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# Double Talk and Twisted Thought: Reflections on Incoherence

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## From the editors...

This issue of *The Second Draft* presents a wide range of views on goals for first-year legal research and writing programs. We thank everyone who contributed. We welcome your responses to what is presented here--we hope that you will include your thoughts, reactions, assessments (whatever) in letters to the editors for publication in the coming Fall issue.

The Fall issue will focus on classroom teaching. Do you have a specific exercise or teaching method that you think other members of the Institute should know about? If so, please share your expertise with our readers by sending a description of the exercise or teaching method (about 750 words, in hard copy and on diskette) to Prof. Joan Blum, Boston College Law School, 885 Centre St., Newton, MA 02159. You may also send your description by e-mail to <blum@bc.edu>, but if you do please paste your essay into your message; don't send it as an attachment. The deadline for essays is October 3, 1997. We'll publish as many essays as the newsletter's budget permits. Also--please remember to send us news, including information about publications, so that we may publish it in the Fall issue.

Jane Gionfriddo and Joan Blum  
Boston College Law School

## Legal Writing Institute News

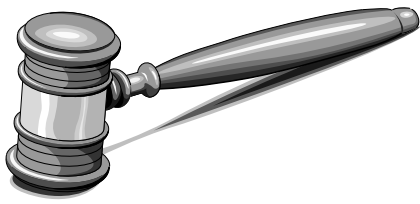
### President's Column

#### Reaching Out

Margaret Mead wrote: "Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has." We LRW professionals are thoughtful and committed not just to LRW, but to legal education in general and to the profession of law. We have good ideas and need to continue to share them not just with each other, but with our colleagues who teach traditional doctrinal courses. These colleagues, especially those recently hired, are fertile ground for planting the seeds of continuing reform in legal education. Most new professors enter teaching and are at a loss as to what to do; they have never been trained as teachers. We should make a point of seeking them out and helping, if we can. (Sometimes they will let us, although not all are receptive.) We can be a valuable, knowledgeable resource for these junior faculty who may ultimately be the power center of the faculty.

"Power conceded nothing without a demand.  
It never did, and it never will."

Frederick A. Douglass, August 4, 1857



## News

The LWI and ALWD co-sponsored ceremony honoring six individuals who were a great help in getting the new LRW standards adopted by the ABA House of Delegates was a fine success with more than 50 colleagues attending. That meeting itself provided an opportunity to meet with clinicians and start things in motion for future cooperation.

The new officers elected under our new Bylaws are: President Steven D. Jamar (Howard), President-Elect Mary Beth Beazley (Ohio State); Treasurer Steve Johansen (Northwestern School of Law - Lewis & Clark College); and Secretary Marilyn R. Walter (Brooklyn). In addition, Susan McClellan was elected the Seattle University School of Law Director and Molly Warner Lien (Chicago-Kent) was elected to complete Laurel Oates' term which expires at the summer 1998 LWI Conference. (She received the next largest number of votes in the fall election.)

Other major business at the January Board meeting in Washington, D.C. included establishing a number of committees and adopting resolutions of the board designed to improve accountability and communication to members, to make funding decisions more formal and regular, and to make greater use of a committee structure for the business and initiatives of LWI.

Cheers,  
Steven D. Jamar  
Professor & Director LRW Program  
Howard University School of Law  
President, LWI Board of Directors

## Legal Writing Institute Committees

LWI is starting (and reviving) a number of committees focused on things to help us all. Jump in. Do what you can.

The major committees at present are:

1. Journal Editorial Board. This pre-existing board will be treated as a committee for organizational purposes. The Editorial Board will continue to have significant autonomy

with respect to the publication of Legal Writing, the journal of LWI, but will continue to be subject to ultimate review by the Board of Directors. The Editorial Board will need to follow the same funding procedures as all other committees of LWI. The four LWI directors who currently serve on the Editorial Board are Diana Pratt (Wayne State), Katy Mercer (Case Western), Lou Sirico (Villanova), and Chris Rideout (Seattle University). Chris is the chair of the Editorial Board. Diana is the editor of the next volume (vol. 3) of Legal Writing (the "proceedings" issue) and Lou is the editor for volume 4.

2. Second Draft Committee. Jane Gionfriddo and Joan Blum (both of Boston College Law School) have been editing it for a couple of years now. The editorship will move to another school in 1998. If you or your school are interested in becoming the editors of The Second Draft for a few years, please contact either Joan Blum or Jane Gionfriddo. The Board will be issuing a more formal RFP on this matter in the future. We want someone to step forward soon so that there can be a smooth transfer of the editing process.

3. Program Committee. Terri LeClercq is the chair of the committee planning the Summer 1998 Program. Other members of the committee are: Ross Nankivell (Emory, the host school for the conference), Peter Bayer (St. Thomas), Mary Beth Beazley (Ohio State), Joan Blum (Boston College), Molly Lien (Chicago-Kent), Susan McClellan (Seattle University), Debra Quentel (Chicago-Kent), and Mark Wojcik (John Marshall). If others (particularly those who are "local" to Emory) are interested in working on this committee, please contact Terri or me.

4. Survey Committee. Lou Sirico (Villanova) is appointed chair of this committee. Jill Ramsfield (Georgetown) is a member of it (though she is unavailable to work on it this spring). This committee will review the survey, prepare a budget, look for outside funding, and make recommendations regarding issues relating to the survey. If there are others who want to work on the survey, contact Lou or me.

5. Citation Committee. Mark Wojcik (John Marshall) is chairing this committee. This committee will be acting as liaison between LWI, ALWD, AALL, the ABA, and anyone else with interests or plans relating to citation. Concerns include vendor-neutral citation forms, Bluebook reform, practice style manual, the cite signal "see," and more. Contact Mark if you are interested.

6. Outreach Committee. Joseph Kimble (Thomas Cooley) has agreed to chair this important new committee. The first business of this committee is to draft a statement of what its charge is. The committee is to report back to the board in six months with a proposed charge and, if possible, a proposed plan of action including the setting of priorities.

7. Scholarship Committee. The general charge of this committee is to explore and develop ways for LWI to support scholarship efforts of its members. Organizational committee members are: Mary Beth Beazley (chair), Jane Gionfriddo, Steve Johansen, Katy Mercer, Helene Shapo, and Lou Sirico. They are to report back in 6 months. If you have a particular interest in this area, please let me know and if there are not too many at that time, I will appoint you to the committee after it gets itself organized.

8. Website Committee. Steve Jamar is the chair of this committee. Anyone interested in working on the LWI website (what it should look like, what should be included, etc.) should contact me.

## Essays on Goals for First-year LRW Programs

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### DELAYED EXPECTATIONS

Hazel Weiser  
Touro Law Center  
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Remedial: Finally we said the word. Now our institution-wide evaluation of how legal research and writing was assigned, evaluated, and valued began to take shape. Ideas germinated. Enthusiasm grew. Faculty rallied. We stopped believing that students could reach levels of competency in all aspects of legal research, analysis and writing within the first year of law school.

As originally conceived, the first year writing program and upper-level writing requirement at Touro Law Center had presumed that students arrived as experienced researchers and writers. This is the 1990s. Too many of our entering students are intimidated by the library (where all of the books do look the same), inexperienced at planning, naive about the complexity of professional conduct, and just plain bad writers. The presumption that entering students have graduate level writing skills was crippling our ability to provide effective instruction and evaluation; we were

leaving too much of the culture of research and writing unexplained. Consequently, faculty evaluation of student writing became punitive, tinged with our disappointment at their poor performance. Finally we acknowledged that we needed to inform students about elementary functions of research, articulate the components of good writing, and then explain the conventions of legal writing. Instruction became explicit. Student writing projects are now closely supervised. Morale is up and student performance is improving. Why?

Our four credit two semester graded program continues to focus on developing research, analytical and writing skills, using both objective and persuasive conventions. Our methodology has changed. Through a series of assignments, students are supervised through the variety of tasks inherent to problem analysis: research, case briefing, charting, outlining, drafting, and editing. Research is introduced early in the fall semester to reinforce how self-education is integral to the profession, and how research is part of the analytical process. Because we do allow collaboration on research projects, we developed a written objective test to evaluate students' knowledge of library resources and strategies, administered at the close of the fall semester. Performance on that exam was above expectations. Especially surprised were the reference librarians who had bet us most of the students would fail.

Classroom instruction focuses on teaching students how to manage assignments so they can move through the predictable tasks that comprise legal problem-solving. We are experimenting with portions of a soon-to-be completed Touro Writing Handbook. The purpose of the Writing Handbook is to present entering students with institutional criteria for competent, professional work products submitted throughout a student's career. The text of the Handbook informs students about how to manage research and writing projects by articulating the various tasks, suggesting a variety of management techniques, and mandating specific editing steps precedent to submitting any paper to any faculty member. The Writing Handbook is intended to create an institutional standard for excellence in writing.

In January Touro's faculty voted to institute a second year writing program that builds on the newly-revised first year program and precedes the upper-level writing requirement. The second year writing program envisions every member of the faculty mentoring a small group of second year students over a semester

in the production of a writing sample portfolio. Upon completion of this portfolio, students will have had three semesters of supervised writing. The institutional expectation is that now they will be prepared to conceive and execute the upper-level writing requirement either through a class or independent study.

In approving this second year mentoring program, the Touro faculty acknowledged that we cannot expect inexperienced students to have mastered analytical and writing skills in just one year, especially without reinforcement elsewhere within the curriculum. However, after the first year, we can expect students to know what they need to do to produce a competent work product. We can expect students to have a working knowledge of their own process so that they can conceive and implement a strategy for subsequent research and writing projects. Therefore, although the actual writing and analysis might be flawed, the structure of a paper should conform to professional conventions. We cannot expect most students to have mastered the poetry of the English language. But we are moving them further on the journey towards professionalism by making them conscious of the editing steps they need to incorporate into their writing process.

By making supervised writing part of the second year curriculum, Touro hopes to reinforce the professional instruction provided students during their first year of law school. We are about to design a faculty retreat dedicated to learning how to teach and evaluate writing better. Our legal writing faculty will be instrumental in designing this program. We are recognized by the faculty as experts on writing, willing and able to share our expertise so that our students will have better supervision, and more of it, during their years here. In understanding our students, in admitting that much of graduate school now requires remedial instruction, we have been able to set realistic goals for ourselves and our students.



**David Walter**  
Mercer University Law School

Each year, before my Legal Writing course begins, I re-examine my teaching goals and methods. Rather than identifying a few broad goals, I focus instead on several specific substantive and procedural goals. I want my students to learn how to: 1) analyze facts and frame legal issues; 2) determine which facts are legally significant; 3) develop and implement a legal research plan; 4) analyze and synthesize

cases and statutes; 5) generate arguments (and counter-arguments) and select supporting authorities; 6) draft and revise a question presented, brief answer, and facts; 7) draft and revise a discussion law portion, using solid organizational techniques; 8) draft and revise a discussion application portion, using solid organizational techniques and making the rule-, analogy-, policy-, and narrative-based arguments explicit; 9) cite basic legal authorities; and 10) write in plain English, avoiding the most common punctuation, usage, grammar, and spelling errors. (At times, some of these goals seem more aspirational than realistic!)

I also have several procedural goals: 1) to teach these topics in a "real world" context, using challenging but not overwhelming problems; 2) to raise professionalism and societal concerns; and 3) to create a course syllabus that allows ample time for quality written critiques and office conferences.

Developing/implementing a legal research plan and generating arguments/selecting authorities are two of the most critical tasks in preparing an objective (or even persuasive) memo. If the writer can at least identify the authorities and arguments, it is likely that the memo will accomplish its intended purpose, educating the attorney. For example, one can imagine many instances in which a few citations accompanied by brief argument statements would suffice to answer a legal question. True, if a memo is poorly written or poorly organized the attorney will need to extrapolate greatly, and may even need to locate and review the cited authorities more fully, but the attorney will probably have a reasonable idea of the value and the nature of the authorities and arguments.

In teaching legal research, my goal is to give the students a good understanding of the legal research PROCESS. Certainly, the students should know which entities generate which types of law, and which sources contain those laws, but the students also need to know that legal research is a process involving certain steps, much-like legal writing. Thus, "library tours" and "treasure hunts" alone are not enough. To teach them about the research tools AND process, we should extend ourselves and our resources, if possible, providing small-group research sessions, having the law librarians assist with teaching, focusing on the more overwhelming hard copy sources, and testing the students to provide additional incentives to learn the material. As in practice, the students must be able to plan their research, identifying the relevant jurisdictions, types of law, key legal and factual terms,

sources to consult, and sources to turn to if the original sources do not produce the desired results. As in practice, the students must know how to use the most common sources (and how to learn-about the unusual sources), and they should be able to locate those sources in a variety of formats: hard copy, Westlaw/Lexis, CD-ROM, and Internet.

Teaching students to generate arguments and select authorities is probably the more difficult task. To generate arguments a student must identify accord and discord between the law and their facts; for example, the UCC requires an "affirmation of fact", but the representation in their case seems to be only an "opinion". To select authorities a student must critically analyze the law; for example, a court's decision may require an "affirmation," but the "affirmation" stated in the facts of the court's decision seems quite analogous to the "opinion" in their facts. Although these topics can be taught in the abstract, explicit examples and problems, together with explicit critiques and modeling, seem to work best: have them orally articulate their arguments and authorities in class BEFORE they write their memos -- give them an oral critique in class; have them submit drafts of their arguments and authorities -- give them written critiques (even grade them); and use the best drafts (and even problematic drafts) as in-class examples -- explain why they are good (and not so good).

Regardless which goals one identifies as most important, or which methods one identifies as best suited to achieve those goals, it is important to re-evaluate the goals and methods before, during, and after each course.



#### **AROUND WHAT GOALS SHOULD WE CONSTRUCT A LEGAL RESEARCH AND WRITING CURRICULUM?**

**Debbie Mostaghel**  
University of Toledo College of Law

First, I believe a legal research and writing curriculum should be an integrated course containing both a research component and a writing component. Including both gives the students a context for research while providing subject matter for their writing.

The primary goals of an integrated Legal Research and Writing curriculum should be to develop students' abilities to analyze legal issues, to develop students' research skills and strategies, to improve their ability to explain this analysis in writing, and to foster awareness of the professional and ethical standards that govern lawyers' work. The

analytical goal is the heart of the program. Without being able to analyze, a student will have nothing to look up, nothing to explain, and no chance to demonstrate professional and ethical standards.

Specific research objectives include: 1) learning to use state and federal reporters, statutes and administrative regulations, secondary sources, finding aids, and computerized research systems; 2) learning to develop basic and more advanced research strategies. Specific writing objectives include learning when to write objectively and when to write persuasively, learning to use legal citation, and learning the appropriate style, tone and diction for legal writing.

To make students aware of professional and ethical standards, instructors should discuss professionalism, civility, and ethics as these topics naturally occur. For example, discussions of plagiarism are an appropriate starting place for discussion of other ethical issues. In discussing the advocate's role, we can point out the ethical duty of competence that requires finding all relevant case law, even when it hurts the client's position.

The primary goal in the first year course is to develop the students' ability to analyze legal issues. Specific objectives under this goal are learning to synthesize diverse sources of law to arrive at a rule that governs a specific fact situation; learning to write a statement of the rule; learning to develop a step-by-step proof. On a recent course evaluation, a student wrote that students did deeper analysis in the "substance" classes than they did when we worked on exercises from our legal writing textbook, so we should just concentrate on "writing" during our class sessions and leave the teaching of analysis to others. This is an unworkable suggestion based on an artificial dichotomy. Writing does not occur in a vacuum. Writing exercises are based on problems that must be analyzed to be solved and written about. We work through a sample analysis as a practical way for students to see how the thought process works and how the thinking must be captured and ordered in the memo or brief. We may be working on the surface of a sample problem in our limited class time, but this is where we guide students to discover what the steps of analysis are and to see how we follow those steps to make the analysis into a piece of legal writing.

These are the obvious goals around which our program has been constructed, but there is another, less visible, goal that I also want to acknowledge: the goal of reducing

frustration. Student resistance to some of the things we do may impede our ability to teach effectively. While we can not eliminate all the frustration inherent in being a novice in an area in which most students think they are experts (writing), reducing frustration is a legitimate goal because it can lead to a better learning situation. For example, students resented the time required to prepare for our old multiple choice bibliography exam. Worse, they believed the test did not demonstrate whether they could actually do research. We agreed that there was no good pedagogical reason for how we had been teaching research. We eliminated the show-and-tell lectures, the library treasure hunt exercises, and the multiple choice exam. Instead, we adopted a research textbook based on active learning principles (Ruth Ann McKinney, Legal Research, West 1996. I highly recommend it.) that teaches research through a series of related exercises based on a single fact situation. The result was very successful. Students not only found learning research more interesting, but the grading of research is more meaningful now because we have made it a component of the open memo assignments. The goal of reducing frustration led us to a more effective way of teaching research.



#### **TEACH THE TRANSITIONS**

**Jessie Grearson**  
**John Marshal**

Our growing recognition of the world's increasingly interdisciplinary and intercultural nature requires us, as a discipline, to pay attention to the following questions: What effect will students' previous understanding in another discipline or culture have on how they adjust to the demands of legal writing? How can students adapt skills from their previous worlds of writing instead of abandoning those skills? How can our increasing knowledge about other disciplines and cultures enhance our teaching effectiveness by helping us build bridges between educational worlds?

As legal writing teachers who work closely with the newest members of our discipline, we have become increasingly skilled at introducing students to our conventions, our community's way of doing things. Now we must continue to develop an awareness of our students' educational "before and after," targeting and teaching them about the transitions they will need to make to become flexible, adaptable professional writers.

A goal for any first-year legal writing program, then, would be to emphasize teaching these transitions. Instead of oversimplifying genuine differences students experience as they move into our writing courses ("good writing is good writing anywhere") or exaggerating those differences ("forget every thing you learned about writing in college"), we must explicitly address the transitions we are asking writers to make into our new way of writing and thinking.

Learning about our students' previous educational backgrounds is not merely a matter of politeness, of showing a passing interest, for example, in whether students were English or Political Science majors. As we are learning from exchanges with educational specialists, this information is of vital importance. We know that people learn new skills and concepts by actively attaching these to the already known and familiar. Preconceptions--the structures already in place in our students' minds that help them make sense of the world--shape (and sometimes jeopardize) how well students receive the new knowledge and conceptions we must convey to them.

As writing teacher Kenneth Bruffee reminds us, preconceptions are not, as they sometimes seem, silly or erroneous, but what he calls "authoritative knowledge"--legitimate, but from another discourse community. Preconceptions are also not private theories, but often public ones with huge memberships. Finally, preconceptions are tenacious: revising, reconsidering or adding to them often requires of students a kind of intellectual "leaving home."

Bruffee's insights remind us why, even when handled carefully, this collision of preconceptions and new conceptions is likely to be stressful. However, such moments can also be enlightening. During these transitional times students can be encouraged to see the importance of flexibility to the professional writer: how central is the ability to adapt, to anticipate how changes in purpose, audience and context shape written communication.

I offer three suggestions that will encourage students and teachers to make the most of such transitions:

1. Think about where students are coming from--and going to. Acknowledge that students are members of multiple, overlapping writing worlds. Since we cannot know everything about these many other writing communities, we need to encourage students to articulate the practical differences between them. We need to teach students to

adapt skills from other places and to remind them that they are adding new skills to an already existing repertoire. Teaching students how to select appropriate strategies for a given writing situation is an appropriate goal these days when tight job markets often require our graduates to branch out into other professional communities with other writing preferences and conventions.

2. Teach students that "different" does not mean "bad" or "useless." Talking with students about other disciplinary ways of doing things is not just good intellectual manners. It's an opportunity for us to remember that all conventions are designed to serve a communicative purpose. Seeing our conventions through new eyes allows us to review them, and to actively compare them with other conventions from other writing communities. This kind of continual inspection of conventions--by which we abandon the archaic and retain the truly useful--is the impulse behind the Plain English movement we endorse.

3. Address (rather than ignoring or exaggerating) transitions. Be as explicit as possible about teaching students how to ask questions about their rhetorical purpose ("who is my audience, what is my purpose, what is my writing context") in relation to legal writing tasks so that students can internalize these questions for future use. For example, teaching an organizational tool like IRAC against the backdrop of such key questions could enable IRAC to be seen as a flexible means to an end rather than a goal in itself. The more we discuss these questions when analyzing writing tasks with our students, the more we enable them to internalize these questions. These questions themselves become tools of the professional, independent writers our students will become.



#### **THE IMPORTANCE OF LEARNING TO MEET STATED EXPECTATIONS**

**Sheryl B. Eitling**  
University of South Dakota School of Law

An important objective of the first year Legal Writing and Appellate Advocacy course is to introduce first-year law students to the kinds of procedural and presentation requirements they will face as law clerks (interns) while in school and as practicing attorneys once they have graduated and passed the bar exam. For some first year law students, the idea of conforming to deadlines and procedural and format expectations established by the

instructor, acting as "senior attorney" (in Legal Writing) or "court" (in Appellate Advocacy), comes easily. Other first year students are more slow to recognize that in their work as law students, and then in their work as lawyers, meeting deadlines and satisfying format and procedural requirements are crucial parts of the enterprise. Legal Writing and Appellate Advocacy present the proverbial golden opportunity to teach, in a relatively painless way, the importance of a writer's meeting stated expectations regarding performance.

Legal Writing presents an early opportunity to convince students that work conforming to stated procedural and format expectations is an important part of the work they will be doing in virtually any aspect of future law practice. Just as important, the students can be assisted in learning that work that conforms to expectations is no more difficult than non-conforming work, once a student invests some time in understanding what the requirements are and how they can be achieved (e.g., learns the appropriate format settings and font selections to be used when working with a computer).

Equally important is the idea that if a student (or lawyer) cannot conform to a deadline or procedural rule, he or she should seek an extension of time or a waiver of the rule from the instructor (or court), rather than simply failing to conform. This concept may well be taught with the assistance of a practicing lawyer or a sitting judge. When one of the justices of the South Dakota Supreme Court came to speak to first year law students during the orientation period last Fall, he stressed the importance of seeking advance permission to depart from a deadline or rule if one finds one cannot comply. Students' level of compliance with the rules of the class, and their willingness to ask, in advance, for permission to depart from a rule or deadline if necessary, is higher this year than ever before! The message did not change from that which had been stated many times previously. The credibility of the messenger, derived from his position on the court, apparently made a big difference.

Because the majority of the students at USD Law School are from South Dakota and will be practicing in the state, I devise Appellate Advocacy problems based on fictional cases that are to be briefed and argued in the Supreme Court of South Dakota. I use the South Dakota Rules of Appellate Procedure to govern the contents and production of students' briefs. (Similar requirements regarding type size, margins and the like are

applicable in the prior semester's Legal Writing class.) Comments the court has made in its opinions about the meaning of the requirements set out in the Rules and others that attach to the appellate process are presented in class as a means of enriching the instruction. We are fortunate to have the Supreme Court of South Dakota sit for a week each Spring in the Law School's courtroom. The students get to see the appellate process in action, at the argument stage. The justices frequently seize the opportunity while hearing cases to give short, informal and (from my perspective) unplanned lessons about the court's expectations of advocates' conduct and presentation. There is no better opportunity for law students to learn, very early in their law school careers, that the law is far more than an exercise in textbook learning. The substance is shown to be important, to be sure, but the manner in which the substance is presented is shown to be important, as well.

The relationship between the University of South Dakota School of Law and the state's appellate justices is perhaps unique, and it may be difficult to duplicate in other locations, but the lessons to be learned should be transferable. Conforming to the expectations that attach to work in the legal profession can and should be part of the instruction from the beginning. Calling on practicing lawyers or sitting trial court or appellate judges to assist in the instruction process can pay dividends for the students and for the school, as well.



#### CONTEXT IS KEY

A. Darby Dickerson  
Stetson University College of Law

Context is key. We cannot merely teach students how to conduct research and how to prepare a particular type of legal document. Instead, we must also teach students how and why attorneys need and use the sources and documents we introduce. Learning in a vacuum simply will not give the students the knowledge and skills they need to compete in today's legal profession.

The philosophy that context is key inevitably affects what we teach and how we teach it. When teaching legal research, we tie almost all assignments to a fact pattern (when possible, the fact pattern students will use to prepare a memo or brief). This semester, for example, we distributed the first memo problem on the second day of class, along with the first library exercise. The students were asked to find legal encyclopedia entries that might be relevant to

their client's case. After asking the students to explain how they located the material, they then had to write a paragraph describing how the rules stated in the encyclopedia affected their client's case. Students later completed other library exercises using that same fact pattern. They will use the same fact pattern to write their first memo and to present an oral report to their partner.

The context approach also affects how we lecture about research sources. We teach sources in the order we want students to approach the research -- thus, secondary sources come before primary sources. We take samples of the sources to class and use overheads and computer-generated images to demonstrate how students can access material in the sources. We follow up lectures with library tours, which also focus on answering questions about a fact pattern. This approach makes the research process more interesting, focused, and realistic for the students. Many comment that they enjoy Research and Writing because it seems so "real" and "practical."

Context is also important during the writing component of class. We spend some class time explaining why lawyers prepare documents as they do; for example, why an appellate brief has a summary of argument section, an argument section, and a conclusion.

Students must research the topics about which they write. With one exception, we do not use closed universe problems. The one closed problem comes in the second semester, and we explain that another associate started the problem and had to move to another project before writing the pretrial brief ~ a situation most attorneys face in practice. In addition, we have moved away from simply handing the students a fact pattern. Instead, we present them with a client file, a pleading file, a client to interview, or a record from which they must extract relevant facts.

All problems are set in an actual, not hypothetical, jurisdiction. If the students have to write a brief, they must follow the local court rules for that jurisdiction. This approach also reinforces the concept of mandatory versus persuasive authority.

Finally, to reflect what they will experience in practice, we teach students to prepare a variety of documents and to communicate both orally and in writing. During their two semesters in Research and Writing, students prepare two office memos, an opinion letter, a demand letter, a pretrial brief, an appellate brief, and a settlement agreement. In

addition, each student must prepare a draft resume and, for a several-day period, must track their "billable time" and submit time sheets for that period.

During the first semester, after the first memo has been turned in, each student must report to the "partner's office" to orally summarize his or her research. We give our students a format and an opportunity to practice this sometimes overlooked skill. Early in the second semester, students argue a motion to the trial court. Later, they give three oral arguments in connection with their appellate brief. Finally, they must work with "co-counsel" to negotiate a settlement agreement with "opposing counsel."

Although we cannot simulate the "real world" perfectly (nor would we want to), we try to make research and writing come alive for our students and to give them basic skills they need to practice but may not have the opportunity to learn elsewhere. Putting what we teach in context helps us to achieve these dual goals.



#### QUERY: AROUND WHAT GOALS WOULD I CONSTRUCT A LEGAL WRITING AND RESEARCH CURRICULUM FOR FIRST YEAR STUDENTS?

Karen Dennis  
University of Memphis Law School

Introduction: I am the (part-time) director of the Legal Method Program at the University of Memphis Law School, having previously taught in the program as an adjunct for eleven years. My remarks are based upon my experience with a program which is required of all students for one year, and which has evolved over time into quite a good one. Nevertheless, it falls far short of my ideal for the treatment of writing in a law school curriculum. I do believe that both the faculty and the administration of the law school desire to provide for a full-time tenure track director, and a multi-year program, and that these goals will, at some point in the near future, be reached. What follows then, is what I would like to see the program become.

Legal Research: I hated legal bibliography in paralegal school and I hated it in law school. Yet I love doing legal research on my cases in practice. Can it be that the many lawyers I know who cringe at research do so because they remember an equally bad learning experience? Isn't the difference in practice that you have problems that you care about to analyze and find law for? Why should it be taught any differently?

Classes in Legal Research should have, as their primary aim, the production of proficient researchers who know how to use a broad range of materials to accomplish a particular result, efficiently, and effectively. I foresee restructuring the first semester's "introduction" to Legal Research along the lines suggested by Christopher and Jill Wren in *The Teaching of Legal Research*, 80 L. Libr. J. 7 (1988). Research is a process, and not one which is easily mastered by the untutored novice. If research is taught solely from a bibliocentric framework, *id.* at 18 (with exercises that are unrelated to the current focuses of their writing course), students will often fail to see the utility of the rote work that is being asked of them, and consequently resist its instruction. They will "get by" until Westlaw or Lexis instruction comes along. As the Wrens suggest, "process-oriented instruction" avoids the boredom and frustration that afflicts many students, and affords "a manageable way to begin to master [legal research] . . . [while] organizing course material around the steps in legal research instead of around descriptions of law books." *Id.* at 55.

Legal Writing: All lawyers have to know how to communicate the law to someone. Language is their toolbox; yet, paradoxically, many students are all thumbs, having not written any significant amount, even in college. Teaching of Legal Writing in the first year, then, should have as its primary aim the production of effective writers. Period.

The difficulty many new law students have with word usage, grammar, punctuation, and syntax, suggests that the increasing use of multiple choice tests in high schools and colleges has benefited the graders far more than their students. Many bright law students have had woefully inadequate writing skills, and the situation is not improving. But, no course can hope to offer full remedial instruction and also teach basic legal writing. Ideally, therefore, a standard essay assignment will be used to screen all enrolling students before the start of first semester, and place those who need it in a language lab. This will allow legal writing instructors the time they need to review, critique, and advise on the techniques of effective legal writing.

Peer review or editing will be employed more often in class sessions because of the salutary effect that teaching another has on one's own learning. This will be accomplished with checklists to ensure some uniformity, but also through narrative critique and discussions. Audio visual (or other) tools will be used to

more effectively demonstrate for an entire class how suggested edits could improve a written passage. Moreover, fewer graded assignments will allow for more rewrites and other "practice."

The research and writing components of the course will be as fully integrated as possible to allow students to see how the problem solving process is, in practice, a seamless whole of which efficient and effective research is an important part.

To the extent that it is possible, the first year curriculum should introduce the students to other practice skills (factual investigation and interviewing, negotiation, counseling) but that can only be a secondary goal. There is simply too much to cover.



#### A PERFECT WORLD

Leslie L. Cooney  
Nova Southeastern University  
Shepard Broad Law Center

Every law student, upon completion of the first year of law school, should be able to articulate issues precisely and analyze problems logically and completely. The legal research and writing curriculum should be designed around this central, common goal, just as should be the other first year substantive law course offerings. Every student must be able to write at a competent level. Our program goal should be for every student to have a firm understanding of what comprises good legal writing, to be able to identify it, and to be able to produce it objectively or persuasively- on demand. As a necessary subset of this, we must identify those students who lack certain basic writing skills and provide a conduit for remediation.

Students should learn analysis and writing go hand in hand. Very few first year law students will write a well analyzed discussion upon a first draft, but all first year law students should be able to improve their analysis when doing multiple drafts of the same discussion. Students should see legal writing as a process which values precision in thought and expression. Students must learn to read even their own writing critically, strengthen the analysis, and enhance their language through editing. We must include enough writing in the first year so competent, basic, legal writing becomes a learned, acquired skill - one students can produce on demand.

Research and writing have been traditionally linked together because, as most of us would agree, one must certainly be able to find the

law in order to communicate it. Our goal should be, therefore, to introduce students to a number of research sources and techniques and to insure students display a level of proficiency in all basic research tools. Our programs must include more than an introduction to technology; rather, we should embrace technology ourselves and guide our students along technological paths upon which they will continue to walk even after they have completed our course.

These goals, however, assume we are functioning in a perfect world: one where law school resources are unlimited. Our goals are most likely achieved when our writing class size is small and when the course is afforded credits equal to those afforded substantive law classes. Our law schools should also reinforce the first year research and writing curriculum through strong upper level course offerings, both required and elective. Just as the curricular goals change in the second and third years of law school, so should our goals change for our upper level students in the area of research and writing. Even a perfect first year program should be just a beginning....



#### WHY WE SHOULD NOT TEACH LEGAL RESEARCH AND WRITING

Kent Bunting  
Saint Louis University School of Law

I had just spent the last month working on a Mission Statement for a local organization when I saw the topic for this issue. I decided to turn my attention to writing a Mission Statement for the teaching of legal research and writing. I failed. I could not come up with anything. In an effort to become unstuck, I approached the problem in reverse -- why should I not teach legal research and writing -- and I think the results are instructive.

A Mission Statement is a statement of purpose. It is not a statement of specific goals ("we want to raise X amount of dollars" or "we want to teach students to use Shepard's Citations.") A mission statement instead expresses the ultimate reason that one is trying to reach these specific goals.

For teachers of subject classes, that mission seems to be to influence the law and thus to make the world a better place. Of course, that is a somewhat idealistic and simplified view. It does, however, fit the reality of law professorship. For example, scholarship takes precedence over teaching because scholarship can more directly influence the



course of the law. It also fits with the typical teaching style in law schools. In most subject courses, students are not just taught black letter law. They are taught to question legal rules and decisions.

In the teaching of legal research and writing, this particular goal is not possible. One does not focus on one area of law enough to change that area, nor does one have the time for the kind of scholarship that can have a meaningful influence. Instead, legal research and writing teachers represent the "trade school" part of the law school curriculum. We teach students how to find and apply the law, and how to write their conclusions in an objective or persuasive fashion.

The result of teaching students how to find the law (legal research) and how to apply it (legal methods) is to create an institutional inequality in our society. We create one set of people (lawyers) who know the rules of society, or at least how to find the rules, and another set (non-lawyers) who neither know the rules nor know how to find the rules. This inequality, therefore, creates a learned, or "priestly," class and an unlearned, or "lay" class.

This priestly class becomes the gate-keepers to the powers and institutions of the state. One must go through them to get to the promised land of justice, just as one had to go through priests in the Middle Ages to reach heaven. As with the Medieval priests, the rich have better access to the promised land because they can afford to hire the learned class. In Medieval times, this practice was known as buying indulgences. Today it is known as billable hours.

The teaching of advocacy and persuasion creates different problems. An adversarial situation is a zero sum game. If one side wins, that means the other side loses. The net result is not an increase in the general well-being of the community. In fact, the costs of litigation make it a net loss for the community as a whole, and the bad feelings left from litigation may linger for years to come. One would not likely adopt a mission that decreased the general welfare of the community.

That leaves objective writing. But a large part of the teaching of objective writing in law school amounts to instruction about the specific forms and language that only lawyers know: citation forms, memo format, "terms of art." All of these things are only available to the learned class. Thus the teaching of objective writing in law school can also lead to the inequalities mentioned above.

In any case, how much time do we actually have for teaching writing itself? Maybe we spend a couple of class periods on writing style problems. But if the students do not know how to form a sentence or how to use apostrophes when they enter law school, we really do not have time to teach them.

Does this mean we should all quit teaching legal research and writing and go "live in a van down by the river?" Not necessarily. My point is simply that it is not enough for us to look at the goals of our course without considering the larger purpose these goals serve.



#### GOALS FOR A LEGAL RESEARCH AND WRITING PROGRAM

Paul Bateman  
Southwestern University School of Law

Three important and often overlooked goals for a legal writing and research class are

- 1) to give students the skills to move from blank page to completed project within a tight deadline;
- 2) to expose students to the realities of law practice by having them juggle several writing assignments at the same time; and
- 3) to provide law students with a sense of their own competency and the message that learning to write well takes a life time.

These are not the only goals I would include, but I believe they are three goals often overlooked in the planning and practice of teaching legal writing. The first two goals are suggested largely in response to comments I receive from graduates and from judges and lawyers I have taught in CLE classes. Those first two goals recognize the importance time management plays in the production of good writing. The third goal becomes obvious each time I teach writing to upper division students.

- 1) Students need skills that help them move from blank paper to completed project in a matter of hours, not days or weeks. While it does take time to develop the necessary skills for writing—and I think that time should be built in to accommodate this learning process-- too often too much time becomes counter-productive. I tell my students it is possible to write the perfect memo, it just might take two years to do it. Furthermore, while the development of skills occurs over time, over the three weeks we might assign to a writing project, the time actually devoted to the task will number in hours, not days or weeks. Students often overlook

this. To encourage efficient use of their time, I to require students to include time-slips with their completed tasks. Time slips serve two goals. Students become aware of how much--or how little-- time they have devoted to a project (and, in a real sense, the project's economic value), and I can counsel them about the eight-hour, two-page memo.

- 2) The second goal should be to teach students the time management skills required for completing several assignments over a period of time. This goal is obviously related to my first goal above. By assigning several assignments on the same day (but with different due dates), students are exposed to the realities of practice and can discover the realities of their own approach to managing the time it takes them to complete each project while still fulfilling their other obligations to their legal education. Again, this mirrors the practice of law and in some ways may actually decrease the pressure students ordinarily feel about completing writing assignments because students will see legal writing in a broader context while they are completing each assignment, rather than appreciating that breadth only at the end of the semester.

- 3) The third goal is unrelated to the first two. Students should take a diagnostic writing examination such as that devised by Anne Enquist or Bryan Garner. Given the realities of teaching legal writing, it is impossible to uncover and correct all of a student's writing deficiencies in a semester or even two semesters. A diagnostic exam, though, can help the student become a self-learner and can fairly painlessly teach students something about grammar and usage and the vocabulary attached to it. This kind of test could be given at the beginning of the course and again at the end, so that students could appreciate more what they have learned and what they have still to master. Furthermore, the results of such a test, when accompanied by the kind of answer key that not only gives the right answer but also explains the answer, becomes an invaluable reference tool for the law student and provides the student with the vocabulary we attach to the study of grammar and usage.



# FROM THE DESK OF THE WRITING SPECIALIST

## Double Talk and Twisted Thought: Reflections on Incoherence



©Elizabeth Fajans  
Brooklyn Law School

What writing teacher has not encountered bizarre and incoherent sentences, sentences that seem to teeter on the very edges of syntactic and semantic psychosis.

- Common to these cases' doormen were the last possible stop the process server could reach due to security.

- Even this act of God is limited in its application being that the effects of the sun's rays could have only affected his distance for a very short distance of roadway, a part of the roadway which, unfortunately, collided with Anderson's fate.

Sentences like these induce feelings of panic and incompetence. We place question marks in the margins and move on, finding it too difficult to pinpoint the error and too

exhausting to make sense of the text, to second-guess its intended meaning, on the basis of the syntactic and semantic clues given. And yet many writing teachers think that there is logic to illogical prose, a logic that we can infer from error analysis and use to thwart incoherence.<sup>1</sup> The rest of this piece describes some of these errors.

Diction errors are a frequent source of incoherence. When the relationship between a word and some other part of the sentence is ambiguous or nonsensical, the meaning of the sentence may become unfathomable. Some diction errors, especially those that result from auditory mistakes, are seriously funny: "The student who objected most strenuously to prayer at

graduation was the school's valid victorian." Spelling errors can also produce some howlers.

- A citizen's fourth amendment right should not be violated by an arbitrary search for contraband simply because a traffic patrolman has a subjective haunch.

- The doctor testified the brake on the leg was about two weeks old.

- The court's colander was full.

Some errors stem from inadequate vocabulary. The student may be guessing at the correct word or the correct form of the word, as in "The prosecutor's argument was circulatory." A related error stems from a novice law student's weak grasp of legal discourse.

- It was unreasonable to hold the social hosts liable for negligence caused by the guest that they did not proximately cause. (Not only is the student confused about whether you proximately cause negligence or proximately cause injuries, but the misplaced modifier compounds that confusion by suggesting the hosts "proximately caused the guest." Thus does incoherence mount.)

- According to id, the substituted service was valid. (The superego argued otherwise.)

Some sentences lose coherence because the writer blurs expressions, erroneously combining or omitting features of similar sounding phrases. This is an error foreign students often make.

- If crimes decrease, at least I can say is that the law worked.

The writer confuses "At least I can say that...." with "the least I can say is...."

Thus, the coherence of a sentence can falter when a student doesn't really understand a word he is using, doesn't know the grammatically appropriate form of that word for the sentence, or mishears a word or misspells it by substituting a word or an expression that sounds similar.

Some incoherence is accidental. The mind rushes faster than the hand and errors are produced that stem less from syntactic or semantic ignorance than from indifferent revision and careless proofreading.

- The deceased, a state trooper, was hit while assisting a motorist on the side of the thruway.

- Because Murray was driving with the flow of traffic, he did not realize his failure to wear sunglasses would render him unable to see the state trooper.

Most students realize that a deceased person is unlikely to assist a motorist, that the subject cannot perform the action the verb asserts it does (barring the student who wrote, "we can argue the victim is not dead"). Most students even realize that the flow of traffic is not a obvious reason for not wearing sunglasses - if it is pointed out to them.

A less common, but still frequent, accidental error results when there is a disjunction between the subject of the sentence and its predicate nominative (a.k.a. subjective complement). A predicate nominative follows a linking verb, and is supposed to describe the subject, though some do not.

- Doormen authorized to accept mail deliveries constitute proper service-of-process.

Just as it is illogical to compare apples and oranges, so it is illogical for a subject and its predicate nominative to be different animals. A doorman is not service-of-process.<sup>2</sup>

Confusion also results when a writer leaves out words that glue the pieces of a sentence together.

- A doorman's duty to accept packages and lack of access to the actual resident make doormen proper people to receive substituted service.

It is not the doorman who lacks access to the resident. For the sentence to make

sense, the appropriate possessive noun needs to be inserted, "a process server's lack of access."

Many of these errors can be corrected when a writer slows down enough to read what is actually on the page rather than in the head. Placing a ruler under a line of text often ensures careful line editing and proofreading because it keeps the eye from rushing ahead.

The most bewildering forms of incoherence are created by syntactic errors, by confused relationships between sentences or between the parts of sentences. An inability to subordinate syntactically one idea to another or to join two ideas of equal significance cause what Mina Shaughnessy calls "consolidation errors," errors that result from attempts to consolidate sentences in order to express relationships or to eliminate redundancy.

Coordination allows writers to link sentences or parts of sentences by grafting part of one sentence onto another. Students often become confused, however, about which parts of the sentence compose the base construction and which are the coordinated elements.

- He alleged that these noises have taken place for over 16 months and complained to the tenants upstairs.

In this sentence, it is syntactically unclear if "and" is compounding the verbs "have taken place" and "complained," or "alleged" and "complained." Although the writer probably wanted coordination within the "that" clause (he alleged two things), the subject of the "that" clause (noise) cannot perform the second action (complained). To coordinate this sentence, the author has to begin the symmetrical construction in a different place.

- He alleged that these noises have taken place for over 16 months and that he has complained to the tenants upstairs.

Like coordination, subordination allows a writer to add parts to the base sentence. The writer can open with introductory phrases or subordinate clauses, insert interruptions into the base sentence, or modify elements of the base sentence. Yet inexperienced writers often have difficulty managing the subordinate structures they

introduce. Sometimes students create structural expectations that are never fulfilled, as in "Testifying against her father it was traumatic." Because "testifying against her father" is a gerund -- a subject, not a participial phrase -- the reader expects a verb to follow rather than "it," another subject. The writer needs to eliminate the redundant subject or to create an independent sentence: "By testifying against her father, she was traumatized." Some writers lose the subject when they open with introductory, subordinate clauses: "Even if he confessed, as the officer testified, was not mirandized." Here, the writer needs a subject for the verb in the independent clause.

Modifiers can also blur the relationships between the parts of a sentence.

- A key aspect of the deposition that his lawyers overlooked was the lighting conditions.

It is unclear whether the modifier "that his lawyer overlooked" goes to "aspect" or "deposition." When a prepositional phrase separates a noun from its modifier, students should eliminate the prepositional phrase or relocate it.

- A key aspect that the lawyer overlooked in the deposition was the lighting conditions.

Incoherence invariably results when the writer is still fuzzy about the point of the sentence.

- Common to these cases' doormen were the last possible stop the process server could reach due to security.

Although the writer ought to be talking about what is common to these cases (namely, that doormen stopped process servers for security reasons), the writer opens instead with an assertion about what is common to doormen. This misemphasis derails the sentence.

We cannot make much headway against syntactic incoherence if all we can say to students is that this sentence doesn't make sense. We must offer explanations as to why, and these explanations will involve teaching students about the parts of a sentence and about common arrangements of those parts. Even then, our task is not done -- for diction errors often compound

syntactical errors and create further obscurities. Moreover, when these mistakes are made within the context of paragraphs, so that incoherence within a sentence pushes paragraph coherence into the remote future, our problems multiply -- as does frustration and despondency. Then we must remind ourselves and our students that, like recovering alcoholics, we are embarked on a twelve-step program and take one correction at a time.

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<sup>1</sup>Mina Shaughnessy addresses the underlying causes of incoherence in *Errors & Expectations* (1977), as does David Bartholomae in "The Study of Error," in *The Writing Teacher's Sourcebook*, 3d ed. (Gary T. Edward et al. eds., 1994). Claire K. Cook's *The MLA's Line By Line* (1985) is a good reference book to consult when diagnosing problem sentences.

<sup>2</sup>Nor can "a roadway collide with fate," as the author of one of our opening examples asserts.

## News

### Atlantic Regional Conference-- May 30, 1997

Temple University School of Law will host the Spring 1997 Regional LRW Conference for Pennsylvania, New Jersey, Delaware and Maryland/D.C. on Friday, May 30, 1997. The theme of this free all-day conference is The Scholarship of Legal Research and Writing. If you want to receive information about or registration materials for the conference, please contact Susan DeJarnatt or Michael Smith at Temple University School of Law, 1719 Broad St., Philadelphia, PA 19122/ Tel 215/204-8736 (Susan) or 215/204-8822 (Michael). Email: <sdejarn@vm.temple.edu> or <msmith5@vm.temple.edu.>

### ALWD Summer Conference

The Association of Legal Writing Directors will be holding a conference this summer in Chicago (July 24-26), entitled "The Future of Legal Writing: Visions, Goals, and Opportunities."

## **Legal Writing Teachers Celebrate New Standards, Honor Sponsors**

Revised law school accreditation standards that for the first time formally require schools to teach legal analysis, research, and communications skills were celebrated last month by legal writing professors from law schools throughout the country. Members of the Association of Legal Writing Directors and the Legal Writing Institute met in Washington, D.C. January 5, 1997 to honor those most responsible for the American Bar Association's adopting the new standards last summer.

The new standards require law schools to assure that their graduates are competent in such skills as legal analysis, problem solving, research, and oral and written communications. They also require that law schools provide terms of employment sufficient to attract well qualified people to direct and staff their legal writing programs.

Much of the credit for persuading the ABA House of Delegates to adopt the new standards was given to Illinois attorney Thomas Leahy, a former president of the Illinois Bar Association, and two clinical law professors: Gary Palm, University of Chicago Law School, and Roy Stuckey, University of South Carolina Law School. Leahy told the legal writing educators that their mission is "so important to your students and their clients" that "down the line, you will achieve the status you deserve."

Also honored by the two legal writing organizations were three of their own members who participated in the ABA standards-setting process: Associate Dean Susan Brody, John Marshall Law School; Professor Ralph Brill, Chicago-Kent College of Law; and Professor Richard Neumann, Hofstra University Law School. Professor Brill drafted portions of the legal writing standards that were adopted by the ABA.

In a keynote address to the group, Professor Emeritus Marjorie Rombauer, University of Washington School of Law, called the new standards a "truly giant step" in the history of legal writing education. Professor Rombauer, herself a pioneer in the field, called ABA recognition a step closer to achieving "appropriate status, stability and

compensation" for legal writing professionals.

The ALWD-LWI reception coincided with the Association of American Law Schools annual meeting in Washington, D.C. January 4-7, 1997.

For additional information contact: Professor Jan M. Levine, President, Association of Legal Writing Directors, (215) 204-8890; levine@thunder.ocis.temple.edu and Professor Steven D. Jamar, President, Legal Writing Institute, (202) 806-8017; <sjamar@law.howard.edu>.

## **New Area Code for LWI phone number**

The area code for all numbers at Seattle University Law School is now <253>, not <206>.

## **Publications (recent and forthcoming) by Institute Members**

Maureen Arrigo (California Western), Hierarchy Maintained: Status and Gender in Legal Writing Programs, Temple L. Rev. (forthcoming).

A. Darby Dickerson (Stetson), An Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Format), 26 Stetson L. Rev. 53 (1996).

A. Darby Dickerson (Stetson), Writing Opposing Counsel, 84. Ill. B.J. 527 (1996).

Jo Anne Durako (Villanova), Kathryn Stanchi (Temple), Diane Edelman (Villanova), Brett Amdur (Villanova), Lorry Brown (Michigan), and Rebecca Connelly (formerly at Villanova), From Product to Process: Evolution of a Legal Writing Program, 58 Pittsburgh L. Rev. (forthcoming, Spring 1997).

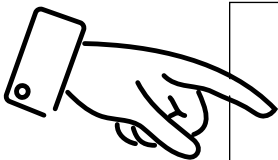
Helene Shapo (Northwestern), Matters of Life and Death: Inheritance Consequences of Reproductive Technologies, Hofstra L. Rev. (forthcoming, Summer 1997).

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