-credited, often carrying only one or two credits for a two-semester course. They were understaffed, sometimes with student/teacher ratios of one-to-eighty or more.<sup>43</sup> The courses were under-resourced because they were created with the mistaken impression that writing could be separated from thinking. Like Rick Blaine, Humphrey Bogart's character in *Casablanca*,<sup>44</sup> law faculties promised new legal writing teachers that they would "do the thinking for both of us."<sup>45</sup> As we have seen,<sup>46</sup> law faculties also believed they could and would adequately cover legal methods concepts in their own courses, so with both legal thinking and core legal method instruction deleted, these new writing courses seemed to need very little curricular presence.

Nor did legal writing – conceived as little more than remedial composition and an introduction to the components of two practice documents -- seem to need a presence in the upper-level curriculum. Almost all legal writing courses were taught only to first-year students and thus only at the most rudimentary level possible. A few upper-level

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<sup>42</sup> Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003 (1990-1991).

<sup>43</sup> In 1986, when I applied to teach legal writing at Columbia Law School, the student/teacher ratio was 1/85.

<sup>44</sup> CASABLANCA (Warner Bros. 1942).

<sup>45</sup> *Id.* Currently, 72.8% of those who teach legal writing courses are women. Association of Legal Writing Directors/Legal Writing Institute 2012 Survey Report 64 (2012), <http://www.lwionline.org/uploads/FileUpload/2012Survey.pdf>. Given that in the 1980s and 1990s, most other law courses were taught by men and that to this day, the overwhelming majority of legal writing courses are taught by women, the gendered implications of the CASABLANCA promise are striking.

<sup>46</sup> See *supra* notes 20-33 and accompanying text.

writing courses were designed to teach the drafting of other kinds of legal documents (litigation or transactional drafting), but these courses did not offer a deeper level of engagement with subjects thought to have been adequately covered in the under-resourced first year course.

While this story is familiar, its historical impact on the development of legal writing doctrine is less well recognized. Legal writing doctrine began to develop in those early years, as legal writing teachers wrote textbooks for the first-year courses. Not surprisingly, the new texts largely conformed to the curricular limitations imposed on the introductory courses they were designed to serve. Also not surprisingly, when legal writing teachers began to write scholarship in the field, the content of these introductory courses naturally seemed to define the boundaries of the discipline. Thus, legal writing doctrine was initially created to match the syllabi for its under-resourced introductory course. The good news was that a doctrine of legal writing had begun. The bad news was that it came with a set of nearly inevitable consequences:

*Legal writing doctrine, as it developed historically, was broad in some ways but narrow in others.* The early view of legal writing doctrine was broad in the sense that it covered a number of diverse topics.<sup>47</sup> Coverage was narrow, however, in the sense that the course covered only office memos and one kind of brief – usually only an opening appellate brief. Originally the typical course did not even introduce trial-level briefs, let alone cover briefs at various procedural points at the trial level.<sup>48</sup> It did not teach the important differences among briefs in the civil and criminal contexts. It had no time to cover a responsive or reply brief. Students did not (and still largely do not) have the experience of reading an opponent’s opening brief and crafting a persuasive response brief. Nor could the first-year course include coverage of the many other writing contexts legal practice demands.<sup>49</sup> Thus, early views of legal writing doctrine tended to

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<sup>47</sup> Covered topics included an introduction to legal research; the standard components of office memos and briefs; a customary organizational paradigm; citation form; and legal writing style. Typically about one class was available to introduce the common law system, often in the context of explaining the varying precedential weights of cases from different courts. Many of those courses also spent time early in the first semester teaching students to read and brief cases for their other courses. Inclusion of case briefing was an interesting phenomenon given that the legal writing course was truncated on the promise that the other first-year courses would be teaching legal reasoning and legal method – in other words, that the other courses would be supporting legal writing rather than that legal writing would be supporting the other courses. The rest of the syllabus typically was taken up with work on various writing assignments, individual conferences, and feedback on papers.

<sup>48</sup> For briefs on motions to dismiss, motions for summary judgment, trial briefs, motions to suppress, and motions on a discovery dispute, the various procedural implications are significant and not inherently obvious to law students.

<sup>49</sup> Such other writing tasks include, for example, retainer letters; opinion letters; client letters; settlement offers; trial notebooks; settlement agreements; litigation documents

assume a very narrow concept of legal writing: office memos and one kind of brief.

*Legal writing doctrine was limited to a level suitable for beginners.* Given that legal writing had virtually no curricular presence outside the first year, the topics it did cover were limited to presentation at their most basic level. Once students were exposed to topics such as case reading, ethical requirements, organizational formats, components of documents, legal methods information, and legal reasoning – all at a level appropriate for new law students – these topics never appeared in a legal writing course again. That lack of upper-level treatment precluded opportunities for students and teachers alike to explore these rich topics at the depth with which lawyers actually must engage them. Thus, legal writing doctrine tended to remain at a fairly simple level.

*Legal writing doctrine was ambivalent about fully embracing legal reasoning.* From its early days, legal writing doctrine has been unsure of whether and how to claim its role in teaching and writing about legal reasoning. This uncertainty is not surprising, especially in light of the extreme syllabus crunch for the first-year course, external resistance to recognizing the role of legal reasoning in a legal writing course, and the lack of upper-level courses. Other professors write about legal reasoning,<sup>50</sup> often at fairly high levels of abstraction. That literature was not particularly accessible to new legal writing teachers, let alone to their students. Since that advanced material could not realistically be included in the first-year course and since the authors of that material treated it as unrelated to legal writing courses, it is no wonder that the scholarship on legal reasoning did not seem to be part of legal writing doctrine. On the other hand, legal writing teachers knew that each semester they were teaching legal reasoning in the context of student writing assignments.

This disconnect had the effect of separating the on-the-ground teaching in legal writing courses from the language and concepts of legal reasoning scholarship. In its initial incarnation, then, legal writing doctrine has tended to avoid thinking globally and conceptually about legal

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such as complaints, answers, discovery documents, or jury instructions; transactional drafting such as contracts, wills, or leases; bench memos; and judicial opinions.

<sup>50</sup> The following are a few examples offered simply to clarify what I mean by writing about legal reasoning: Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L. J. 929 (1986) (law and economics policy-based reasoning); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517 (1998) (how lawyers reason about a case of first impression); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (dealing with gendered notions of harm in legal reasoning); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305 (2003) (rule-based, analogical, and policy-based reasoning working together); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (the role of justice in legal reasoning); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645 (1991) (rule-based reasoning); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (analogical reasoning); Brain Z. Tamanaha, *Understanding Legal Realism*, 87 Tex. L. Rev. 731 (2009) (the relationship between rule-based reasoning and policy reasoning).

reasoning, staying within the safer arena of reasoning applicable to individual assignments. Yet non-writing courses seldom taught legal reasoning in more than a haphazard way, relying on serendipitous opportunities to spend a few minutes here or there on some legal reasoning concept. Thus, the doctrinal disconnect had the unfortunate effect of separating some of legal reasoning's primary teachers from its primary scholars.

*Early legal writing doctrine accepted the flawed premise that legal methods concepts are the province of others.* As we have seen, law faculties believed that they could and would teach legal methods “pervasively” in other courses. With no syllabus time to spare, early legal writing courses had little choice but to take these faculty members at their word, so early views of legal writing doctrine did not include legal method. As some years went by, legal writing teachers realized that their own course had to include more legal reasoning instruction than the initial vision had contemplated, but they were less prepared to reassess the initial vision of legal method instruction. Perhaps the reason for this difference is again related to the extreme syllabus crunch of the first-year legal writing course. It probably makes sense that if one has to choose – and one did have to choose -- expanded legal methods instruction is less important than expanded legal reasoning instruction (rule extraction; synthesis; analogies; distinctions; policy reasoning; and narrative). Since in many schools, the first-year course was the only legal writing presence in the curriculum, no other opportunities were available to expand legal methods coverage, so legal methods remained largely outside the early view of legal writing doctrine.

*Legal writing doctrine suffered from its relatively recent creation inside the academy.* In order to understand the way its recent creation limited legal writing's doctrine, we should begin with a comparison to a sister discipline, English literature. For centuries, there has been a strong academic tradition of studying the work of master writers. The ideas of what a master writer might do were formed in large part by studying the work of writers like Shakespeare, Dickens, and Hemingway. That long tradition yielded a rich body of thought about what makes a novel, poem, or play really good. When universities began to offer masters' degrees in fine arts (MFAs) for budding authors – a relatively recent development in the academy -- those programs could draw from a deep well of preexisting knowledge about the art forms they would teach.

Such was not the case for legal writing. Consider the teaching of brief-writing: When legal writing courses were created in the 1980s and 1990s, no one had undertaken a sustained inquiry into the work of master brief writers.<sup>51</sup> Soon legal writing textbooks were produced, but they were created from inside the academy and quite appropriately, were designed to teach entry level students and to teach them efficiently. The first-year courses had to focus on precisely designed formats pitched at well-targeted introductory ability levels. The syllabus allowed no time to introduce briefs the way genres are first studied in English literature – by reading and studying

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<sup>51</sup> English and MFA programs were staffed by teachers with a rich background in the academic study of the genres they taught. Legal writing courses initially were staffed by third-year students, very recent law graduates looking for a short-term position, practitioners teaching as adjuncts, or fairly inexperienced lawyers leaving practice. But these staffing decisions did not cause the problem, for there simply had been no academic study of brief writing on which new legal writing teachers could draw. No matter who had staffed the legal writing courses, there simply was no body of work on which to draw for the question of what made a real brief good.

great examples. Instead, they were limited to simulated assignments carefully created to fit a first-year ability level and to teach a generic organizational format. Since the textbooks and pedagogies were created to match the legitimate needs of first-year courses, early legal writing teachers and scholars did not have an opportunity to begin to create a body of knowledge about how great brief-writers actually work.

Thus, early legal writing doctrine was limited to the highly stylized version of legal writing that best fits the pedagogical needs of first-year students. In some ways, this approach resembles classical “compulsory figures” in figure skating. In compulsory figures, a skater uses her blades to draw circles, figure eights, and similar shapes in the ice. Skaters are judged on the accuracy and clarity of the figures and the cleanness and exact placement of the various turns. The figures are important because they teach the elements of basic skill and edge control. But what if figure skating consisted only of carefully executed circles and figure eights drawn on the ice? What if the free skating and ice dancing did not exist and instead what mattered were the etchings on the ice rather than the beauty of what the skater could do with her body?

Such a mechanistic vision of ice skating may offer interesting parallels to a vision of legal writing doctrine almost totally focused on the first-year course. In ice skating, the function of compulsory figures was primarily to teach basic skills. The skater mastered those basic skills in order to deconstruct and use them to become a champion ice dancer or free skater. The same is true of the organizational formats and generic customs and practices taught in the first-year legal writing course, but in early legal writing doctrine, the teaching of those formats sometimes seemed like an end unto itself rather than a step along the way. Early legal writing doctrine, focused as it was on entry-level skills, emphasized the legal writing equivalent of compulsory figures. It rarely had a chance to explore how great writers might use the skill and control they learned in their first-year class to transcend the basic formulas and reach a true level of mastery.

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Like that of any other discipline, legal writing’s doctrine has been formed by its history. It began to be built in earnest in the 1980s and 1990s, when legal writing became a recognized part of the legal academy, but because its foothold in the curriculum was only in the first year and was under-resourced even there, it suffered from inherent limitations. It was narrow in the sense that it covered only two documents -- office memos and briefs – and in the case of briefs, it covered only one kind of brief. It was focused almost entirely on matters crucial to an entry-level exploration of the subject. It was unsure of how to embrace legal reasoning as part of its own doctrine, and it was too willing to accept the view that legal methods concepts belonged to others. Finally, it suffered from the lack of systematic study of the work of master legal writers. All of these limitations were understandable – even inevitable -- given the story of legal writing’s creation. All of them are remediable now, however, when legal writing is maturing as a discipline. So where should we go from here?

### **The Future of Legal Writing Doctrine**

Legal writing still has ample struggles to face, of course, but matters have improved significantly. Courses receive more credit,<sup>52</sup> and almost all are graded on the same basis as any other course.<sup>53</sup> Other professors usually refrain from denigrating the course when they talk to students. In fact, most students see legal writing courses as among the most important they will take. Upper-level courses are offered more frequently.<sup>54</sup> Most important, legal writing is now largely taught by full-time professors with some opportunity for job security and professional development.<sup>55</sup> Many of these professors have decided to make the teaching of legal writing their careers. The discipline is now in a position to do a mid-course assessment of its doctrine and make some decisions about where to go from here. I'd like to offer a few suggestions for thinking about the future of legal writing's doctrine:

1. We should stop using the term "doctrinal" to label any list of courses that does not include legal writing, and we should use the term often and intentionally to describe legal writing. If our subject matter is perceived inaccurately as having no doctrine, it will never take its rightful place in the academy and therefore never fulfill its potential benefit for our students.
2. We should continue exploring and expanding legal writing's doctrine by writing good scholarship. Recent years have seen an explosion of excellent, groundbreaking legal writing scholarship. More of us are writing and more of our scholarship seriously explores the substance of our courses. The better our scholarship, the better our doctrine. The better our doctrine, the better our students' education.
3. We should work toward offering more upper-division courses. The discipline of legal writing will never realize its full potential if most of us teach only the entry level course. Upper level courses allow us to explore both the breadth and the depth of legal writing's doctrine. This suggestion, therefore, leads directly to the next two.
4. We should consciously explore a broader coverage of the myriad writing tasks lawyers are called upon to perform. Because most of us teach only the first-year course, we do not tend to think or write about kinds of legal writing other than office memos and a very limited view of briefs. We have not thought carefully about responsive briefs or reply briefs. We have not explored the important rhetorical and substantive differences among different kinds of trial-level briefs. We have not explored the crucial rhetorical differences raised by the identity of the lawyer's client.<sup>56</sup> We are only beginning to work

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<sup>52</sup> In 2012, the average legal writing two-course pair carries 5 credit hours. The Association of Legal Writing Directors/Legal Writing Institute 2012 Survey Report 7, <http://www.lwionline.org/uploads/FileUpload/2012Survey.pdf>.

<sup>53</sup> *Id.* at 9-10.

<sup>54</sup> *Id.* at 24.

<sup>55</sup> According to the ALWD/LWI 2012 Survey Report, 111 schools reported staffing legal writing with 405(c), 405(c)-track, and tenured or tenure-track faculty. *Id.* at ix-x & 61.

<sup>56</sup> Consider, for instance, the important rhetorical differences between prosecuting a criminal case versus representing a criminal defendant; between representing a large corporation versus



seriously on issues relating to transactional documents and litigation documents other than briefs. We have much uncovered territory for our future work.

5. We should continue our exploration of analysis and persuasion at a deeper level. In recent years, we have been doing exciting work that far exceeds an entry level understanding of the content of the typical first-year course. We have begun to explore a doctrine of legal writing that includes advanced topics about brief writing in particular. Much of this good work forges interdisciplinary links with other literatures, such as cognitive theory, narrative theory, and metaphor theory. There is exciting work to be done here, and we are the scholars best equipped to do it.
6. We should reclaim legal methods topics as rightfully a part of legal writing doctrine. As a discipline, we have barely begun serious work in the area. Yet legal writing is the natural home for these topics, which are covered virtually nowhere else in the typical law school curriculum. Today those who write and think about legal methods topics seldom teach them. We teach them. We should think and write about them. We also should evaluate how well we are teaching them and whether we should try to teach them better.
7. We should resolve our ambivalence about legal reasoning and legal theory. There is a rich, though sometimes difficult literature about legal reasoning, but it is largely written by others. There is a rich though sometimes difficult literature about legal theory, also largely written by others. As a discipline, we have affirmatively avoided both of these literatures. Perhaps it is time for us to face our fears and take our place among those who think and write about these two important areas of legal writing doctrine.
8. We should read and study briefs written by today's best legal writers and those of the past. What's more, we should be ready to amend our doctrine according to what we find in those briefs. If we actually studied the briefs of the best practitioners, we might find that they do not do what we teach our students to do. Perhaps our perceived norms and implicit rules about brief writing do not actually apply in practice in the ways or to the degree we think they do. We should test our doctrine in real life application and be ready to deepen our understanding based on what we learn.

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All of this is tremendously exciting work. Our contracts and torts colleagues may be struggling these days to find something interesting to write about, but it will be a long time before we find ourselves with that problem. I can't wait to see what we come up with.

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representing a sympathetic individual; or between representing a poverty law client versus representing an administrative agency or a low-rent landlord.

