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"Ph.D. Lite": A New Approach to Teaching Scholarly Legal Writing

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Essay:

"Ph.D. Lite": A New Approach to Teaching Scholarly Legal Writing

Jacqueline D. Lipton[*]

Abstract

Most American law schools require the satisfaction of an upper level writing requirement, usually in the form of a seminar paper, or "Note", for graduation. The problem for many students is that the J.D. is not generally geared towards learning scholarly writing. In recent years, the author has experimented with reformulating a seminar class as a "writing workshop" in order to focus on the scholarly writing process. In so doing, she has drawn from experiences supervising legal research degrees in other countries where research-based LL.M. degrees and Ph.D. degrees in law are the norm. This essay details her approach – effectively a condensed version of the training for a Ph.D. in law that might be called "Ph.D Lite". The aim is to better train students in the scholarly writing endeavor. The approach seems to elicit better results in terms of student research and writing, as well as student engagement.

Table of Contents

I. INTRODUCTION

As a law professor trained outside the United States, and teaching within the United States for the past eight years, the author has been intrigued with the upper level writing requirement. Its focus on scholarly writing seems out of a place within a curriculum that is based predominantly on mastering areas of doctrinal law and preparing students to pass the bar examination. Most legal writing training in American law schools is based on writing like a practitioner, rather than writing like a scholar. Unlike many other jurisdictions, the American J.D. is the highest level of legal academic qualification that most students here will take, even those intending to become academics.[1] It must therefore serve the needs of the legal practice community as well as the academic community as a training ground for future practitioners and professors. Because most J.D. students will become practitioners, the degree tends to be skewed accordingly. This makes the scholarly upper level writing requirement feel anomalous. It also tends to create apprehension in the minds of students facing scholarly writing for the first time in the context of a practice-oriented course of study.

Because American law professors do not supervise students undertaking legal research degrees such as PhDs - unlike our counterparts in other countries - we are not especially well trained in methods of teaching scholarly legal writing. A professor in a British law school, for example, will typically supervise a number of research LL.M. and Ph.D. students in law. Thus, the teaching of scholarly writing in the context of higher level legal research degrees is a common endeavor. Many British professors have well developed methods for training students in the scholarly enterprise.

This essay outlines the author's attempts to translate some of these methods to the American seminar context. It considers the author's development of a workshop-based seminar format that combines dissecting and analyzing the structure of good academic writing with developing the students' own substantive thoughts in their chosen topic areas. This approach incorporates increased one-on-one supervision with students augmented by small group sessions focusing on workshopping each other's, the professor's,[2] and other people's scholarly writings.[3] Judging by discussions with students, and student evaluation forms, participants in these seminars have generally found this "Ph.D. Lite" approach more satisfying than the traditional law school seminar format. Additionally, the author has discerned a marked improvement in the quality, and

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[1] Of course, many American academic lawyers will also undertake Ph.D. degrees, but these are usually in fields outside of law. By contrast, in many European countries, as well as countries like Australia, New Zealand, and Canada, the basic law degree – the LL.B. – is typically only the first of two or three legal academic qualifications that students will take if they want to become academic lawyers.

[2] Obviously, the author is not alone in incorporating her own writing projects into law school seminars. Professor Roberta Rosenthal Kwall, for example, has recently written about her experiences of doing just that: Roberta Rosenthal Kwall, *Teaching an Intellectual Property Seminar Through the Legal Literature*, 52 SAINT LOUIS UNIVERSITY LAW JOURNAL 813, 818 (2008) (describing incorporation of the professor's own previously published work and works-in-progress into law school seminar teaching).

[3] Professor Kwall has, in fact, taken this idea a step further and has invited other professors to come to her seminar classes to talk about articles they have written and that the students are reading in the context of the seminar: Kwall, *supra* note 2, at 813-814.

also the timeliness, of papers submitted.[4] Part II sets out the Ph.D. Lite methodology, while Parts III and IV respectively identify its key advantages and disadvantages. Part V sets out some conclusions on teaching law school seminars in the Ph.D Lite format.

II. A PH.D. LITE APPROACH

A. SEMINARS AS WRITING WORKSHOPS

Traditionally, American law professors have taught 3 credit upper level writing seminars in a format that consists of six to eight weeks of traditional Socratic classes with prescribed readings on substantive areas of law related to the seminar topic.[5] This is generally followed by a brief break for students to work on their Notes, and then a series of classes where students present their work on their Notes to the class, often in a fairly formalized structure, utilizing handouts and PowerPoint presentations. At the end of the semester, each student submits her Note for grading. Assessment is generally based on a combination of the final submission of the Note, general class participation, and the student's individual presentation of her research project.

The problems with this approach are self-evident. It attempts to cover too much substantive doctrinal information within one semester, while simultaneously requiring students to foray into what is typically their first major scholarly legal writing project. For many students, it will be their first major writing project of any kind, given that many students now undertake four years of college without being required to engage in a major piece of scholarly writing. Thus, in the first six to eight weeks of a law school seminar, most students will be struggling to research an unfamiliar topic and formulate a research proposal, while at the same time being required to stay on top of often substantial weekly prescribed reading assignments.[6]

Another problem with the traditional format is that the assessment regime is often not well tailored to students' aims and expectations. Most students will enroll in a seminar class to satisfy the upper level writing requirement. Their main aim is to master scholarly writing. The general reliance on an assessment regime that combines grades for weekly class preparation and participation with marks for in-depth scholarly writing in

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[4]   I must acknowledge that our entire law school program has focused more strongly on good legal writing in the years that I have spent developing the Ph.D Lite approach. Thus, the improved results may be attributed to a combination of this approach and other innovations in our curriculum such as our CaseArc program (see http://www.law.case.edu/curriculum/content.asp?id=398, last viewed on August 18, 2008) and our recently establish Writing Center (see http://www.law.case.edu/curriculum/writing_center/, last viewed on August 18, 2008).

[5]   This is obviously a generalization. There are clearly some professors who take very different approaches. Some of these approaches are discussed in Kwall, *supra* note 2. Professor Kwall also identifies a group of intellectual property law seminar teachers who take a more interactive writing-workshop approach: Kwall, *supra* note 2, at 815-6 (footnote 4).

[6]   Professor Kwall has also expressed dissatisfaction with what is required of law school seminar students in terms of scholarly legal writing in the space of a single semester: Kwall, *supra* note 2, at 819 ("If I had my way, student seminars would last a full year rather than a semester, because I think it is unrealistic to expect students to produce a law review article of publishable quality in just fourteen weeks (despite the facts that some students do).")

one narrow area can draw students in opposing directions. Many students will either focus on the class participation aspects of the course and sacrifice time that could be spent developing a research proposal. Some students, on the other hand, will want to concentrate on their Note writing process and will not have time to properly complete weekly reading assignments. Either way, students are sacrificing valuable grades in an increasingly competitive job market where grades are of prime importance.

This is not to say that students should not be expected to prepare for seminar classes. Rather, the suggestion here is that seminar classes should better prepare students for their scholarly writing projects. Drawing on methods developed to supervise research-based LL.M. and Ph.D. degrees, it is possible to formulate a more effective approach for training students for scholarly legal writing within the J.D. degree. Obviously, the upper level writing requirement is not aimed at having students write a research paper that would rival a legal LL.M. or Ph.D., but there are some distinct similarities. In all cases, the aim is that students will develop a solid and sustained legal argument, based on a research question - or legal thesis. They will need to express their ideas clearly and concisely, as well as to master and clearly convey arguments both for and against their thesis, supported by appropriate authority.

If the thesis here is that we can improve what we do by looking to higher level legal research degrees in other countries, we must recognize that these degrees have not always been perfect in their approach to teaching scholarly legal writing. A problem experienced for a long time in law schools in Britain and Australia, for example, has been that undertaking these degrees can be a very isolating experience for students. Historically, without much support or guidance from faculty and peers, many higher degree research students in law failed to complete their degrees. Because of concerns about this possibility, many British and Australian universities allowed Ph.D. students to fall back on obtaining an LL.M. or M.Phil degree if they failed to satisfy the requirements of the Ph.D. In fact, some universities have not permitted students to enroll directly into a Ph.D. program because of concerns about possible non-completion. They require students instead to first enroll in an LL.M. or M.Phil degree and then to convert to a Ph.D. after demonstrating a capacity to complete the more onerous requirements.[7]

British and Australian law schools have recently been working to make their higher degree research programs more user-friendly. Many have developed teaching methodologies that involve combinations of regular intensive one-on-one meetings with one or more designated supervisors, as well as small workshops where students present their work for each other in an informal setting. Many of these small workshops are facilitated by professors. Of course, it is not realistic to translate the full structure of such a program into an American law school. The manpower and coordination required to teach a group of higher degree research students is beyond what will be available in most American schools. More importantly, the time frame for completing the legal writing

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[7] In fact, some schools require students to enroll in a pre-masters qualification before they are entitled to enroll in either a Masters level legal degree or a Ph.D. See, for example, the rules at Cambridge University in the United Kingdom which require students to first enroll in a one-year research program entitled a Certificate of Postgraduate Study in Legal Studies before they are entitled to upgrade to a Masters or Ph.D. degree in law (see http://www.law.cam.ac.uk/courses/phd/, last viewed on March 7, 2009).

requirement in the United States is much more condensed than the three to six years[8] usually devoted to a Ph.D. degree in law in other countries.[9]

Thus, to develop a Ph.D. Lite version of the British approach to suit American law schools, one must identify the key factors of the British program and distill them into a smaller and more intensive format. One important starting point for American professors might be to analyze their own writing processes in order to be able to explain them to students. Different professors will have different approaches to scholarly writing. Our students could likely learn a great deal from comparing and contrasting them.[10] Another extremely important issue that students can learn from professors is time management.

Law professors (hopefully) have more experience than students in time management in the context of scholarly writing.[11] This includes the timing of the writing project itself, as well as the balance between that project and other competing work and family related pressures. Professors will have a better idea than students about how long it will realistically take to research a particular question, as well as to draft and re-draft a paper of a given length. In legal research degrees, professors typically help students develop detailed timelines for writing projects, and continuously help students rework the timeline as needs arise. Obviously, in a research LL.M. or Ph.D. degree, professors and students have the luxury of a much longer timeline than in the upper level writing requirement. However, a shorter timeframe can be an advantage because it can force teachers and students to be more realistic and economical about use of time.

In this context, there are some tricks that professors can think about sharing with their students. For example, the "how much is too much?" question. Given the volume of information available for researching via electronic databases and the Internet more generally, students need to know when to stop reading and start writing. Over-researching, particularly within a limited time frame, can be a trap for new players. Professors might alert students to think about when the amount they are reading is adding incrementally smaller amounts of important information to their research base, but taking up a disproportionately large amount of their research and writing time. Students also need to learn how many arguments they can realistically fit into a paper of a certain length. They need to ask the "how much is too much?" question in relation to their drafting. A paper with less argument made in more detail and supported with evidence and authority will generally do better than a paper with more arguments made only superficially.

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[8]   See, for example, Monash University Graduate Studies Handbook, Rule 1.3.1 (requiring a Ph.D. to be completed within 3 years or full time study or equivalent part time study); full text available at: http://www.mrgs.monash.edu.au/research/doctoral/chapter1c.html, last viewed on March 7, 2009).

[9]   Some would argue too condensed even for what is required within the American law degree: Kwall, *supra* note 2, at 819.

[10]   Professor Kwall describes a law school seminar approach where she invites other professors into the class to workshop their writings with her students (as well as also using some of her own works in progress) to achieve this aim: Kwall, *supra* note 2, at 813-814 (re other professors' writing); 818 (re Professor Kwall's own writing).

[11]   Professor Randy Pausch set out some very useful guidelines for good time management: RANDY PAUSCH, THE LAST LECTURE, 108-111 (2008)

B. DEVELOPING A WRITING WORKSHOP CLASS

1. Getting Started

In considering how to reformulate a traditional law school seminar class along the lines described above, a good first step is to clearly identify the professor's and the students' respective aims and expectations. If one assumes that most students are focused on satisfying the upper level writing requirement as a primary goal, and presumably writing in an area in which they have some interest as a secondary goal, that is a good place to start. It may be a good idea to clearly discuss these aims and expectations in an early class. It may also be useful for the professor to have some level of one-on-one interaction with students to put those expectations and goals down on paper in some form. This can be akin to making a contract between the student and the professor in which the student's goals are identified and the professor helps the student formulate an individual plan for achieving those goals within a realistic timeframe. This can be achieved by the professor working closely in consultation with the student both about formulating a realistic and manageable scholarly proposal, and by setting out realistic timelines for completion of various aspects of the project: that is, research, outlining, drafting, and re-drafting.

It is equally important for students to learn early on to take full advantage of available resources outside of interactions with the professor. This will include: (a) using the librarians and available library services effectively to assist with research, (b) using available resources about legal writing[12] as well as about substantive areas of law, (c) using peers enrolled in seminar classes as proofreaders and trial audiences for ideas to be raised in the paper,[13] and, (d) practicing explaining arguments to be raised in the paper to both small working groups of peers and to the professor. All of these aspects of legal writing are routinely dealt with in higher research degrees, and their basic attributes can be distilled into one semester to satisfy the needs of the American upper level writing requirement.

In the author's experience, the best way to open a class focused on scholarly legal writing is to have students start thinking about what good scholarly writing is from the first minute of the first day of class. In this respect, a professor cannot afford to be too prescriptive about how much substantive doctrinal material can be covered in the seminar. The professor should be prepared to focus more squarely on each student's individual writing process. In the author's current seminar model, students focus quite narrowly on one substantive topic area very early on in the semester. They are not required to read a wide variety of background materials outside the scope of their chosen research area. The author does provide students with a detailed seminar reading guide as a schedule at the back of the seminar materials, but the reading is not required, nor is it graded. It is included as a mechanism to give students some ideas about research

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[12]   See, for example, EUGENE VOLOKH, ACADEMIC LEGAL WRITING (3 ed, 2007).
[13]   Kwall, *supra* note 2, at 819 (professor notes that she has in some years mandated students critiquing each other's work as part of her seminar classes).

directions. To this end, some suggested research questions are included with the reading materials.

This approach probably works best with seminars that correspond with substantive doctrinal classes that students have either already taken or are concurrently taking. This enables the seminar teacher to more easily jettison broad substantive law class sessions in order to shift the focus to writing methodology. It does not necessarily deprive students of the opportunity to learn the substantive law if they want to take the corresponding doctrinal course. This approach may, however, be more problematic in seminars that do not have corresponding doctrinal classes. It may be that students should be discouraged generally from undertaking writing projects in areas in which they do not already have some background. Alternatively, grading systems might take into account the extent to which the subject matter covered in the seminar is completely new to the student. Where the subject matter is completely new, students should perhaps be given more leeway in the grading to accommodate the fact that part of what they have achieved in the seminar is mastering a new area of law.

In terms of first steps towards legal writing – after the aims and expectations have been clearly set out – a good approach is to start with scholarly *reading*. It is generally the case that the best way to learn how to do a particular kind of writing is to closely read that kind of writing.[14] In supervising higher level legal research degrees, professors often start by requiring students to read a dozen or so articles in the area and in the style of writing they need to master themselves. In the research LL.M. and Ph.D. context, students might be asked to start by reading a combination of published law review articles and unpublished graduate theses. However, given the time constraints of most upper level J.D. students, asking them to read a dozen papers in a short amount of time, and still give them sufficient time to formulate a topic - and actually write something - would be unrealistic. In recent years, the author has experimented with requiring upper level writing students to read and analyze only *one* article, but to do it immediately when the semester started and to report back fairly quickly to the class on their observations.

In this vein, the author has developed a fairly informal legal writing analysis exercise that provides students with a solid grounding in the basic structure of a research paper. She has used this exercise as a small part of the formal assessment for the seminar in order to keep students very focused on it. The detailed instructions for this exercise are set out in Part II.B.3.[15] However, it may be worth briefly outlining two important features of the exercise at this point. The first is that students must learn to appreciate that writing is an evolving process and that no one is ever perfect. Even the most experienced writers are subject to criticism. Thus, the author typically includes at least one of her own articles as part of this exercise[16] to give students the message that it is important to learn to question and critique your professors' words. It is important that students learn that writing is a process in which we all – including professors – experience and work with constructive criticism. Where students have an opportunity to

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[14]　　See also *id*, at 815 ("In order to maximize the success of their own writing agendas, students need to be careful readers of other articles…. Good writers tend to be good readers.")

[15]　　See, in particular, Table 2 *infra*.

[16]　　Kwall, *supra* note 2, at 818 (discussing assigning the professor's own writing to her seminar students).

critique the professor's work, they come to understand also that the professor's critiques of their work are meant as constructive suggestions for them to work with, not mandatory requirements for getting a good grade.

The second feature the author likes to incorporate into the seminar is a commitment to go through a writing process of her own in tandem with the students. She attempts to hit all deadlines that she sets for students, including participating in the writing analysis exercise and the drafting of a short law review article or book chapter concurrently with the students working on their Notes. She also shares her drafts with students at points in the semester when students are asked to share their drafts with each other or with the professor. This enables her to demonstrate a number of aspects of the writing process, including approaches to researching, outlining, drafting, re-drafting, and general time management. It also enables her to empathize with students on issues such as balancing competing work pressures, study pressures, and family pressures with a writing project.

Such an approach has other benefits. It brings home to students that they are writing as colleagues in a shared enterprise that may well lead to a publication – and that they should aim as high as they can in this respect. It also evidences that it is possible to complete the task in the time allotted at a reasonably high standard. Finally, it gives the students a feeling that they are part of a writing community and that they are working together to achieve something, rather than having something imposed on them by a figure of authority such as a professor or institution. The additional side benefits for the professor are that it is a good way to force yourself to stay on top of your own writing agenda during the course of the teaching semester. A week-by-week outline of the author's approach to teaching scholarly writing follows.

2. The First Class: Setting out Objectives

The seminar will typically commence with a two hour class session where the professor explains the teaching methodology and the assessment for the class including: the writing analysis exercise, the class participation component, and the Note writing part of the class. She also includes an introduction to scholarly legal writing. This is a brief written set of guidelines on developing a scholarly writing project that students may refer back to over the course of the semester. It is generally available to students to read before the first class. It includes consideration of the general nature of scholarly legal writing, and defines some key terms, such as "topic area" and "thesis", while explaining the difference between them. An example of some guidelines the author has used in the past appears in Table 1. The guidelines combine information and interactivity. They contain simple questions for students to respond to while the professor illustrates her suggested approach to legal writing.

Table 1: Introductory Guidelines for Writing a Legal Note

<u>Introduction to Writing a Legal Note</u> An important part of learning to write a good legal paper in a law review format is learning what you think makes good legal writing in this genre. Although this is to an extent a matter of personal taste,

there are some basic issues that are common to all good legal writing and can be mastered with careful thought and some effort. They include developing a clear thesis, researching relevant sources thoroughly, and structuring your arguments clearly in support of your thesis.

It is important to understand the difference between a topic (or subject area in which you might want to write) and a legal thesis (or research question). A topic is a generic description of the area in which you want to write. A thesis is a specific proposition that you plan to argue for, or against, in your written paper. For example, you might want to write a paper in the area of 'privacy protection for Internet shoppers'. This is *not* a thesis, as it is not a proposition you can argue for or against. It is a subject area or general topic. An example of a *thesis* in this area might be: "Because privacy rights are not effectively protected in an online environment, it is important for Congress to create online privacy rights that can be enforced in practice." This is a proposition that you could argue for or against in the body of a paper. In reality, you would present both the case for your thesis and the case against, and explain to the reader why the arguments for your thesis are preferable to those against it. Obviously, any one topic or subject area potentially lends itself to many possible theses.

Exercise 1: Give an example of another thesis – or research question - you could develop in the subject area of 'privacy protection for Internet shoppers'.

Once you have decided on your basic thesis, you have to consider the kinds of issues you will need to develop to convince the reader of your position. This will involve detailed legal argument for and against the thesis. You should also ensure that you have briefly, but clearly, explained all the key terms and concepts in the introductory sections of your paper.

Exercise 2: What issues/terms may need to be defined or explained to write a paper supporting the thesis presented above about the need for Congress to legislate to protect online privacy?

When you have clarified the scope of your thesis by explaining the key terms and issues, you will need to develop arguments both for and against your thesis. As with all good legal writing, it is important to consider both the pros and cons of your thesis in order to fully develop your case, and to explain why the position you take should be preferred over any competing arguments. The development of supporting arguments is a somewhat subjective task and will involve careful planning. Deciding how many arguments/issues to incorporate in your paper, the order in which they should be presented, and the detail in which they should be presented will all be matters that involve some judgment on your part.

Exercise 3: What kinds of arguments do you think you might raise in the body of a written paper on the thesis outlined above?

Bear in mind you might have to re-visit and re-work many parts of your paper as you write successive drafts. After starting work on supporting arguments, you may realize that you need to revise your basic thesis in some way. Further, you may find that you are trying to include too much information without enough time or space, or that you do not have enough arguments to support your case. These are issues you constantly need to think about as you plan and write.

The final draft of your Note should be between 25 and 35 pages in length so you need to think carefully about how to use this space (and your time) economically and effectively. Trying to cover too many issues in too little time and space will likely lead to a poor grade. The chances are that you would have to sacrifice detailed legal analysis in favor of brief descriptions of each issue. Thus, you must think carefully about the balance and structure of your arguments. If your thesis is too broad, you may have to either narrow its scope, or confine your analysis to two or three main arguments with a brief summary of other relevant issues at the end of the paper.

On the other hand, if your thesis is too narrow, you may struggle to develop sufficient arguments to create a full legal Note. It is therefore very important that while you are surveying source material for your paper, you should think carefully about the scope of the thesis and the kind and amount of arguments and legal analysis you might raise in the body of the Note.

> In order to decide on a topic area and thesis, you will need to perform a detailed literature survey to work out what has already been written in your area of interest and what issues still remain to be covered. You can do this online (through resources such as LEXIS, Westlaw, and the Internet generally), and you should also browse through relevant areas of the law library. The librarians can help you with your literature survey.
>
> The following exercise should help you with your Note preparation. The idea of this exercise is to have you analyze a law review article in detail in terms of structure and content, so you can start thinking about how you would structure your own Note.
>
> *[The next section of the seminar materials sets out the requirements for the legal writing analysis exercise. They are detailed in Table 2 in Part II.B.4 infra.]*

From these guidelines, it is clear that the professor wants the students to learn that in developing a research paper, they need to first identify a topic area, research it, and formulate a legal thesis - or research question. They will then need to come up with legal arguments that flesh out their position and that argue for and against the proposition they have set forth in the research question, drawing on appropriate authority where possible. Finally, the students should be able to come to a conclusion on that proposition, based on detailed legal reasoning. A key point that students should grasp early on in the semester is that they need to know the difference between a topic area and a research question (or thesis). This is a common trap for new writers.

In the information law area in which the author teaches, students will often describe their research question as being something like "information privacy" or "fair use in digital copyright works". It is important that students quickly come to appreciate that these are broad topic areas, but that more research and thought is required to develop an actual thesis that can form the basis of a research paper. Once this work is done, and done properly, it is much easier to structure the writing project. However, if the student starts writing with only a vague topic area in mind, she is much more likely to run into problems in terms of not having a clear structure and going off on tangents. Thus, a thesis in the information privacy area, as noted in Table 1, would be: "Because privacy rights are not effectively protected in an online environment, it is important for Congress to create online privacy rights that can be enforced in practice." This is a thesis because it contains a distinct proposition that the student can argue for and against.

It is also important that students very early in the process make an appointment with a librarian, and start utilizing the library and its resources for background research to formulate a thesis. The professor can make a choice whether to bring the librarians into the classroom or to require students to go to the library and make individual appointments with librarians in the first instance. The author has tried both approaches – of course, under either approach students should at some point make contact with a research librarian individually. The advantage of not inviting librarians into the classroom is that forcing students to find their own way into, and around, the library and its staff better approximates the kinds of skills that students will have to master in the "real world" either as practitioners or academics. The upper level of the J.D. degree can be a good place to start this approach. Of course, the advantage of bringing a librarian into the

classroom to begin with is that it gives the students a better idea of who the library personnel are, and what they do. Either approach can work, and it is obviously a matter of individual choice for the professor. Naturally, the professor can make this decision in consultation with the students from year to year.

The author typically concludes the first class by moving into the instructions for the writing analysis exercise. In this exercise, each student chooses one of a group of law review articles set out in a list in the reading guide. The list includes work by senior scholars, junior scholars, and students. Each participant in the class must analyze her chosen article for an informal oral presentation over the following three to four classes.[17] While undertaking this exercise, students should also be reading more broadly to start identifying a broad topic area in which they want to write. The idea is to have done enough reading to formulate a thesis and a research paper outline by the last week of the writing exercise presentations - around week four or five of the semester. The outline includes the proposed research question, identification of the key arguments for and against the proposition set out in the research question, and a list of readings considered to date.[18]

3. Weeks Two to Six: Writing Analysis Exercise

The writing analysis exercise is generally structured around three to four topic areas related to the subject matter of the course – in the author's case, usually cyberlaw/information law. This might include topics like online privacy, intellectual property rights online, Internet governance, cyberspace jurisdictional issues, or electronic commerce. The exercise will typically include three to four recent law review articles or published student Notes in each of the chosen topic areas. Preferably, these articles would comprise a variety of different writing styles – from doctrinal to comparative to purely theoretical. The author also tends to include at least one article she has written herself for the reasons described in Part II.B.1.[19] She then allocates each of one of the following three to four classes for examination of the articles in each of the respective topic areas. Thus, if the three chosen topic areas were: (a) privacy rights; (b) Internet governance; and, (c) intellectual property online, the privacy articles would be assigned for one week, the Internet governance articles for the following week, and the intellectual property articles for the week after that.

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[17]   This bears some similarity to Professor Kwall's approach of focusing particular class sessions on an in-depth analysis of one article: Kwall, *supra* note 2, at 816. The key difference is that Professor Kwall is contemplating a group of students all focusing on the same article, whereas my approach requires each student to present her own chosen article to the rest of the class. To some extent my approach sacrifices depth of analysis of the given articles – because less time is spent on each article. However, the advantages are that different articles often prompt different reactions in students which allows the class to compare structural differences between articles within the same class session. Of course, with Professor Kwall's approach, these structural comparisons can be made from week to week.

[18]   This is fairly close to the approach Professor Kwall describes on students preparing their Note proposals: Kwall, *supra* note 2, at 818 ("Historically, I have required an outline and bibliography three to four weeks into the semester …").

[19]   *id*. (use of professor's own work as seminar reading material).

Each article is allocated to one student, usually on the basis of expressed interest. Students are not required to read any of the other articles, although they are welcome to do so either for purposes of class discussions over succeeding weeks or to formulate a research paper proposal in that area. Students are given the second week of the semester off classes in order to work on the writing analysis exercise. Thus, the oral presentations for the exercise take place from weeks three to five, or three to six of the semester, depending on how many students are enrolled and how many topic areas are covered. Students are required to obtain their own copy of the article either from the library or from one of the online services like Westlaw or LEXIS. Articles are not distributed to students by the professor. Again, this is because it is important for students to start getting hands-on experience with legal research technologies from the first week of the semester. Once they have logged on to a database, they are more likely to experiment with it and begin to feel comfortable with it in terms of their larger research project. They will also have more useful tips to share with their peers in future classes on their own approaches to research methodology.

Once students have obtained their articles, each of them is required to read the article at least once with the following questions in mind. Each student must make an informal in-class presentation based on their answers to these questions. The class presentations are required to be made in an informal workshop format. PowerPoint and other visual aids are not permitted because they tend to distract students from focusing on thinking and communicating collaboratively about the writing process. The assignment questions are set out in Table 2.

Table 2: Assignment Questions for Legal Writing Analysis Exercise

Assignment Questions:

1. What is the author's thesis?
2. Present a brief synopsis of the author's main arguments.
3. How does the author present the arguments structurally?
    Consider issues like:
    a. What information is in the introductory section?
    b. What information is in the conclusion?
    c. How long is the introduction?
    d. How long is the conclusion?
    e. How does the author structure the body of the text?
    f. Are arguments developed in a logical order that is easy to follow?
    g. Does the author use headings/sub-headings to guide the reader?
    h. If so, are these signposts to the reader effective? Why/why not?
4. What are your main criticisms of the author's arguments?
5. What do you like about the author's arguments?
6. What are your main criticisms of the structure of the article? How might it be improved?
7. Did you learn anything from this exercise that you think might help you in writing your Note? Explain.

These assignment questions require students to consider both substantive and structural issues in relation to their chosen law review article.[20] This makes them focus on the structure of the piece to the same extent as they are thinking about its substance. Importantly, students are learning about the interaction between structure and substance. They are learning that a writer can only make a strong legal case with a clearly structured piece of writing. This is the kind of exercise that is not often undertaken in law school,[21] and it can be very beneficial in a seminar class.

The author has experimented with various different iterations of this exercise. Initially, students were required to write up and submit their responses to these assignment questions for formal grading and feedback.[22] However, eventually the author found this to be largely unnecessary. The initial aim for doing this was to have the students take the exercise seriously. However, it soon became clear that students were happy to undertake the exercise on the basis of a class presentation alone. They would take it seriously if they had to verbally present their thoughts, regardless of the need to submit their thoughts on paper. Also, there was a lot of redundancy with the requirement of submitting the exercise on paper. Class presentations basically repeated – almost verbatim – what students wrote down and submitted. Requiring the writing therefore wasted the students' time. It also involved a need to allocate marks between the oral and written versions of the exercise, which largely ended up being the same mark in both cases because the answers were pretty much the same in both cases. Thus the two sets of marks were largely redundant.

The author has also gone back and forth about how many marks to allocate to this exercise, assuming a need to formally grade it at all. When the written component was required, the author tended to allocate up to 30% or 40% of the overall class grade to the exercise. This included sub-components for: (a) oral presentation; (b) class participation during other students' oral presentations; and, (c) written submission. More recently, the author has dropped the allocation of marks to 20% of the seminar grade which involves 15% for the oral presentation, and 5% for class participation/contribution on other students' presentations. This leaves 80% of the overall grade for the larger research paper, which seems sensible given that the focus of the seminar is on writing the Note.

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[20] On the importance of considering both substance and structure of legal literature in a law school seminar environment, see *id*, at 816.

[21] *id.*, at 815 ("[A]lthough students may read parts of law review articles for various legal writing assignments, or even as part of assignments for other courses, in these instances the reading is usually geared toward the objective of learning the material in order to accomplish the specific task of writing a memorandum or performing well on an exam. In the seminar format, however, students have a luxury they do not enjoy elsewhere in law school – the ability to read an article just for the sake of learning and enjoying the material without any other end in mind.")

[22] This is similar to Professor Kwall's requirement of an "article review" of one of the articles assigned in her seminar class: *id*, at 817. The difference being that Kwall's article review was somewhat like a book review in which she "expected students to go beyond a critique of the article they selected and present their own analysis of the topic": Kwall, *supra* note 2, at 817.

In terms of assessment generally, there are also hurdle requirements throughout the semester that students must meet in terms of submitting drafts and outlines in a timely fashion. Failure to meet deadlines results in a penalty in the final grade.[23] Students typically have not regarded this as particularly onerous if they understand that it is in their best interests to stick to the deadlines in terms of preparing the best paper they can write within the time allotted. In other words, students have generally regarded this approach as "tough, but fair". Additionally, if a professor is prepared to write a paper within the same timeframe as the students, the students appreciate that: (a) the deadlines and timeframe are realistic, and, (b) the professor can empathize with what students are going through in the writing process. Of course, this is not always possible for professors with heavy administrative loads, for example.[24] But the author has found that where she is able to put the effort into writing a paper along with the students, they appreciate it, and seem to enjoy the writing process as more of a shared experience than a task imposed upon them.

4. Week Six Onwards: The Writing Process

After completion of the class presentations on the writing analysis exercise, the focus of the class turns to Note writing. Rather than work on the basis of regular substantive classes, the schedule for class sessions from this point onwards is decided by the professor in consultation with the students. This is why it is important for the professor to have approved the Note topics – or come as close to final approval as possible – by the time the writing analysis exercise presentations are completed. At this point in time, the students must have a good sense of the direction in which their research is likely to take them and must be able to make relatively well informed decisions about what kind of support they will need going forwards both from their classmates and from the professor. Note topics do not have to be in the same area as the article chosen for the writing analysis presentation. What often happens is that students with pre-set ideas about their topic areas happily start researching in the background while preparing their writing analysis exercise in another area. Students who are initially less sure about their likely topic area tend to be more guided by information coming out of the writing analysis exercise in terms of potential substance for a Note.

From this point onwards, the author has tended to work flexibly in a combination of styles with students to help them develop their research papers to final completion. The styles include one-on-one discussions, small group discussions, online communications (that may involve discussion boards or wikis), full class discussions, and

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[23]   Professor Kwall takes a similar approach, although she appears to be more flexible than I am with respect to the submission of the final draft: *id*, at 820 ("[I] tend to be strict with respect to the outlines and first drafts, but liberal in terms of the final papers. Barring extenuating circumstances, I do not allow extensions for the outlines and first drafts, as these are intended as checkpoints for the overall writing process. I will deduct points from the final grade if these assignments are turned in late. In contrast, for the final papers, I usually select a due date the week after classes end as a baseline, but allow students to vary their individual completion times according to their respective circumstances.")

[24]   In the spring of 2009 I was in fact unable to commit to writing an article along with the students due to deadlines on a book contract, but I attempted as best I could to maintain my book chapter writing deadlines to meet those of the students.

facilitated work in small groups or pairs. The professor has to be sufficiently flexible to work in consultation with the students to figure out which approaches will be the most beneficial at which point in time. Because of the amount of individual attention to students and general flexibility required here, this method probably would not work very effectively in a seminar class of more than about twelve to fifteen students. Full class sessions are not jettisoned in this approach. However, the author generally attempts to timetable them to facilitate, rather than interfering with, the students' individual writing processes. Group sessions are best held at times when students are facing common problems and challenges within their respective writing processes. Thus, they can be useful at crucial stages of draft preparation, or to give general group feedback on drafts.

While flexibility is required here, it is important that students have some sense of structure, particularly in relation to deadlines. Thus, it is important to require all students to submit at least a first draft of their research paper on an agreed timeline. The author has generally aimed for week 9 or 10 of the semester.[25] This gives the students enough time to write something substantive, but it also leaves enough time at the end of the semester for them to complete their projects, taking into account feedback on the first draft. It is important to be flexible in terms of allowing students to submit extra drafts of either the whole paper or of specific sections of the paper both before and after this deadline, as long as everyone has met the deadline of at least one substantive draft of the paper on a set date. This keeps everyone on track, while allowing flexibility to cater to individual writing styles and approaches, and dealing with specific issues that may arise in respect of particular papers.

It is important that when students are required to submit their first drafts, the professor also have a first draft of her paper available to show students: that is, in seminars where the professor is attempting to write a paper along with the students. The students then have an opportunity to critique the professor's work, and take a break from their own writing, for a week or so while the professor is preparing feedback on their drafts.[26] It is a good idea to schedule a full class session the week after the drafts are due to workshop the professor's and the students' drafts. This can be a good opportunity for the professor to share some general feedback with the students, and possibly also to have the students comment on each other's drafts. This can be done in pairs or small groups to make the reading burden on each student manageable. The professor should, of course, prepare individual written feedback on drafts, but should also come to the group session with general comments on problems that she might have identified in the drafts more generally. She can also compare those problems with difficulties she may have encountered in writing her own first draft – some of which the students may have identified while reading her draft.[27]

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[25]   Again, there are some similarities here with Professor Kwall's approach. She requires a first draft around weeks 8 to 9 of the semester: Kwall, *supra* note 2, at 818.

[26]   *id*, at 818 (talking about value of giving the students a break from their own workload and looking at some of the professor's writing; Kwall does this over a pizza lunch which is a nice idea).

[27]   Kwall has also commented on students' responses to the professor's writing: *id*, at 816 ("[I]t is fun, and often instructive, for professors to see a given article through their students' perspectives. There have been many times in the past when my view of a particular article has been influenced by my students' reactions and commentary.")

In the past, the author has generally made it optional for students to look at her own draft. She has also typically prepared some notes on her own draft about problems she has encountered in the writing process and issues on which she would value feedback. She has found that some students are interested in critiquing her work and comparing it with theirs, while others prefer to focus their time on their own work. Some will go to the trouble of reading the professor's draft, while others will only look at the notes on her draft. The point of the exercise is that the students watch a "professional" scholarly writer go through the process at the same time they are undertaking it usually for the first time. Thus, the shared experience, and the ability to self-critique in a group session after the first draft is due tends to be good for the class dynamic whether or not any or all students have actually read the professor's draft.[28]

In terms of the balance between full class sessions and individual one-on-one meetings with students, the author's approach has tended to vary from year to year depending on the needs of individual students. Typically, she holds at least one or two individual face-to-face meetings with each student – usually, one around the time of formulating the proposal, and one later in the writing process. These are generally augmented with detailed email and sometimes telephone discussions throughout the semester. Generally, students prefer two to three full class sessions during the writing process. The first is usually to compare topic areas and research approaches early in the writing process. Then, there are usually one or two group meetings around the time of the first draft. Sometimes students like to wait until they have completed their first drafts to talk to each other as a group, and sometimes they like talking together as a group while working on their first drafts.

The class workshop sessions during the writing process are useful on a number of levels. Students can compare notes with each other and with the professor on their approaches to research, writing, and analysis of relevant arguments. Students can identify others whose work touches on their own. This enables them to communicate outside of formal class sessions and occasionally to give feedback on each other's written drafts. Where students are looking at each other's drafts, it is of course important to have given sufficient instruction and feedback on plagiarism to ensure that students understand when and where they should attribute ideas to other people. The author has paradoxically found that her students are actually overly conservative about attribution when working cooperatively in this format, so plagiarism has not been a major problem. Students tend to be respectful of each other's efforts in this format and keen to give credit where someone else has helped them out.

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[28] Professor Pausch has also talked about the importance of professors being able to facilitate the ability of their students to self-critique their work: PAUSCH, *supra* note 11, at 113 ("[Professors] need to let [our students] know how to judge for themselves how they're coming along. The great thing about working out at a gym is that if you put in the effort, you get very obvious results. The same should be true of college. A professor's job is to teach students how to see their muscles grow when they look in a mirror.")

This writing-up stage of the seminar draws heavily on the way in which a British professor might supervise a research LL.M. or Ph.D. degree. In that context, professors need to be sufficiently flexible in approach and sufficiently well-versed with where each student is in the writing process to ensure that everyone is on track and that everyone is getting the help that they need with the writing process. It can actually be a lot of fun and very rewarding to work with students as if they were supervisees in research degrees. They appreciate the vote of confidence in their abilities, and the chance to work more collegially and collaboratively with their classmates and with the professor. All in all, this can be a very rewarding, if somewhat time-consuming, experience. The remainder of this essay sets out the major advantages and disadvantages of this method.

III. ADVANTAGES OF THE WRITING WORKSHOP

In situations where it is feasible to attempt this kind of seminar teaching, students obtain benefits including a sense of greater autonomy and responsibility in relation to their own writing. They are put in the position of sharing a writing experience with classmates and the professor, rather than being assigned a project and monitored from above. This also leads to a greater sense of ownership and engagement of the students. They generally seem to feel that their work is valuable as part of an important scholarly tradition and, at the end of the day, may be publishable.

They also learn to think critically both about their own work and about the work of others – classmates as well as professors and other published writers. They learn that scholarly writing is a process, and that it is important to be able to take criticism as well as to thoughtfully critique the work of others. These are transferable skills that can be brought to bear in any kind of career, legal or otherwise, that involves oral and written communication. This "critiquing" aspect of the class can lead to greater respect between peers in class and between the students and the professor. Another advantage here is that it makes the writing process – and the process of teaching students how to write – more transparent and less isolating at the same time. Rather than the professor setting some vague goal that students have to try and meet with their writing, the professor is working with students intensively and interactively week by week, and hopefully writing alongside them, and explaining the process as she goes. This should give the students a better idea of how to approach their writing and how to develop and achieve their ultimate scholarly goals in their writing.

In terms of comfort with relevant resources, this method also has benefits. It encourages students to get into the library and work one-on-one with librarians as well as with peers and professors. It thus facilitates the students' engagement with library resources from the early part of the semester. Although this method of teaching can potentially be highly resource intensive in terms of the time of librarians and professors devoted to helping students, it is low cost in terms of other resources. There is no need for expensive classroom technology, for example. Pretty much anyone can teach in this style if they have access to a seminar room. Not much else is needed unless the professor wants to add things like wikis or online discussion boards to get students sharing ideas

online in between class sessions. Even this can be accomplished in a small class with something as simple as a group email list.

Another advantage of this approach is that it can work for a wide variety of topic areas, and is particularly useful for seminars that are geared towards advanced levels of classes that are taught separately outside the seminar. Thus, in the example of an advanced cyberlaw (or information law) seminar, students are not deprived of substantive material on these topics in other courses, so can come into the seminar focused on one particular area in which they want to write. In cases where a seminar is the only subject at a given law school focused on a relevant topic area, this method might not be as appropriate. In these cases, students will not have the opportunity to obtain substantive grounding in the subject matter outside the seminar, so they may require more seminar time to be devoted to the substance of the seminar topic.

IV. DRAWBACKS OF THE WRITING WORKSHOP

Outside the unsuitability of the Ph.D Lite approach for seminars that do not extend on other substantive courses, there are a few other potential problems that may be encountered by those interested in exploring this method. For one thing, student expectations can be problematic. If the school typically presents seminars in the traditional format involving six to eight weeks of substantive classes followed by oral presentations on Note topics, it can be difficult to break student expectations, and to engage students in a new format. This is why it is very important to use the first class to set up the expectations and requirements of the seminar and the fact that the first class comprises the only session in which the professor will monopolize or direct the class discussion in a major way. It is also important for class requirements to be explained in detail in a written document that students can refer back to during the semester – and that is made available to enrolled students before classes commence if possible. This also helps with students who have not attended the first class for various reasons.

Teaching in this format is also potentially more time intensive than traditional seminar teaching for a number of reasons. Professors have to be flexible in responding to individual student needs. In this format, students often produce more than one draft and professors have to be available to give feedback in a timely fashion on often multiple drafts. Where students have more time to write built into the seminar structure, they will (hopefully) write more. This is good, but it does impose more of a time commitment on the professor. Additionally, the professor has to be vigilant about ensuring that each student is keeping on top of her writing agenda. It is important not to let any students slip through the cracks. When there are regular scheduled class meetings throughout the semester, it is easier for the professor to keep track of everyone than when the seminar is moving from group work to individual meetings and back to group work. The professor must keep checking in on all students, at least via email, if she has not heard from a student for a significant period of time, say, every three to four weeks at the very least.

Add to these time pressures the fact that, if the professor is going to attempt to write something along with the students, she also has to factor in sufficient time in her

workload to achieve this. There would be nothing worse than the professor accepting the same deadlines as the students and then failing to meet the deadlines the students are required to meet. Professors attempting to write along with the students should therefore ensure that they realistically have the time to do so, bearing in mind that they are likely to have additional meetings and receive additional drafts from the students throughout the semester over and above what is technically required in the seminar instructions. The professor should be prepared to give students an extension if she herself is unable to meet what is supposed to be a realistic deadline.

V. CONCLUSIONS

At the end of the day, the author has concluded that there are definitely some useful tips that American law school seminar teachers can take from the training of higher research degree students in other countries. The PhD-Lite focus on getting students to think about the structure and process of scholarly writing, along with the intensive workshopping of drafts can be very useful within the context of the law school upper level writing requirement. Of course, this approach has to be tailored to the realities of our curriculum. Professors must be realistic about what can be achieved within typically only one semester. Of course, American law schools also have the option of focusing the writing requirement more on practical legal writing skills, such as writing briefs in lieu of scholarly writing. However, there is something to be said for requiring graduate students to master some scholarly writing. Many of the skills are transferable, and a substantial piece of scholarly writing, particularly a publishable Note, can be a useful addition to a student's curriculum vitae whether the student is looking for work in practice or in academia. Given the pressures on students to find a job in a competitive job market in troubled economic times, and to be good writers in whatever job they find, this method certainly has some advantages.