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Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing

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NEITHER DEAD NOR DANGEROUS: POSTMODERNISM AND THE
TEACHING OF LEGAL WRITING

Adam Todd*

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I. INTRODUCTION

The term postmodernism, as applied to the law, has engendered much controversy.¹ It has been called “dangerous”² and characterized as “trendy”³ by some and “useless” or “irrelevant” by others.⁴ More recently it has been branded as un-American⁵ and frequently is declared “dead.”⁶

¹The term “postmodern” has generated intense debate and outright academic quarrels not just in law but in other disciplines such as literature. Compare Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 MICH. L. REV. 461, 461 (1997) (a legal parody of postmodern themes), and Arthur Austin, *A Primer & Deconstruction’s “Rhapsody of Wordplays,”* 71 N.C. L. REV. 201, 202–03 (1992), and Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2352 (2001), with Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 88 (2000) (noting the same types of reactions provoked by postmodernism and deconstruction by feminist scholars), and CHRISTOPHER KEEP ET AL., *POSTMODERNISM AND THE POSTMODERN NOVEL* (2000), available at <http://elab.eserver.org/hfl0256.html>.

²See John C.P. Goldberg, *On the Merits: A Response to Professor Sherry*, 50 VAND. L. REV. 537, 550–51 (1997) (referring to Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 485 (1997)); see also Michael Donaldson, *Some Reservations About Law and Postmodernism*, 40 AM. J. JURIS. 335, 339 (1995); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 141 (1998).

³See Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053, 1057 (2001).

⁴See Feldman, *supra* note 1, at 2356 (citing ROBIN WEST, *CARING FOR JUSTICE* 204 (1997)).

⁵See Stanley Fish, *Don’t Blame Relativism*, 3 THE RESPONSIVE COMMUNITY 27, 28 (2002), available at <http://www.gwu.edu/~ccps/rcq/Fish.pdf> (commenting on post-9/11 attacks on postmodernism such as Edward Rothstein’s, *Attacks on U.S. Challenge the Perspectives of Postmodern True Believers*, N.Y. TIMES, Sept. 22, 2001, at A17); see also Jay P. Moran, *Postmodernism’s Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon’s Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 159 (1997); Richard Rorty, *The Unpatriotic Academy*, N.Y. TIMES, Feb. 13, 1994, § 4, at 15, reprinted in RICHARD RORRY, *PHILOSOPHY AND SOCIAL HOPE* 252 (2000).

⁶See Gary Pavela, *Applying the Power of Association on Campus: A Model Code of Academic Integrity*, 24 J.C. & U.L. 97, 102 (1997); see also Glen Scott Allen, *Baptismal Eulogies: Reconstructing Deconstruction from the Ashes*, 3 POSTMODERN CULTURE ¶¶ 4–8 (Jan. 1993), available at <http://www.iath.virginia.edu/pmc/text-only/issue.193/review-7.193>; Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 89 (2000) (citing JEFFREY T. NEALON, *DOUBLE READING: POSTMODERNISM AFTER DECONSTRUCTION* 22 (1993)); see generally *AFTER POSTMODERNISM: AN INTRODUCTION TO CRITICAL REALISM* (José López & Garry Potter eds., 2001); TERRY EAGLETON, *AFTER THEORY* (2003) (arguing postmodern literary theory was relevant in its heyday, but not any more).

Postmodernism is an undeniably important concept and has deeply affected the way texts are taught to be read and written.⁷ Postmodernism's effect on legal theory has also been profound.⁸ Many would agree postmodernism is impossible to ignore and firmly imbedded in the discourse of the legal academy and pedagogy of many law classes.⁹

This Article explores the ways postmodernism has affected the teaching of legal writing in American law schools. While most law school classes are modernist in structure and pedagogy, the legal writing course in most law schools is, consciously or unconsciously, often quite postmodern. On one hand, legal writing professors' work within a modernist paradigm which seeks to normalize the law and create unitary meaning from the morass of texts and ideas considered the law.¹⁰ On the other hand, legal writing professors have a dangerous postmodern bent to their teaching and engage in a number of postmodern paradoxes in their work in the academy.¹¹ It is the postmodern components of legal writing professors' work that provides strength to the profession and helps prepare law students for both modernity and postmodernity.¹² Far from being dead or irrelevant,

⁷See STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 188-98* (2000); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURIES END 189-91* (1996); Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 2d 39, 41 (2000).

⁸See FELDMAN, *supra* note 7, at 188-98.

⁹See *id.* at 137; MINDA, *supra* note 7, at 91, 189, 251; Peter C. Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2507 (1992). Proof of postmodernism's ubiquity in legal scholarship is that a Westlaw search on March 6, 2006 for the words "postmodern" and "postmodernism" resulted in over 5300 entries.

¹⁰See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 127-36 (2003).

¹¹See Eichhorn, *supra* note 2, at 105 ("The term 'dangerous supplement' stems from Jacques Derrida's analysis of the relationship between speech and writing."); see also Joel Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091, 1120-21 (1997). A number of critics have branded postmodernism as dangerous. See generally POSTMODERNISM AND ITS DISCONTENTS: THEORIES, PRACTICES (E. Ann Kaplan ed., 1988) (a collection of essays branding postmodernism as dangerous); see also HANS BERTENS, *THE IDEA OF THE POSTMODERN: A HISTORY* 203 (1995) (quoting Nancy Hartsock, *Foucault on Power: A Theory for Women?*, in FEMINISM/POSTMODERNISM 157, 160 (Linda J. Nicholson ed., 1990)); Goldberg, *supra* note 2, at 550 (responding to Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 485 (1997)).

¹²To be able to function within the norms of the legal profession, students need to be grounded in modernity; to be able to function in the age of globalism and the internet, students need also the ability to function in the postmodern era. See *infra* Part III.

postmodernism is still alive and well in many aspects of the legal writing classroom.¹³ This Article seeks to acknowledge the contribution postmodernism has made to the teaching of legal writing and how postmodernism's influence on legal writing has affected the legal academy as a whole.

II. DEFINING POSTMODERNISM

Part of the controversy surrounding postmodernism comes from the fact that it does not have one clear definition.¹⁴ Another problem is the abstruse language used by many writers on the subject.¹⁵ In fact, postmodernism has often been identified with poor writing and communication skills.¹⁶ The term "pomobabble" emerged within pop culture to illustrate this trend.¹⁷ Like most articles addressing postmodernism, this one begins by defining the term and lamenting the lack of a clear definition.¹⁸ It is this lack of clear definition that makes postmodernism difficult to appreciate and creates

¹³To dismiss or denigrate postmodernism and its contribution to the teaching of legal writing is either a disservice to or a misunderstanding of the important tools postmodernism provides to teachers, scholars, students and practitioners of the law.

¹⁴See Donaldson, *supra* note 2, at 335 (citing Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 456 (1991)) (referring to Jennifer Wicke, who states in her attempt to define postmodernism, that there are "more than thirty-one flavors" to be found). Even the spelling of the word is uncertain: "Post-modernism" tends to be used by critics of postmodernism, "postmodernism" by its supporters. See Postmodernism, available at <http://en.wikipedia.org/wiki/Postmodernism> (last visited Sept. 27, 2006).

¹⁵Giving an example of abstruse language, Clare O'Farrell writes:

Opening a book with the hermetic title *Postmodernism and Heterology*, one reads: "The paradigmatics of and pragmatics of the game, the philosophies of erotics, and the privilege accorded the work of art and literature—as players in the critical/theoretical field—have to be related to the question of writing in post-structuralism."

Clare O'Farrell, *Postmodernism for the Uninitiated*, in UNDERSTANDING EDUCATION: CONTEXTS AND AGENDAS FOR THE NEW MILLENNIUM 11 (Daphne Meamore et al. eds., 1999), available at <http://michel-foucault.com/pomo.html> (quoting JULIAN PERFANIS, HETEROLOGY AND THE POSTMODERN: BATAILLE, BAUDRILLARD AND LYOTARD 5 (1991)). O'Farrell also includes this joke: "'What do you get when you cross a Mafiosi with a postmodernist?' The answer of course is 'someone who will make you an offer you can't understand.'" *Id.*

¹⁶See *id.*; see also Arrow, *supra* note 1, at 608; Douglas Litowitz, *Postmodernism Without the 'Pomobabble'*, 2 FLA. COASTAL L.J. 41, 45–46, 76 (2000).

¹⁷See Arrow, *supra* note 1, at 608.

¹⁸"Everyone begins the discussion of postmodernism by asking what the word could possibly mean." JOHN MCGOWAN, POSTMODERNISM AND ITS CRITICS, at ix (1991).

problems in its application to legal contexts. Even more irksome to many in the legal community, however, is postmodernism's disdain for and rejection of the very act of creating a single definition.¹⁹

The term postmodernism is generally used in two ways.²⁰ In popular usage and in its most simple form, the term postmodernism is used as a marker of a cultural era identified as the period after modernism or the post-modern era.²¹ Modernism, as an era, is defined as the period when people came to terms with the Industrial Age and explored innovative and non-traditional methods of expression.²² Under this usage, postmodernism is defined as simply the period when people are coming to terms with the computer or information age as opposed to the Industrial Age. Following this definition, we are all living in a postmodern period and any developments coming from this electronic or information age, can be considered postmodern.²³ Thus, a piece of legislation regulating the internet, such as the Financial Services Modernization Act²⁴ or the United

¹⁹ Stephen Feldman specifically avoids defining postmodernism, stating: "A proffered definition for postmodernism would appear to reduce it to some fundamental core or essence, which would be too foundationalist, too essentialist—too modernist." See FELDMAN, *supra* note 7, at 38.

²⁰ See J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1967–69 (1992); see also James Boyle, *Anachronism of the Moral Sentiments? Integrity, PostModernism and Justice*, 51 STAN. L. REV. 493, 497 (1999) (stating that "it seems useful to distinguish between postmodernism as a kind of arch cultural schtick and post-modernism as an earnest epistemology"). Michael Donaldson points out that postmodernism is also used as a methodology, "a way of reading texts and interpreting history using a cluster of tools, the chief of which is deconstruction." Donaldson, *supra* note 2, at 336 (1995). I see the methodology as integrated into the second part of my definition. The methodology is one of the products emerging from the theory-based definition of postmodernism.

²¹ Ihab Hassan points out that the term postmodern was used in a number of instances from as early as 1870 and the 1930s before the more recent popular use. Ihab Hassan, *From Postmodernism to Postmodernity: The Local/Global Context*, 25 PHIL. & LITERATURE 1, 16 (2001), available at http://www.ihabhassan.com/postmodernism_to_postmodernity.htm. Charles Jencks' *The Language of Postmodern Architecture* is credited as among the more recent works to shape and popularize the term. See, e.g., ROBERT ATKINS, *ART SPEAK: A GUIDE TO CONTEMPORARY IDEAS, MOVEMENTS, AND BUZZWORDS, 1945 TO THE PRESENT*, 118–20 (2d ed. 1997).

²² See AMERICAN HERITAGE COLLEGE DICTIONARY 876 (4th ed. 2006).

²³ J.M. Balkin separates the use of postmodernism as a label for or a referent to products emerging from the postmodern era. See J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1969 (1992).

²⁴ See Gramm-Leach-Bliley Financial Services Modernization Act, 15 U.S.C. §§ 6801–6809 (2000). In fact, the Financial Services and Modernization Act and the Safe Harbor Agreement

States-EU Safe Harbor Agreement,²⁵ could be called postmodern legislation or a postmodern law.²⁶

Such a broad definition of postmodernism fails to capture the more radical and complex meanings attached to the word by scholars in the past thirty years.²⁷ Scholars define and use the term postmodern not just to refer to an era but to a philosophical movement that has profoundly affected the way scholars look at the law and legal text in particular.²⁸ The core of this movement is a rejection of modernism.²⁹

Modernism has been characterized as a period when tradition and authority were rejected in favor of reason and science.³⁰ It is associated

also can be considered postmodern because they fit the characteristics of postmodern theory. See generally Adam G. Todd, *Fractured Freedoms: The United States' Postmodern Approach to Protecting Privacy*, in AMERICAN FREEDOMS, AMERICAN (DIS)ORDERS 319 (Zbigniew Lewicki ed., 2004).

²⁵ See Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 666,45 (July 24, 2000) (to be codified at 50 C.F.R. 216 and 15 C.F.R. 902).

²⁶ In order to clarify the distinction between postmodernism as an identifier of an era as opposed to a theory or philosophy, scholars refer to the period of postmodernism as the "era of postmodernity." See Balkin, *supra* note 23, at 1969; see also FELDMAN, *supra* note 7, at 8–9.

²⁷ Feldman points out that some scholars distinguish the different uses of the word "postmodernism" by referring to "postmodernism" as a cultural phenomenon and "postmodernity" "as a particular social, political, and economic arrangement." FELDMAN, *supra* note 7, at 8–9.

²⁸ See Donaldson, *supra* note 2, at 337 ("Postmodernism seeks to question not only objectivity, but the notion of subjectivity as well. It is this third branch of postmodernism, which both strives to be and loathes becoming a theory, which I believe presents a great danger for law."); Frances J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515, 520 (1992) ("Simply by asking how postmodern cultural forces are affecting legal practice, we adopt a critical and interpretive posture toward the social conceptions . . . [without which] we would not have 'postmodernity.'").

²⁹ Since postmodernism is essentially defined by its rejection of modernism, any discussion needs to begin with a clear understanding of the definition of modernism. Adding to the confusion is the fact that the term "modernism" is also difficult to define. See Postmodernism, www.jahsonic.com/PostModernism.html (last visited Sept. 27, 2006); see also Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 577–78 (1991) ("The first point to be noted is that postmodernism obviously is to be understood in relation to modernism. Characterizing an intellectual position relationally in this way defers the problem of definition. Since it's not very clear what modernism is, it's not very clear what postmodernism is."); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, 95 MICH. L. REV. 1927, 1933 (1997) ("[P]ostmodernism is generally defined by reference—it is that which is not modern.").

³⁰ See James Morley, *Defining Postmodernism*, in THE ELECTRONIC LABYRINTH (Christopher Keep et al. eds., 2000), available at <http://elab.eserver.org/hfl0242.html>; see also Donaldson,

with the Age of Enlightenment, the Renaissance and the Protestant reformation when divine and feudal authorities gave way to the rise of mercantilism, industrialization and secular governance.³¹ Modernists work to reduce meanings of ideas, words and texts to an “essential core or single truth.”³² Modernism assumes the autonomous and rational individual is solely responsible for finding the truth and creating meaning from the world.³³

Postmodernists claim modernism is too centralized and monolithic in its mindset.³⁴ Modernists rejected tradition and authority in favor of reason and science, but its views of reason and science seek out only single unifying theories of reason and science. Scholars have characterized modernism as espousing these single master or meta “narratives of truth.”³⁵ Modernists believe truth is a concept that is uncovered through progress. Modern forms and theories are considered part of progress or development within a linear conception of history.³⁶

Postmodernists reject articulating a single meaning or definition of truth or, in fact, any modernist concept. Skepticism is applied to the very meaning of words, even the word postmodernism.³⁷ The denial of its own definition thereby creates a paradox: postmodernism’s denial of the possibility of its own definition while simultaneously defining itself as

supra note 2, at 336 (“Postmodernism, then, is the rejection of this faith in rationalism, and a recognition that any argument, no matter how perfectly logical, is only as good as its presuppositions.”); FELDMAN, *supra* note 7, at 15–28.

³¹ See Jürgen Habermas, *Modernity Versus Postmodernity*, in A POSTMODERN READER 91, 91–92 (Joseph Natoli & Linda Hutcheon eds., 1993).

³² See Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1048 (1994).

³³ See FELDMAN, *supra* note 7, at 15–28; see generally Morley, *supra* note 30.

³⁴ See, e.g., Peter A. Alces & Cynthia V. Ward, *Defending Truth*, 78 TEX. L. REV. 493, 521–22 (1999); see also Postmodernism, www.jahsonic.com/PostModernism.html (last visited Sept. 27, 2006).

³⁵ See JEAN FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 34 (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979).

³⁶ See FELDMAN, *supra* note 7 at 15–28; see generally Morley, *supra* note 30.

³⁷ See Wicke *supra* note 14, at 456 (discussing the difficulty of defining postmodernism). Stephen Feldman specifically avoids defining postmodernism. FELDMAN, *supra* note 7, at 38, n.19.

such.³⁸ It is the identification, exploration and celebration of such paradoxes which characterize postmodernism and make it such a challenge to the student of postmodernism and abhorrent to those who seek clarity, unity of meaning, and stability in the works being characterized as postmodern.³⁹

Products emerging from this theory-based definition of postmodernism are also labeled as postmodern.⁴⁰ But these products, in order to be classified as postmodern, are not just dated from a certain time period, instead they must have certain characteristics that connect them to the underlying philosophy of postmodernism.⁴¹

Some may ask, what is the point or utility of identifying those components of the profession that are or originated from postmodernism.

³⁸ See Feldman, *supra* note 32, at 1048 (“Hence, postmodernism immediately presents a paradox. Postmodernism exists and even structures its own reproduction, yet postmodernism denies the possibility of its own definition.”) (footnote omitted).

³⁹ See Feldman, *supra* note 32, at 1048 (“Indeed, this paradox illustrates one recurrent aspect or theme of postmodernism: the recognition, exploration, and even celebration of this existence of various paradoxes.”). One core tenet of postmodernism is that the meaning of words and texts are never fixed or stable but instead are in a constant state of flux, thus, a word or text has multiple meanings. Similarly and more distressing to many in the legal profession, postmodernists see the concept of truth as similarly not fixed or stable and thus open to multiple interpretations. See *id.* at 1048 (“According to postmodernists, the meaning of a text is never grounded or stable, and therefore one can always find multiple meanings or truths.”). A particularly vehement brand of criticism has been leveled at postmodern reading of texts, particularly legal texts. See Goldberg, *supra* note 2, at 549–51. The very uncertainty raised by postmodernism is an anathema to the normative needs of the law as a societal regulator. See Donaldson, *supra* note 2, at 344 (“[L]aw must not be postmodernized, or it will cease to be law. Law is, by definition, about absolutes. . . . [P]ostmodernism, once it is adopted into legal analysis, quickly renders law impotent. Once relativism is accepted into law, there is no basis on which to justify legal prohibition or action.”).

⁴⁰ See Balkin, *supra* note 23, at 1969.

⁴¹ See *id.* Other disciplines have used the term “postmodern” to label a movement or style within their discipline. For an excellent survey of postmodernism’s emergence in various fields see Hans Bertens, *The Postmodern Weltanschauung and Its Relation to Modernism: An Introductory Survey*, in *A POSTMODERN READER* 25, 35–42 (Joseph Natoli & Linda Hutcheon eds., 1993). Architecture was one of the first professions to use such a label. Comparisons between law and architecture are common by legal scholars. For a recent example, see JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* xvii (West 2000); see also John Nivala, *The Architecture of a Lawyer’s Operation: Learning from Frank Lloyd Wright*, 20 J. LEGAL PROF. 99, 99 (1996). Certain types of paintings, sculptures, fashion and music are labeled postmodern. See Examples of “The Post-Modern in Everyday Life,” available at <http://www.georgetown.edu/faculty/irvinem/technoculture/pomoexamples.html> (last visited Oct. 26, 2006).

Indeed, Professor Stephen M. Feldman argues that postmodern legal scholars and their scholarship are not particularly useful to judges and practicing attorneys who “primarily want normative arguments to apply instrumentally to their practices.”⁴² He states that postmodern scholars detach themselves from the practical aspects of the law and mystify readers with “impenetrable terminology.”⁴³

I disagree. Postmodernism has become such a standard part of modern discourse that to ignore or write-off postmodern scholars and postmodernism in such a way is inappropriate for law professors as well as attorneys, judges and others in the legal profession.⁴⁴ Postmodernism helps us understand the patterns of thought that are emerging in this technological era.⁴⁵ It advances understanding of the law and jurisprudential theory for all in the legal profession.⁴⁶ Indeed, it is a scholar’s job to study and point out trends in his or her field, label those trends, and open a discourse on them.⁴⁷ To ignore or write-off postmodernism would be to perform incomplete scholarship lacking in complete rigorous inquiry into the field of law.⁴⁸

⁴² See Feldman, *supra* note 32, at 1093.

⁴³ See *id.* Professor Feldman further argues postmodern scholars’ “primary function [is] to deliver the goods by publishing articles.” See *id.* at 1099. But then, like any good postmodern scholar, he complicates this reductionist statement by arguing that the postmodernists play important roles in opening the legal community to “different voice scholars” (and then even this reductionist statement, he argues, can be made more complicated). See *id.* at 1102–05.

⁴⁴ See *id.* at 1093, 1099, 1102–05.

⁴⁵ See Balkin, *supra* note 23, at 1968 (“Furthermore, it is important to recognize that the postmodern epoch as such is already upon us. Postmodernism is a cultural phenomenon that has already happened and that we are only becoming aware of now.”); Donaldson, *supra* note 2, at 344 (“Clearly postmodernism cannot be ignored. The questions it asks about law and the criticisms it makes are far too important to go unanswered. If law cannot find a way to engage and respond to postmodernism, people will soon have little use for it.”); Feldman, *supra* note 1, at 2370 (“Postmodern culture, in other words, permeates all aspects of our lives, including the writing of theory.”); Litowitz, *supra* note 7, at 40 (“This ‘postmodern turn’ brought legal scholarship up to speed with the rest of the academy, where postmodernism was already well-established in such diverse fields as philosophy, literary theory, sociology, geography, art, and political science.”). See generally Feldman, *supra* note 1 (noting the attention postmodern debate has garnered among legal scholars); Litowitz, *supra* note 7.

⁴⁶ See Balkin, *supra* note 23, at 1969; see also Todd, *supra* note 24, at 319.

⁴⁷ See Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 254 (2003).

⁴⁸ See Litowitz, *supra* note 7, at 46–49. European academics state postmodernism as a part of a working European constitution. See, e.g., Marc Glendening, *Post-Modernism and the Silent Revolution*, EUROPEAN J., Nov.–Dec. 2005, at 8, 10, available at

The postmodern paradox, which arises in any article addressing postmodernism, is that the act of defining postmodernism is anti-postmodern because it is a reductionist and modernist act.⁴⁹ It is, however, this act of capturing and describing postmodernism that is useful for bridging the discourse between postmodern theory and the normative needs of the legal profession.⁵⁰ Such a bridge is needed in this age of postmodernity where the internet, globalization and rapidly changing technologies outstrip the normative boundaries of the law, and a more fluid paradigm is needed.⁵¹ Some argue the American Constitution is postmodern in its characterization as a “living document.”⁵² Some may also question the role of a theory such as postmodernism in a skills-based or practical class such as legal writing. The ancient Greeks often placed theory (*theoria*) and practice (*praxis*) as binary opposites.⁵³ Scholars historically have, and the legal academy particularly has, treated theoretical knowledge as superior to practical knowledge.⁵⁴ Since legal writing is considered a practical or skills-based course, it has suffered in the legal academy from this historical hierarchy.⁵⁵ This division between theory and practice, like the division between doctrine and skills, however, has come under criticism by contemporary scholars within and outside of the legal

movement.co.uk/main/pdf/MG%20Post-Mod.pdf; WENZEL, NIKOLAI, IDEOLOGY AND INSTITUTIONAL CHOICE: THE EUROPEAN CONSTITUTION AS REFLECTION OF EUROPE'S EMERGENT POSTMODERNISM 7 (2005), available at <http://www.pubchoicesoc.org/papers2005/Wenzel.pdf>.

⁴⁹ See Feldman, *supra* note 32, at 1046–48; Conference on After Postmodernism, <http://www.focusing.org/apm.htm> (last visited Sept. 27, 2006) (stating “[w]hat postmodernism teaches is not new. Heraclitus said, ‘You cannot step into the same river twice’ and his student added, ‘not even once, since there is no same river.’ The ancient Eristics showed the unreliability of logic alone.”).

⁵⁰ See Feldman, *supra* note 32, at 1093 (indicating that judges and attorneys “primarily want normative arguments to apply instrumentally to their practices”).

⁵¹ Some European academics see postmodernism as a component of a working European Union constitution. See, e.g., Glendening, *supra* note 48, at 10.

⁵² See FELDMAN, *supra* note 7, at 188–198; see also NIKOLAI, *supra* note 48, at 7.

⁵³ See SIDNEY I. DOBRIN, *CONSTRUCTING KNOWLEDGES: THE POLITICS OF THEORY-BUILDING AND PEDAGOGY IN COMPOSITION* 9 (1997).

⁵⁴ Indeed this may be an explanation for the denigration of legal writing within the legal academy. See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 115–16, 127–36 (2003).

⁵⁵ See *id.*

academy.⁵⁶ Some scholars have argued that theory requires abstraction and is often divorced from real life.⁵⁷ But such an argument should not detract from the privilege given to theory; if theory is indeed impractical, its value in the legal academy should cause it to have less status compared to the practical components of the academy.

Theory is given such privilege because theory, consciously or unconsciously, determines practice.⁵⁸ And conversely, practice shapes theory.⁵⁹ Similarly theory determines and influences pedagogy and vice versa. The two cannot be separated. The choice a teacher makes as to how she chooses to teach a class or structure an assignment is based on the theory she brings to the class.⁶⁰

Theories provide explanations for the way the world operates. In the physical sciences, theory provides explanations for the origins of the universe through the Big Bang theory or the development of human intelligence through evolution.⁶¹ In law, theory explains whether a contract will be found to be enforceable or whether a statement should be found defamatory. Similarly, in legal writing, theory explains how and what is taught in the first year of law school.

⁵⁶ See, e.g., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4–6 (1992); see also Suzanne Darrow-Kleinhaus, *Incorporating Bar Pass Strategies into Routine Teaching Practices*, 37 GONZ. L. REV. 17, 19–20 (2001) (stating legal educators should incorporate practical skills into their teaching methods).

⁵⁷ See DOBRIN, *supra* note 53, at 9; see also Jasper Neel, *Dichotomy, Consubstantiality, Technical Writing, Literary Theory: The Double Orthodox Curse*, in COMPOSITION THEORY FOR THE POSTMODERN CLASSROOM 16, 20–21 (Gary A. Olson & Sidney I. Dobrin eds., 1994).

⁵⁸ DOBRIN, *supra* note 53, at 9–10.

Practice cannot be separated from theory. And yet, we can talk about theory for theory's sake but not practice for practice's sake. Why? Because practice cannot exist without theory. . . . Even the most inexperienced teachers who may be completely unaware of the origins of their practice use a pedagogy that was founded in some theory.

Id. See also GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 105 (1999) (“Experiential learning integrates theory and practice by combining academic inquiry with real-life experience.”).

⁵⁹ See DOBRIN, *supra* note 53, at 9.

⁶⁰ See *id.* at 9–10.

⁶¹ See STEPHEN M. BARR, *MODERN PHYSICS AND ANCIENT FAITH* 33 (2003); MONROE W. STRICKBERGER, *EVOLUTION* 76 (3d ed. 2000).

In order to advance our understanding of what legal writing teachers perform in their classrooms, the role and contribution postmodernism has played in the teaching of legal writing must be acknowledged and appreciated. Denying or disparaging theory in general, or postmodernism in particular, does a disservice to the legal writing profession and the academy as a whole.⁶²

III. POSTMODERNISM IN THE LEGAL ACADEMY

Postmodernism affected the legal writing classroom in part by affecting the legal academy as a whole. Professor Stephen Feldman in *American Legal Thought from Premodernism to Postmodernism* places postmodernism in the legal academy, in relation to modernism and premodernism.⁶³ He argues that premodern jurisprudence, as found in the writings of jurists such as Blackstone, was based on natural law principles.⁶⁴ Modern jurists rejected these natural law principles in favor of rational, scientific, empirical and secular principles. Scholars such as Christopher Columbus Langdell and other legal scientists developed legal principles from the careful study of cases and used reasoning through upward induction to derive scientific formula that explained law; in contrast to the downward deductive reasoning of natural law.⁶⁵ The Restatement treatises are most emblematic of legal modernism. Restatements derive supposedly objective, neutral, and ordered rules of law from the common law.⁶⁶ Such a search for an orderly, monolithic articulation of the law is thoroughly modern.⁶⁷

⁶² See Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASSOC. LEGAL WRITING DIRECTORS 1, 22 (2004) (noting the role of legal writing to the profession and the academy).

⁶³ Professor Feldman argues that postmodernism needs to be understood relationally to modernism and premodernism. See FELDMAN, *supra* note 7, at 9; see also Litowitz, *supra* note 7, at 42–43.

⁶⁴ Blackstone writes that “human laws are only declaratory of, and in subordination to [natural law principles].” WILLIAM BLACKSTONE, COMMENTARIES OF THE LAW OF ENGLAND 9 VOLUME 2 (1979).

⁶⁵ FELDMAN, *supra* note 7, at 96–97; see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 52–53 (1983).

⁶⁶ See FELDMAN *supra* note 7, at 111–12; G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 1–2 (1997).

⁶⁷ See White, *supra* note 66, at 2.

While legal scientism and the Restatements are illustrative of modernism, scholars criticizing these movements are not necessarily postmodernists. Legal realists and scholars from the critical legal studies (CLS) movement are often very modernist in their philosophy.⁶⁸ Both movements, while critiquing earlier jurisprudential theory, still ground their scholarship on modern aspirations of developing a single, unifying theory of the law. Legal realists used economics and other social sciences as methods of study of the legal system. CLS scholars used Marxism and politics as the "metanarrative" to explain the functioning of the legal system and to work towards the progressive improvement of the legal system.⁶⁹

While the foundations of the legal realist and CLS movements are modernist, these movements formed a bridge to postmodern legal movements.⁷⁰ These movements' examination of the connection between law and society sowed the seeds of the postmodern legal movement.⁷¹ Postmodern scholars "rejected the idea that law could be rendered coherent by a comprehensive legal theory."⁷² This rejection of "large-scale, totalizing theories"⁷³ is manifested by skepticism of any claims by jurists to qualities of neutrality, objectivity, internal consistency and the truth.⁷⁴

⁶⁸ See FELDMAN, *supra* note 7, at 132.

⁶⁹ See *id.* Minda points out that later "second generation" CLS scholars were postmodernists. See MINDA, *supra* note 7, at 116.

⁷⁰ Some view the legal realists as the first postmodern legal scholars. From the legal realist movement came "Plain English" advocates who argued the main function of legal language is to obscure and conceal the lack of consistency and imperfections of the law. Postmodern scholars built on the legal realists' work, keeping the Plain English movement's critique of modernist legal discourse but rejecting the Plain English movement's solution as too simplistic and reductive (or too modernist). Legal language is more complex, dynamic and fluid to be simply fixed by the imposition of plain language. See Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 716 (1998).

⁷¹ See Christopher L. Sagers, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, 95 MICH. L. REV. 1927, 1931 (1997) (book review).

⁷² See MINDA, *supra* note 7, at 77.

⁷³ See *id.* at 224 (quoting COSTA DOUZINAS ET AL., *POSTMODERN JURISPRUDENCE: THE LAW OF TEXTS IN THE TEXTS OF LAW* (1991)).

⁷⁴ See Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 354 (1995).

Many argue that the lack of certainty and fragmentation of postmodernism is antithetical to the normative needs of the law.⁷⁵ The very idea behind a written law is to create certainty and clarity in our relations with others and the State.⁷⁶ As a result of these normative needs, many scholars have called postmodernism dangerous or irrelevant to the law or dead in terms of its applicability to law.⁷⁷

On one level, the critics of postmodernism are correct. In its purest form, postmodernism can lead to a form of chaotic nihilism that serves little practical use to the legal academy.⁷⁸ If all attempts to create meaning, search for unifying truths and rules of behavior, and other quests that are essential to a meaningful legal system are deemed futile, then legal scholarship and the legal system itself becomes meaningless.⁷⁹

Professor Feldman has identified this type of nihilism and the postmodern theorists who put forward this rather pessimistic viewpoint as

⁷⁵ See MINDA, *supra* note 7, at 208; see also Feldman, *supra* note 32, at 1093 (indicating judges and attorneys “primarily want normative arguments to apply instrumentally to their practices”).

⁷⁶ See MARCEL PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 61 (La. State Law Inst. trans., 12th ed. 1939) (noting that the virtues of written law are “precision, certainty, fixity, and above all unity”); see generally Andrei Marmor, *The Nature of Law*, THE STAN. ENCYCLOPEDIA OF PHIL., May 2001, available at <http://plato.stanford.edu/entries/lawphil-nature/> (“Law, however, is also a normative social practice: it purports to guide human behavior, giving rise to reasons for action.”).

⁷⁷ See Eichhorn, *supra* note 2, at 141 (“Writing may indeed be a dangerous supplement in the law school curriculum.”); Feldman, *supra* note 1, at 2357 (“[P]ostmodernism has become an academic joke even before the dawn of the millennium.” (citing WEST, *supra* note 4, at 204)); Pavela, *supra* note 6, at 102 (declaring “postmodernism as we used to know it is dead”).

⁷⁸ See Feldman, *supra* note 1, at 2373–74 (“[Postmodernism] encompasses a belief in radical relativism. . . . There is no way to adjudicate among competing claims to truth and knowledge. When it comes to textual interpretation, anything goes.”); Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317, 332, 334 (1994) (“[A] possible articulation[] of postmodernity’s positive thesis [is] . . . [n]ihilism” and “nihilism leaves one in a state of incomprehension concerning meaning, knowledge and value.”); Moran, *supra* note 5, at 157 (“[T]he use of postmodern theory in contemporary legal scholarship has accomplished very little.”).

⁷⁹ See Donaldson, *supra* note 2, at 344–45 (“What postmodernism does is deprive us of the ability to determine what right and wrong are, and once this is done, law is without meaning or purpose.”); Moran, *supra* note 5, at 159 (“[I]f carried to an extreme, postmodern principles threaten to undermine the Western legal system in such a way that return will become unattainable.”).

the “antimodernist” who takes postmodernism to an extreme.⁸⁰ There is another type of postmodern theorist who takes a more pragmatic approach to postmodernism whom Professor Feldman labels “metamodernists.”⁸¹ Metamodernists are moderate postmodernists who use the tools of postmodernism for a better understanding of the world. Postmodernism can be a liberating construction that allows for a bridge between the rigidity and normalization of modernity and the fluidity and flux of postmodernity. Postmodernism does not need to be reduced to nihilism nor must it eliminate the ethical and moral foundations produced under modernism.⁸² Instead, postmodernism grants a license for flexibility and multiplicity. It removes the necessity of privileging one position over another and can allow multiple positions and interpretations to exist simultaneously.

Indeed the antimodernist postmodernists who espouse a total rejection of modernism have arguably fallen into a modernist trap. A complete rejection of modernism is itself a modernist act.⁸³ Postmodernism, unlike modernism, does not supplant those theories that have preceded it⁸⁴ but, instead, supplements them.⁸⁵ Postmodernism recognizes the value and existence of modern and traditional norms and needs at the same time as acknowledging the uncertainty and fluidity of the high tech age.⁸⁶

It is in the spirit of the metamodernists or those who see postmodernism as a supplement to our modernist (and traditionalist) work that this Article

⁸⁰ Feldman, *supra* note 1, at 2374; *see also* Lipkin, *supra* note 78, at 332–38.

⁸¹ *See* Feldman, *supra* note 1, at 2374; *see also* Donaldson, *supra* note 2, at 336, 345 (“A second way to understand postmodernism is as a methodology, a way of reading texts and interpreting history using a cluster of tools What is needed is a sensible middle ground, a worldview which can contain both grand vision and a cautious skepticism.”); Moran, *supra* note 5, at 159.

⁸² *See* Donaldson, *supra* note 2, at 345 (arguing postmodernism, as a critique of modernism “helps us to recognize our limitations” but the dangers of postmodernity, when it goes too far, “crosses the line from humility to pointless self abasement”); *see also* Fayaz Chagani, *Postmodernism: Rearranging the Furniture of the Universe* (1998), available at <http://www.geocities.com/athens/agora/9095/postmodernism.html>.

⁸³ *See* Feldman, *supra* note 1, at 2367 (“[P]ostmodernists do not rely on binary oppositions.”). *See also* Chagani, *supra* note 82 (“Many have complained that postmodernism falls into nihilism Postmodernists . . . simply remove the necessity of foundations and the necessity of choosing one position over another, allowing us the freedom to construct our own positions.”).

⁸⁴ Modernism sees itself as having replaced or supplanted traditionalism and tribalism. *See* Feldman, *supra* note 30 and accompanying text.

⁸⁵ *See* Donaldson, *supra* note 2, at 335; Eichhorn, *supra* note 2, at 141.

⁸⁶ *See* Litowitz, *supra* note 7, at 43–44.

is written and argues that postmodernism has informed the legal writing classroom in the American law school. By identifying and labeling the work or parts of the work of legal writing professionals as postmodern, understanding, communication, and insight can be gained into the place of legal writing in the legal academy. Postmodernism can help explain the manner in which legal writing is taught and why there is a "dividing line" between legal writing and the rest of the academy.⁸⁷ Furthermore, an examination of postmodernism's effect on legal writing demonstrates that postmodernism is indeed alive and well in the legal writing academy.

IV. THE LEGAL WRITING PROFESSION AND POSTMODERNISM'S ATTRIBUTES

Scholars who define postmodernism attribute certain characteristics and themes to the term.⁸⁸ Since postmodernism is difficult to define or label, the identification of characteristics and themes of postmodernism helps identify a subject's postmodern traits.⁸⁹ An examination of the characteristics associated with postmodernism demonstrates how the legal writing profession maintains postmodern attributes and that postmodernism is intimately integrated into the teaching of legal writing.

Professor Feldman identifies eight themes of postmodernism found in American legal thought that help define what constitutes postmodernism in the legal academy. He characterizes postmodernism as (1) anti-foundationalist and anti-essentialist; (2) challenging certainty, edifices and boundaries; (3) involving paradoxes;⁹⁰ (4) concerned with power, especially linguistic and discursive power; (5) emphasizing social construction of the self (as opposed to an independent or autonomous self); (6) self-reflexive or

⁸⁷ See Eichhorn, *supra* note 2, at 114-17; see also Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ASS'N LEGAL WRITING DIRECTORS 3, 3 (2002).

⁸⁸ See FELDMAN, *supra* note 7, at 38-44; see also Litowitz, *supra* note 7, at 41.

⁸⁹ These scholars readily identify the irony of the modernist act in which they engage when labeling a subject postmodern or seek to evade such an act. See FELDMAN, *supra* note 7, at 38.

⁹⁰ Scholars of postmodernism have identified paradoxes and contradictions about postmodernism itself: (1) it is anti-theory which is essentially a theory; (2) it stresses the irrational but instruments of reason a freely employed within the movement; (3) it emphasis on the marginal is an evaluative emphasis; (4) it stresses intertextuality but often treats texts in isolation (e.g., deconstruction vs. internet intertextuality); (5) by rejecting modern criteria for assessing theory, it cannot argue there are no valid criteria for judging. See PAULINE MARIE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS* (1991).

self-referential; (7) ironic; and (8) politically ambivalent (and even neoconservative).⁹¹

I would add to these eight characteristics three other characteristics identified by other scholars of postmodernism: (1) celebrating fragmentation, uncertainty and chaos;⁹² (2) connection to everyday consumerism and consumer transactions;⁹³ and (3) utilizing and intertwining high-technology and the Internet with things low-tech and primitive.⁹⁴

Examining these themes and characteristics in relation to the work of legal writing professionals demonstrates the postmodern bent of the profession. The legal writing classroom can be characterized as anti-foundationalist and anti-essentialist because it challenges the

⁹¹ See FELDMAN, *supra* note 7, at 38–44.

⁹² The scholar Hans Bertens identifies “ontological uncertainty” as a “central concept of postmodernism.” See BERTENS, *supra* note 11, at 203. Professor Feldman captures this characteristic, somewhat, in his first identified theme, “antifoundationalist and anti-essentialist,” but its importance makes it deserving as a characteristic in its own right. See Feldman, *supra* note 32, at 1080.

⁹³ Barbara Stark identifies three characteristics of postmodernism that she applies to international law. Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT’L L. 503, 546 (2000). First is its fragmentary and chaotic condition. *Id.* Second is its “incredulity toward metanarratives.” *Id.* Third, it is not abstract but “rooted in daily life.” *Id.*

⁹⁴ Professor Martin Irvine on his web site charts out key characteristics of modernism and postmodernism. Martin Irvine, “*The Postmodern*,” “*Postmodernism*,” “*Postmodernity*”: *Approaches to Po-Mo* (1998), <http://www.georgetown.edu/irvinemj/technoculture/pomo.html>. His list is helpful in seeing how postmodernism is a reaction to and rejection of modernism. *Id.* The key characteristics of postmodernism shape my definition of what can be considered or labeled a “postmodern law.” *Id.* Among the characteristics he lists are: (1) rejection of master narratives in favor of local narratives and countermyths; (2) “rejection of totalizing theory” and “pursuit of localizing and contingent theories”; (3) “social and cultural pluralism, disunity”; (4) “skepticism of progress”; (5) “sense of fragmentation and de-centered self, multiple, conflicting identities”; (6) “subverted order, loss of centralized control, fragmentation”; (7) “trust and investment in micro-politics”, “institutional power struggles” (8) “rhizome/ surface tropes”; (9) use of technology, mix of text and image, interactive, the internet; (10) “hyper-reality, images and texts with no prior ‘original’”; (11) “disruption of the dominance of high culture by popular culture; mixing of popular and high cultures”; (12) “demassified culture”; (13) “information management, just-in-time knowledge, the web”; (14) “interactive”; (15) “dispersal, dissemination, networked, distributed knowledge”; (16) “indeterminacy, contingency”; (17) “play, irony, challenge to official seriousness”; (18) “hybridity,” “intertextuality,” combined genres; (19) “mixing of organic and inorganic, human and machine”; and (20) “hypermedia as transcendence of physical limits of print media; the Web or Net as information system.” *Id.*

foundationalist and essentialist nature of the doctrinal classes in the rest of the legal academy—particularly first year classes. In classes, other than legal writing, the law is categorized, essentialized, and modernist labels are attached: tort, contracts, property, constitutional, criminal and civil procedure issues are parsed out in each class, and the black letter principles are sought, outlined, studied and applied in the final exam. In most legal writing classes, these subjects are all jumbled together. Legal writing classes mimic real life; students deal with facts that do not come in a bound textbook and announce the word “Torts” or “Contracts” on the cover. Instead students are given fact patterns that require an understanding and critique of the boundaries imposed by normal classifications of the law. This practical approach found in the writing classroom challenges the boundaries and edifices erected in the other doctrinal classrooms which artificially isolate legal doctrine in ways not encountered in legal practice.⁹⁵

Certainly, a legal writing class that uses a practice approach to teaching writing also reinforces these very modernist boundaries by having the students identify the categories of law from the facts.⁹⁶ But such an exercise has the effect of making the student aware of the artifice and limitations of these very boundaries. This self-reflective act is postmodern.⁹⁷ Students, by participating in the act of labeling and directly working with real facts, gain an understanding of the linguistic and discursive power involved in calling a certain act either a tort, a contract or a crime.

The emphasis found in legal writing classes on citation and the acknowledgment of sources found in the act of labeling a legal argument is also consistent with postmodernism’s emphasis on a social construction of ideas rather than autonomous or independent argument.⁹⁸ Students in a

⁹⁵Not all doctrinal classes function in the way I characterize here. Some professors use a problem method for teaching which focuses on facts. Other professors and law schools approach some doctrinal classes in an inter-disciplinary manner, combining classes such as torts and contracts. See Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, in *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 1, 7–71 (Steve Sheppard ed., 1999); see also Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Methods Continues*, 1998 *BYU EDUC. & L.J.* 1, 7 & nn.36–37 (1998).

⁹⁶See Romantz, *supra* note 10, at 146; see generally Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 *U. PITT. L. REV.* 719 (1997) (overviewing legal writing).

⁹⁷See FELDMAN, *supra* note 7, at 38–44.

⁹⁸See *id.*; see also Schanck, *supra* note 9, at 2508–09.

legal writing class are urged to ground their arguments in statutes, precedent and learned treatises rather than original theories.⁹⁹ An opinion is given greater weight and validity if it has reference to its origins. An argument that is purely original and without reference to other sources is suspect.¹⁰⁰

As argued in detail below, the legal writing class is quite postmodern because it is entangled in postmodern paradoxes and acrobatics that make the class different from its more modernist doctrinal counterparts.¹⁰¹ Students are told in legal writing assignments that there may be not one correct or right answer but multiple arguments that should be made.¹⁰² Students use high technology (computers) and basic implements (pencil and paper) to produce and engage in the classroom.¹⁰³ The legal writing class, while an academic enterprise of a high theoretical level—addressing the development of language and thought—is the most practical and consumer-

⁹⁹ See MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL RESEARCH & WRITING: OBJECTIVE LEGAL WRITING AND ANALYSIS* 163 (2006).

¹⁰⁰ See Kris Franklin, *The Rhetorics of Legal Authority Constructing Authoritativeness, the "Ellen Effect," and the Example of Sodomy Law*, 33 RUTGERS L.J. 49, 49 (2001) ("Legal citations construct legal authority. Legal authority, in turn, constructs law. Thus, the question of what is cited in a judicial opinion . . . fundamentally shapes what we understand to be American law."); see also Joel R. Cornwell, *Languages of a Divided Kingdom: Logic and Literacy in the Writing Curriculum*, 34 J. MARSHALL L. REV. 49, 56 (2000) ("Students are taught that the strength of a legal assertion lies in its familiarity; original ideas are by nature idiosyncratic and untrustworthy."); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 59 (1994) ("[T]o learn legal writing is to learn how to write within the conventions and practices of a particular professional group more than it is to write original ideas . . ."). But see Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 597 (1997) ("[A] law school writing curriculum should provide students the opportunity to 'think on paper' . . . to formulate and express original ideas concerning issues of importance to the students and to society.").

¹⁰¹ See discussion *infra* Part V; Eichhorn, *supra* note 2, at 141 ("[W]riting is dangerous because it highlights what is not present in the traditional doctrinal course.").

¹⁰² See e.g., Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 12 (1990) ("The reader's experience will attest that in an extremely high percentage of situations . . . no genuinely exceptional circumstance intervenes. . . . [But,] [s]omewhat unusual circumstances may arise when the application of the directive and the manner in which Sam should respond to it are unclear."). Students need to construct arguments and counterarguments. This is not to say that there are not correct answers in the law. *Id.*

¹⁰³ See Craig T. Smith, *Practices and Procedures Synergy and Synthesis: Teaming "Socratic Method" with Computers and Data Projectors to Teach Synthesis to Beginning Law Students*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 113, 123–26 (2001), available at 7 Legal Writing 13 (LEXIS).

oriented, from the student as consumer point of view, of the first year classes.

In addition to the postmodern characteristics found in the legal writing classroom, the legal writing profession, as a movement, also has postmodern characteristics. Its challenge to the boundaries of legal education and the standard curriculum has been significant. Legal writing has transformed the legal academy (most certainly the first year of legal studies) substantially over the past twenty years and continues to work to erase the lines between skills and doctrinal instruction in the academy.¹⁰⁴

The movement has been self-reflective in its well-organized and faithfully attended conferences, numerous publications in its own established journals and immeasurable postings on computer listservs all analyzing where the profession has been and where it is going.¹⁰⁵ While the legal writing professionals are well organized, the movement is politically ambivalent; indeed the legal writing course is not necessarily associated with a right or left political orientation. In fact, established legal writing programs can be found in law schools that have both right and left political reputations.¹⁰⁶

The legal writing movement is also not monolithic and is generally antifoundationist in its overall orientation. There is no single model for the teaching of legal writing to be found in American law schools, and the

¹⁰⁴ See Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ASS'N LEGAL WRITING DIRECTORS 3, 3 (2002), available at 1 JALWD 3 (Westlaw).

¹⁰⁵ See Jo Anne Durako, *A Snapshot of Writing Programs at the Millennium*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 95, 98-100 (2000), available at 6 Legal Writing 95 (LEXIS) (discovering results of a survey taken of legal writing programs); Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51, 52 (2000) ("This article shows who is teaching legal writing at the turn of the century, and which law schools have programs that reflect either sound investment in writing abilities of future lawyers or shortsighted penury."); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 123, 123-24 (1991), available at 1 LEGWRIT 123 (Westlaw); Smith, *supra* note 62, at 11-20, available at 2 JALWD 1 (Westlaw).

¹⁰⁶ The Princeton Review Best Law Schools 2005 Edition indicates that Ave Marie Law School, Brigham Young University, and Regent are all considered politically oriented to the right and UDC, CUNY, and Northeastern are considered left-leaning, and yet all of these schools have established legal writing programs. See ERIC OWENS ET AL., THE PRINCETON REVIEW: 117 BEST LAW SCHOOLS 66, 74, 138, 150, 301 (2005 ed.); see also Karen Dybis, *Is Your Law School Too Liberal?*, THE NAT'L JURIST, Feb. 2006, at 26, 27, available at http://www.stthomas.edu/law/in_the_news/is_your_lawschool_too_liberal.pdf.

staffing of legal writing programs varies widely.¹⁰⁷ While some in the legal writing profession have strong opinions as to how legal writing programs should be run and staffed,¹⁰⁸ there is not consensus on these issues.¹⁰⁹

Often, the movement is ironic and even celebratory about its situation and position in the academy. The use of irony and humor pervade the titles and subjects of legal writing conference presentations¹¹⁰ and articles,¹¹¹ and an underlying spirit of celebration pervades the movement. The postmodern characteristics of legal writing and the movement itself, particularly its history of marginalization in the academy—its fragmentation and variety of approaches, would make some believe the profession would be mired in self-pity or cynicism. But paradoxically, it is its outsider status and other postmodern characteristics which give the legal writing movement its celebratory spirit and sense of community.

The rise of the legal writing community coincides with the influx of a new breed of student. This new type of student has been called “Generation

¹⁰⁷ Association of Legal Writing Directors, *2006 Survey Results* (2006), available at <http://www.alwd.org> (follow “ALWD/LWI Survey” hyperlink; then follow “2006 ALWD/LWI Survey Report” hyperlink); see Durako, *supra* note 105, at 96; Levine, *supra* note 105, at 60–78 (displaying charts of schools differences); Ramsfield, *supra* note 105, at 126–27; see also Terrill Pollman & Judith M. Stinson, *Irlafarc! Surveying the Language of Legal Writing*, 56 ME L. REV. 239, 254–55 (2004) (referring to diversity of terminology used in the teaching of legal writing).

¹⁰⁸ See Parker, *supra* note 100, at 563–64 (discussing new standards in legal writing); see also Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 564–71, 571–74 (1995) (describing strategies to staff and manage legal writing programs); Levine, *supra* note 105, at 59; Jan M. Levine, “You Can’t Please Everyone, So You’d Better Please Yourself:” *Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 624–30 (1995); Ramsfield, *supra* note 105, at 129–31.

¹⁰⁹ See Ramsfield, *supra* note 105, at 152–54. The Author has e-mail listserv postings from legal writing professionals supporting this point which are on file with the author with identifying information removed to protect confidentiality.

¹¹⁰ See generally LEGAL WRITING INSTITUTE, 2006 CONFERENCE BROCHURE (2006), <http://www.lwionline.org/activities/2006conferencebrochure.pdf> (identifying some witty conference titles like James B. Levy’s and Anne Bobbins’ *Emotion Granted—The Pedagogy of Emotion in Legal Advocacy*; Terri LeClercq’s and Diana Abdo’s, *Gerunds, Infinitives, and Set-ups, Oh No! Composition Vocabulary for Creatures You’ll Uncover in the Abyss of One-L Memos*; Kristen K. Robbins’ *They’re a Little Bit Plato, We’re a Little Bit Aristotle: Understanding the Schism Between Doctrinal and Legal Writing Faculty*).

¹¹¹ See e.g., Mary Beth Beazley “Riddikulus!”: *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79, 79 (1998–2000) (using Harry Potter motifs in a poignant criticism of the legal academy’s denigration of the legal writing profession).

X.”¹¹² This generation of students enters law school with a different perspective on the law from their forbearers.¹¹³ Generation X has been described rather derogatorily as slackers, arrogant, disloyal and having short attention spans.¹¹⁴ More positive attributes bestowed on Generation X are independent, technologically literate, “‘ambitious,’ ‘entrepreneurial,’ and ‘pragmatic’ to the point of engaging in ‘situational ethics.’”¹¹⁵ Whether these descriptions are accurate or fair is debatable, but they do seem to have a “kernel of truth”¹¹⁶ since the influence of technology, politics, and media necessarily change the character of students from one generation to the next. Legal writing teachers directly engage in the challenges of teaching to the postmodern attributes of Generation X.¹¹⁷ Legal writing teachers use a variety of teaching methods which can engage the attention and interests of these students. Many legal writing teachers use PowerPoint, web pages, email and computer exercises as teaching tools.¹¹⁸ The practical aspects of legal writing combined with its hands-on engagement, use of one-on-one

¹¹²There is a new label for some of the most recent students entering universities today: Generation M. See DONALD F. ROBERTS ET AL., GENERATION M: MEDIA IN THE LIVES OF 8–18 YEAR OLDS (2005), available at <http://www.kff.org/entmedia/7251.cfm> (Full Report). This label applies to media saturated and tech-savvy children who have different learning styles from earlier generations. *Id.*

¹¹³Some have even labeled Generation X “the postmodern generation.” See PETER SACKS, GENERATION X GOES TO COLLEGE: AN EYE-OPENING ACCOUNT OF TEACHING IN POSTMODERN AMERICA 110 (1996).

¹¹⁴See Margot Hornblower, *Great Xpectations: Slackers? Hardly. The So-Called Generation X Turns Out to be Full of Go-Getters Who Are Just Doing It—But Their Way*, TIME, June 9, 1997, at 58–62, available at 1997 WLNR 5538088 (Westlaw); see also Douglas L. Keene & Rita R. Handrich, *Keene Trial Consulting, Jurors for the Next 50 Years: Generation X*, in FEBRUARY, 2002 ATLA WINTER CONVENTION REFERENCE MATERIALS ADVOCACY TRACK: JURY RESEARCH 63, 63 (Ass’n Trial Law. Am. 2002), available at Winter2002ATLA-CLE 63 (Westlaw).

¹¹⁵See Hornblower, *supra* note 114, at 58–62.

¹¹⁶See Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 119, 123 (2003), available at 9 Legal Writing 119 (LEXIS).

¹¹⁷See *id.*; see also Jennifer Jolly-Ryan, *Coordinating a Legal Writing Program with the Help of a Course Webpage: Help for Reluctant Leaders and the Technologically-Challenged Professor*, 22 QUINNIPIAC L. REV. 479, 491–92 (2004) (using web pages to connect to students).

¹¹⁸See, e.g., Maria Perez Crist, *Technology in the LRW Curriculum—High Tech, Low Tech, or No Tech*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 93, 98–99 (1999), available at 5 Legal Writing 93 (LEXIS).

and small group exercises meet the learning needs of students in the postmodern era.¹¹⁹

Finally, the postmodern condition of the real world found outside of the law school academy affects and bestows a postmodern bent to legal writing. The legal writing course is considered the most real world course in a student's first year of law school and, perhaps, of the student's entire law school career. The legal writing course tries to mimic the conditions and settings a student will face when writing in a real law practice setting.¹²⁰ Indeed, most legal writing professors have had legal practice experience prior to entering the legal writing profession. In this post-modern era, the real world is fragmented, uncertain, diverse, rapidly changing, imbued with complex high-technology and archaic tradition, secular rationalism and religious fundamentalism, paradox, irony and mass consumerism. The postmodern characteristics of legal writing classes simply mirror the postmodern characteristics of modern society reinforcing the idea that the legal writing class is the most real world of all law school classes.

V. POSTMODERN THEORY IN THE LEGAL WRITING CLASSROOM

The legal writing classroom has attributes of postmodernism that demonstrate postmodernism's infiltration into the discipline. But the area where postmodernism has most influenced the legal writing classroom is in the theory and pedagogy of legal writing.

While postmodernism has affected the teaching of writing and the legal academy in general, at least in terms of scholarship, it has not had much overt effect on most law school classrooms and the pedagogy in doctrinal classes. Most doctrinal law classes are taught in a modernist paradigm little changed from the pedagogical practices introduced by Christopher Langdell

¹¹⁹See, e.g., Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 185, 198 (2003), available at 9 Legal Writing 185 (LEXIS) (“[S]tudents cannot fully learn legal research, analysis, and writing by listening passively to lectures. . . . [S]tudents will fully internalize these important legal skills only with repeated practice on their own. Accordingly, many of us have replaced more and more of our lecturing with active learning activities.”).

¹²⁰See Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73, 105 (2004), available at 2 JALWD 73 (Westlaw); see also Kenneth D. Chestek, *Reality Programming, Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 59 (2003).

at Harvard Law School in 1870.¹²¹ The typical law school classroom has the professor at the center either lecturing or leading a discussion through the pseudo-socratic method associated with the case method of teaching.¹²² The professor is seen as holding the truth or core knowledge about the subject and students are tested at the end of the semester using exams where formalism and black letter law are expected to be mechanically applied to limited fact patterns.¹²³

The legal writing classroom uses a different paradigm.¹²⁴ The students, rather than the professor, are often the center of classroom activities.¹²⁵ The

¹²¹The case method is “the predominant mode of law school instruction,” despite longstanding criticism. Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405, 406 (2002) (citations omitted). See David D. Garner, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 321–31 (2000); Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 351 (1998) (“For over a century, the ‘case method’ of instruction . . . has been the predominant mode of law school instruction.”); see also Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 118–22 (1999) (examining critiques of the case method).

¹²²See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 593 (1982); Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 150 (2001). Christopher Columbus Langdell introduced his method at Harvard Law School in 1870. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850’S TO THE 1980’S* 36 (1983). It has been pointed out that the Socratic method is more myth than reality in contemporary law schools. See also Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 475–76, 489 (1996) (calling for an adoption of the traditional Langdellian Method to contemporary needs).

¹²³See Kissam, *supra* note 122, at 153; see also Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 437–38 (1989); Romantz, *supra* note 10, at 108–36; Stropus, *supra* note 122, at 485.

¹²⁴David Romantz argues both doctrinal and legal writing classrooms seek to achieve the same pedagogical goals of teaching critical thinking skills, though he does indicate the methodology is different. See Romantz, *supra* note 10, at 107.

¹²⁵See Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 57, 73 (2000), available at 6 Legal Writing 57 (LEXIS) (“[T]he teacher must look to . . . his students for a new approach to which he can make a tentative commitment.”); Robin Boyle, *Bringing Learning-Style Instructional Strategies to Law Schools: You Be the Judge!*, in PRACTICAL APPROACHES TO USING LEARNING STYLES IN HIGHER EDUCATION 155, 165 (Rita Dunn & Shirley A. Griggs eds., 2000) (concluding “that straight lecture, the case method, and the Socratic method are not effective instructional strategies for significant percentages” of her legal writing students due to the diversity of learning-style preferences among them); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 66 (1994).

difference in paradigms can be attributed to the adoption of the process method of writing instruction, a method which came from postmodernism.¹²⁶

Rhetoric and composition studies, which have guided legal writing teaching and theory,¹²⁷ have been profoundly affected by postmodern theory but in a manner that differs from postmodernism's effect on legal writing. Rhetoric and composition studies have a long history, dating back to ancient Athenic and Roman writing instruction described by Quintilian, far predating any formal school of legal writing.¹²⁸ These classical roots formed the foundation of modern rhetoric in the eighteenth and early nineteenth centuries.¹²⁹ Early classical rhetoricians saw language as fixed and "reporting objectively, rather than interpreting."¹³⁰ Consistent with modernism's search for order and rational thought, early rhetorical studies and writing instruction were concerned with writing as a discrete skill. The language process was seen to be static and the goal of rhetoricians was to find universal, unifying meaning to words and writing.¹³¹ Literary theorists similarly sought the objective, singular interpretation of an author's intention in a piece of writing. The roots of the exclusion of composition and writing as a scholarly discipline can be attributed to this early view of

¹²⁶ See FELDMAN, *supra* note 7, at 38–44.

¹²⁷ See Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 155 (1999); see also Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 174–79 (1993); Jessie C. Grearson, *Teaching the Transitions*, 4 LEGAL WRITING: J. LEGAL WRITING INST., 57, 62–64 (1998), available at 4 LEGWRIT 57 (Westlaw); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1094–98 (1986); Rideout & Ramsfield, *supra* note 100, at 51–56.

¹²⁸ See *Roman Writing Instruction As Described by Quintilian*, in A SHORT HISTORY OF WRITING INSTRUCTION: FROM ANCIENT GREECE TO TWENTIETH CENTURY AMERICA 19, 20–29 (James J. Murphy ed., 1990); see also KATHLEEN E. WELCH, *Writing Instruction in Ancient Athens After 450 B.C.*, in HISTORY OF WRITING INSTRUCTION: FROM ANCIENT GREECE TO TWENTIETH CENTURY AMERICA 1, 2–5 (James J. Murphy ed., 1990); Eichhorn, *supra* note 2, at 106–07.

¹²⁹ Winifred Byran Horner, *Writing Instruction in Great Britain: Eighteenth and Nineteenth Centuries*, in SHORT HISTORY OF WRITING INSTRUCTION: FROM ANCIENT GREECE TO TWENTIETH CENTURY AMERICA, *supra* note 128, at 121–24.

¹³⁰ Terrill Pollman, *Building a Tower of Babel or Building a Disciple? Talking about Legal Writing*, 85 MARQ. L. REV. 887, 899 (2002) (citing Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 633 (1999)).

¹³¹ See *id.*

writing as a rote skill, disconnected from the thinking process and, therefore, inferior in the hierarchy within the academy.

In the mid-twentieth century, rhetoric and composition studies underwent significant change. Contemporary scholars of rhetoric and writing argued that language is constitutive of thought; they argued language creates thought and meaning is made through language.¹³² Under this view, writing is not peripheral to thought but central and essential.¹³³ Hans-Georg Gadamer further argued true objective meaning in a text could not be found by any reader but readers interpret a text in particular contexts. Meaning from a particular text is derived from the dialectic which occurs between reader and text.¹³⁴

The changes in composition and rhetoric theory were mirrored in legal writing pedagogy. Scholars identify three theoretical approaches to teaching legal writing which have been influential in law school curriculums: the traditional or product approach, the process approach (or "New Rhetoric"), and the social context approach.¹³⁵ All three approaches are found in most law school writing programs.¹³⁶ Indeed, most legal

¹³² See Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365, 366-87 (1981); see also Berger, *supra* note 125, at 58; Pollman, *supra* note 130, at 902-03.

¹³³ See Lynn Z. Bloom, *The Great Paradigm Shift and Its Legacy for the Twenty-First Century*, in COMPOSITION STUDIES IN THE NEW MILLENNIUM: REREADING THE PAST, REWRITING THE FUTURE 33 (Lynn Z. Bloom et al. eds., 2003); Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 78 (1982).

¹³⁴ See HANS-GEORG GADAMER, TRUTH AND METHOD 292 (Joel Weinsheimer & Donald Marshall trans., Crossroad 2d rev. ed. 1989) (1960); see also Pollman, *supra* note 130, at 901 (citing Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L.J. 353, 354, 358-59 (1985)).

¹³⁵ See Rideout & Ramsfield, *supra* note 100, at 50 (discussing "a revised view of legal writing" through three perspectives: the formalist perspective, the process perspective, and the social perspective); see also Parker, *supra* note 100, at 565.

¹³⁶ See Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 99 (2005) ("In the past two decades or so, LRW [Legal Research and Writing] has undergone a pedagogical revolution that has shifted our emphasis from the product of writing to the process of writing." (citing Durako et al., *supra* note 96, at 719-20)); see also Phelps, *supra* note 127, at 1090; Rideout & Ramfield, *supra* note 100, at 63.

writing programs do not fit one model, but embrace all three in a postmodern mix.¹³⁷

The product or instrumental method is firmly imbedded in traditional modernist pedagogy and is the model first used by legal writing teachers.¹³⁸ Under the instrumental approach, the teacher and the writer, using formal and rigid rules, focused on the final product of the writing as opposed to the process of writing. Writing, under this approach, is thought to begin once the thought process is complete, rather than seen as a thinking or discursive process. Writing courses that focus on a product approach have been criticized as neglecting important considerations in the instruction of its students and thus being too narrow in scope and deficient in instruction.¹³⁹ For example, the product-centered model is epitomized by a writing instructor who lectures about proper writing form, assigns a five-paragraph essay, and then grades the assignment without opportunities for feedback or revision.¹⁴⁰

The product-centered model was supplanted by the process method.¹⁴¹ The process method, also called "new rhetoric,"¹⁴² is firmly embraced by legal writing programs in most law schools.¹⁴³ The process method emphasizes the acts involved in the writing rather than the final written

¹³⁷ See Margolis & DeJarnatt, *supra* note 136, at 99.

¹³⁸ See Pollman, *supra* note 130, at 893; see also Phelps, *supra* note 127, at 1093-94; Rideout, *supra* note 100, at 49.

¹³⁹ See Rideout & Ramsfield, *supra* note 100, at 50; see also Phelps, *supra* note 127, at 1094; Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 LEGAL WRITING: J. LEG. WRITING INST. 81, 82-83 (1997).

¹⁴⁰ See Pollman, *supra* note 130, at 896-98.

¹⁴¹ See Hairston, *supra* note 133, at 77-78; see also Fajans & Falk, *supra* note 127, at 173-74, 174 nn.44, 46 (citing James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, in THE WRITING TEACHER'S SOURCEBOOK 47, 53, 55-58 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988)). This metanarrative of the development of the predominance of the process method and the process-product dichotomy is criticized as overly reductive and simplistic by scholars tracing Composition theory. See Paul Kei Matsuda, *Process and Post-Process: A Discursive History*, 12 J. SECOND LANGUAGE WRITING 65, 67-69 (2003).

¹⁴² See Phelps, *supra* note 127, at 1094-98 (labeling the "process method" part of "new rhetoric theory"); cf. Berger, *supra* note 125, at 61 ("New Rhetoric Theory thus extends beyond the 'process approach' . . .").

¹⁴³ See Margolis & DeJarnatt, *supra* note 136, at 99; Fajans & Falk, *supra* note 127, at 174; see also Durako, *supra* note 96, at 719-20; Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 496 (2002) ("Writing is no longer viewed as the mere transcription of thought, but rather as an active way of making meaning . . .").

product. Coupled with the focus on the writing process came an emphasis on seeing students as the central focus of the classroom rather than the professor.¹⁴⁴

Professor Gary Olsen cogently sums up ten essential characteristics of the process method that are readily identifiable in a legal writing classroom today:

[W]riting is an “activity,” . . . that is itself composed of a variety of activities; that the activities involved in the act of writing are typically recursive rather than linear; that writing is first and foremost a social activity; that the act of writing can be a means of learning and discovery; that experienced writers are often intensely aware of audience, purpose, and context; that experienced writers invest considerable amounts of time in invention and revision activities; that effective instruction . . . provides opportunities for students to practice the kinds of activities involved in the act of writing; that such instruction includes ample opportunities [for peer review]; that effective composition instructors grade a student’s work not solely on the finished product but also on the efforts the student has invested in the process of crafting the product; and that successful composition instruction entails finding appropriate occasions to intervene in each student’s writing process.¹⁴⁵

As can be seen from this list of characteristics, the process method is a flexible, multi-faceted and dynamic operation.¹⁴⁶ It cannot be characterized as “modernist.” This move to a process and student-oriented method of teaching legal writing was grounded in the postmodern impulse that rejected single, unitary models or formula for the instruction.¹⁴⁷

¹⁴⁴ See Gary A. Olson, *Towards a Post-Process Composition: Abandoning the Rhetoric of Assertion*, in *POST-PROCESS THEORY: BEYOND THE WRITING-PROCESS PARADIGM* 7, 7–15 (Thomas Kent ed., 1999); see Soonpaa, *supra* note 139, at 82–83 (stating “researchers began to question the product-oriented composition course, began to teach their classes with a student-centered focus, and began a new age in teaching writing”).

¹⁴⁵ See Olson, *supra* note 144, at 7.

¹⁴⁶ See Bloom, *supra* note 133, at 33.

¹⁴⁷ See FELDMAN, *supra* note 7, at 36.

The process method, while stemming from postmodern theorists' re-evaluation of traditional pedagogy, is arguably still modernist rather than postmodern in that it still reduces and formalizes instruction of writing into a single method. The process method strives for a single truth about the best way to teach writing. But this theory shares an underlying postmodern trait which is recognition of a multitude of influences on the writing and thinking process. The recognition of the fluidity and uncertainty entailed in the process of thinking and writing grants these theories a postmodern bent.

While the process method comes from postmodernism, the institutionalization of the process approach makes it a modernist construct. For example, the process method is called a method, which indicates that the process approach has been reduced to a singular construction and has lost its postmodern bent. Within composition studies, scholars have critiqued the rigidity of a linear writing process model found in modernist "process method" pedagogy and have replaced it with the idea that writing is a recursive process. Under a more postmodern process method, the emphasis should be on helping students develop their own writing process model.¹⁴⁸ This postmodern critique of the process method is sometimes labeled "post-process"¹⁴⁹ and is also part of "New Rhetoric" theory.¹⁵⁰

Post-process advocates see some of the most recent composition theorists as having turned away from postmodern theory and reviving modernist paradigms or tropes for the instruction of writing.¹⁵¹ Post-

¹⁴⁸ See James A. Reither, *Writing and Knowing: Toward Redefining the Writing Process*, in LANDMARK ESSAYS ON WRITING PROCESS 141, 142 (Sondra Perl ed., 1994); see also Sondra Perl, *The Composing Process of Unskilled College Writers*, in LANDMARK ESSAYS 39, 58–59 (Sondra Perl ed., 1994); Sondra Perl, *Understanding Composing*, in THE WRITING TEACHER'S SOURCEBOOK 113, 117, *supra* note 141, at 113, 117–18.

¹⁴⁹ See Thomas Kent, *Introduction*, in POST-PROCESS THEORY: BEYOND THE WRITING-PROCESS PARADIGM, *supra* note 144, at 5 ("[P]ost-process theorists hold that the writing act is public, thoroughly hermeneutic, and always situated and therefore cannot be reduced to a generalizable process.").

¹⁵⁰ See Phelps, *supra* note 127, at 1094 (stating that the new rhetoric theory is more than a generalized process, rather it is public, the "audience . . . figure[s] prominently in the assignment of writing task;" hermeneutic, "writing is fruitfully informed by linguistic research;" and situated, the writing is "rhetorically based."); see also Berger, *supra* note 125, at 62–64; Pollman, *supra* note 130, at 902–10 (defining New Rhetoric Theory as an extension of process theory and not a rejection of it).

¹⁵¹ See, e.g., Sidney Dobrin, *Paralogic Hermeneutic Theories, Power, and the Possibility for Liberating Pedagogies*, in POST-PROCESS THEORY BEYOND THE WRITING-PROCESS PARADIGM,

process theory criticizes the process method for its overemphasis on the process of writing.¹⁵² Post-process theory also reclaims the traditional instrumental method of teaching legal writing by acknowledging the value of the product.¹⁵³

Post-process theorists challenge the process method's overly rigid definition of the composing process, which posits writing occurs in three linear stages: pre-writing, writing, and revision. Post-process theorists, however, by observing and listening to writers at work, discovered big differences in how various writers created texts. Many writers, particularly experienced writers, combine elements of all three stages in complex ways to compose a finished written document.¹⁵⁴ Thus, for most writers, writing is not linear, except perhaps in the advancement of the parts of the thinking process. Post-process theorists recognized that the composing process is complex, multi-layered and recursive, with many of the writing processes occurring at once, and information flowing back and forth and in several directions at once.¹⁵⁵ This non-linear, multi-leveled model of writing is quintessentially postmodern—it is antithetical to the unitary and linear approaches favored by modernism.

Post-process critics, like postmodernist critiques of any modernist technique, call the process method, at least in its “pure form,” too reductive and monolithic as a single theory.¹⁵⁶ Post-process “does not constitute, in practice or theory, a rejection of the process movement, but rather its extension into the social world of discourse.”¹⁵⁷ Post-process theorists expand the process method to see the act of writing as a public act between the writer and “other language users” to whom writing must be accessible.¹⁵⁸ They also see writing as an interpretative act where writing is context-specific, requiring the writer to be sensitive to the reader's situation

supra note 144, at 139 (“[N]ewer process pedagogies are not really that different from older current-traditional formalisms . . .”).

¹⁵² *See id.* at 138–39.

¹⁵³ *See id.*

¹⁵⁴ *See generally* Lester Faigley, *Competing Theories of Process: A Critique and Proposal*, in LANDMARK ESSAYS ON WRITING PROCESS, *supra* note 148, at 149.

¹⁵⁵ *See* Helen Rothschild Ewald, *A Tangled Web of Discourses: On Post-Process Pedagogy and Communicative Interaction*, in POST-PROCESS THEORY: BEYOND THE WRITING-PROCESS PARADIGM, *supra* note 144, at 116–20, 128–30.

¹⁵⁶ *See* Bloom, *supra* note 133, at 36.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* (citing Kent, *supra* note 149, at 16).

and motivations.¹⁵⁹ And finally, they see the writer as always situated somewhere and not ever truly writing from a neutral stance.¹⁶⁰ From this perspective, the legal writing professional, using post-process theory, teaches students the conventions of the particular discourse and the needs of the audience or variety of audiences.¹⁶¹

Most legal writing teachers embrace the post-process theory. Students are almost always clearly told of the context, audience and purpose of their writing.¹⁶² The typical legal writing assignment informs the student where they are writing from (in the case of a memorandum assignment often as a clerk in a law office) and who they are writing to (an attorney in the law office) and the purpose of the written product.¹⁶³ Some legal writing professionals have recognized the need for students to develop “multiple consciousness” or voices in their writing in the legal profession.¹⁶⁴ Such an emphasis on the state of flux in the act of writing comes directly from the postmodern distrust of modernism’s singular processes.

Joel Cornwell, in a recent article, articulates the problems with the modernist approach used in legal writing classrooms.¹⁶⁵ In the article, he encourages the integration of postmodern techniques into legal writing pedagogy.¹⁶⁶ Much of what Professor Cornwell says is apt, but legal writing pedagogy, either consciously or unconsciously, has for the most

¹⁵⁹ See *id.*

¹⁶⁰ See Kent, *supra* note 149, at 3.

¹⁶¹ See Bloom, *supra* note 133 (discussing multiple consciousness).

¹⁶² See Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 PERSP.: TEACHING LEG. RESEARCH & WRITING 58, 58 (1995); see generally HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (rev. 4th ed. 2003) (containing sample writing assignments and exercises throughout each chapter in the book).

¹⁶³ See SHAPO, *supra* note 162, at 142, 357 (illustrating that memoranda are used to advise an attorney in a law office setting, and that an appellate or trial brief is used to educate or persuade a judge).

¹⁶⁴ See Chris K. Iijima, *Separating Support From Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 778–80 (2000) (discussing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297, 298–99 (1992)); see also Eichhorn, *supra* note 2, at 125–26; Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 53 (1998).

¹⁶⁵ See generally Cornwell, *supra* note 11.

¹⁶⁶ *Id.* at 1134–35.

part done as Professor Cornwell urges; legal writing professors now do mix modern and postmodern techniques into their classrooms.¹⁶⁷

An example of the use of postmodernism in today's legal writing classroom is the use of the social context or social constructivist approach in teaching writing.¹⁶⁸ This theory, which can be categorized as a post-process writing theory, is directly and openly postmodern.¹⁶⁹ Social constructivism posits "that entities we normally call reality, knowledge, thought, facts, texts, selves, and so on are constructs generated by communities of like-minded peers."¹⁷⁰ Professors in legal writing classes emphasize the contextual nature of legal writing. Students are asked to write in a particular setting to a particular audience, usually a partner in a law firm or a judge. This particular audience has very specific needs, form requirements and jargon. Legal writing professors emphasize the rhetorical devices will change as the social context changes. Thus, the tone, wording, style and format changes in a written document sent to a client, as compared to a judge or another attorney. The use of computers, e-mail and online filing has complicated even further the forms and style of written discourse, making instruction in legal writing not adaptable to modernist notions of regularity and uniformity but more emblematic of postmodernism's fluidity.

Furthermore, a number of legal writing scholars have noted legal writing teachers, as they become reflective about their responses to students' writing, complicate the writing composition and reading process for both students and teachers. The teacher is "unavoidably engaged in a rhetorical transaction" with the students.¹⁷¹ This complex transaction takes into account the multiple audiences involved in the construction of a written document by a student and how the teacher's reading and reflection plays in this process.¹⁷² The recognition of this complexity is consistent with post-process theory's skepticism of the process method.

The legal writing classroom, due to these postmodern characteristics, avoids the modernist trap posed by a rigid application of any one formal

¹⁶⁷ See Fajans & Falk, *supra* note 127, at 185 (observing that the University of Pittsburgh and Carnegie Mellon are colleges that have pioneered mixing modern and postmodern techniques in the classroom).

¹⁶⁸ See Rideout & Ramsfield, *supra* note 100, at 56-57.

¹⁶⁹ See *id.*; see also Berger, *supra* note 125, at 63.

¹⁷⁰ See Kenneth A. Brufee, *Social Construction, Language, and the Authority of Knowledge: A Bibliographical Essay*, 48 C. ENG. 773, 774 (1986).

¹⁷¹ See Berger, *supra* note 127, at 159.

¹⁷² See *id.* at 62.

composition theory, including the process method. Legal writing pedagogy does not—or should not—fully embrace pure process methodology. Most legal writing classes do not focus on the process of writing to the exclusion of the product. Scholars indicate many legal writing professors teach using the process method in tandem with a social context approach.¹⁷³ But the traditional product approach is also important. In legal classes and in law practice, product is ultimately more important than process. A student's grade is usually based on the product. Legal documents are tightly scripted, formal, regimented and are the backbone of a lawyer's practice. The product is necessarily the focus of much of the instruction and attention of teacher and writer. In legal writing, like in postmodernism, the old (product emphasis) is intertwined with the new (the process method) and also mixed with the avant-garde (post-process).

Legal writing professors have incorporated writing theories into the needs of the legal writing classroom and the profession to create a postmodern mix. As postmodern architecture is a mix of the old, new, natural and synthetic,¹⁷⁴ postmodern legal writing classes are a mix of process, product and social context theories. Like postmodernism itself, legal writing pedagogy cannot be easily and neatly defined. The legal writing classroom uses traditional teaching methods like Socratic dialogue alongside computers and role playing.¹⁷⁵ Legal writing teaching also adapts to fit the needs of each particular institution and the institutions' particular pedagogical needs.¹⁷⁶ This flexible, adaptive pedagogy is more akin to postmodernism's flexibility and fragmentation than modernism's unitary approaches.

¹⁷³ See Stanchi, *supra* note 164, at 11.

¹⁷⁴ See generally RAMSFIELD, *supra* note 41 (comparing legal writing to architecture).

¹⁷⁵ See Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 886 (1991); see also Margolis & DeJarnatt, *supra* note 136, at 95–99 (2005); Romantz, *supra* note 10, at 136–42.

¹⁷⁶ See Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213, 247 (1998) (discussing the need for schools to structure their legal writing class based on the individual school's goals and culture); see also Durako, *supra* note 96, at 744–47 (sharing conclusions from Villanova's innovative approach to the legal research and writing program); Pollman & Stinson, *supra* note 107, at 240 ("Language, like law, is a living thing. It grows and changes. It both reflects and shapes the communities that use it. The language of the community of legal writing professors demonstrates this process.").

If one had to characterize the theory and pedagogy of the legal writing classroom as either modernist or postmodernist, the latter is the better descriptor. It is postmodernism's flexibility and accommodation of change that makes it the appropriate pedagogy for the legal writing classroom.

VI. DECONSTRUCTION AND THE TEACHING OF LEGAL WRITING

Outside of the legal academy, postmodernism instituted changes in the way writing and text are read and taught. The most profound of these postmodern theories is deconstruction.¹⁷⁷ Deconstruction profoundly affected both the legal writing and doctrinal law classrooms as well.¹⁷⁸ Deconstruction is a tool of interpretation of texts put forward by Jacques Derrida, Paul de Man, Stanley Fish and others.¹⁷⁹ This tool emerges from an examination of the nature of language and, consistent with postmodern theory, sees indeterminacy of meaning in language.¹⁸⁰ Deconstruction

¹⁷⁷ See Gary Aylesworth, *Postmodernism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), available at <http://plato.stanford.edu/entries/postmodernism>; see also Donaldson, *supra* note 2, at 336 ("A second way to understand postmodernism is as a methodology, a way of reading texts and interpreting history using a cluster of tools, the chief of which is deconstruction."); *Postmodernism*, in ISCID ENCYCLOPEDIA OF SCIENCE AND PHILOSOPHY (B. Long ed., 2001–2005), available at <http://www.iscid.org/encyclopedia/Postmodernism>. But, like many things relating to postmodernism, there is some debate as to whether deconstruction is to be considered "postmodern." See Jacques Derrida, *Marx & Sons*, in GHOSTLY DEMARCATIIONS: A SYMPOSIUM ON JACQUES DERRIDA'S SPECTERS OF MARX 23, 228–29 (Michael Sprinkler ed., G.M. Goshgarian trans., 1999). Derrida, credited with Deconstruction, wrote: "postmodernism or poststructuralism . . . are catchall notions into which the most poorly informed public (and most often, mass-circulation press) stuffs nearly everything it does not like or understand, starting with 'deconstruction.' I do not consider myself either a poststructuralist or a postmodernist." *Id.*

¹⁷⁸ A Westlaw search of the word "deconstruction" brings up some 3593 articles.

¹⁷⁹ See Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 719 (2005).

¹⁸⁰ See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 783–86 (1987); see also J.M. Balkin, *Law and Social Theory, the Footnote*, 83 NW. U. L. REV. 275, 318 (1989); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1613 (1990); J.M. Balkin, *Transcendental Deconstruction, Transcendental Justice*, 92 MICH. L. REV. 1131, 1132–33 (1994); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 108 (1993). Steven Feldman also sees deconstruction as a tool in the "lawyer's toolbox." See Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 151–52 (1999); see also Feldman, *supra* note 32, at 1084. But see WEST, *supra* note 4, at 204 ("[A]s a tool of analysis deconstruction has all the usefulness of an unhinged steering wheel in avoiding a collision with a wall.").

seeks out meanings in text that are otherwise explicitly excluded in order to make authorized meaning possible.¹⁸¹ Deconstruction, by questioning the authorized meaning, exposes bias and unstated meanings in texts.¹⁸² By identifying and reversing the conceptual hierarchies in a text, a new understanding can be derived from it. This dangerous supplement, however, has turned out, as defined in this Article,¹⁸³ to be quite benign and quite established in the legal writing classroom and other parts of the academy. While deconstruction is dismissed or even ridiculed by some scholars,¹⁸⁴ in the new millennium, it is a standard part of readers' and writers' thought processes.¹⁸⁵ Deconstruction exposes the multiplicity of meanings, both complicated and contradictory, present in a text.¹⁸⁶

Any exercise in identifying and resolving ambiguity in legal writing will inevitably draw on deconstructive techniques. An examination of contemporary federal legislation, for example, would need some deconstructive tools to help students understand the interplay between what the statute says and what the statute is trying to accomplish or why the statute was written in its particular form. For example, a professor would have to call on deconstructive tools to explain why a statute entitled, "The Defense of Marriage Act," precludes certain forms of marriage.¹⁸⁷ Legal meaning of the statute is created by the external social and cultural environment. Additionally, under traditional conceptual hierarchy, the title of a statute is a summary of the statute or an aspirational statement of what

¹⁸¹ See Balkin, *Deconstructive Practice and Legal Theory*, *supra* note 180, at 783–86.

¹⁸² See *id.* at 755–58.

¹⁸³ See JACQUES DERRIDA, *DE LA GRAMMATOLOGIE ENGLISH 3* (Gayatri Chakravorty Spivak trans., 1976).

¹⁸⁴ See e.g., Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-plays"*, 71 N.C. L. REV. 201, 203 (1992) (asserting "applied to law, deconstruction is mischievous nonsense"); see also WEST, *supra* note 4, at 204.

¹⁸⁵ See Balkin, *supra* note 179, at 722 (analyzing legal, literary and philosophical deconstruction illustrating the pervasiveness of deconstruction among readers, writers, and scholars); see also Pierre Schlarg, *A Brief Survey of Deconstruction*, 27 CARDOZO L. REV. 741, 747–48 (2005) (deconstructing the deconstruction of another author's work).

¹⁸⁶ See Balkin, *Deconstruction's Legal Career*, *supra* note 179, at 727 (stating "[d]econstructive readings do not assert that texts have no meaning or that their meanings are undecipherable. Rather, deconstruction argues that texts are always overflowing with complicated and often contradictory meanings. The predicament that deconstruction finds in texts is not the lack of meaning but a surplus of it.").

¹⁸⁷ See Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. §§ 1, 7 (2000); 28 U.S.C. § 1738C (2000)).

the statute hopes to achieve.¹⁸⁸ A deconstructive reading would question this traditional hierarchy and read the title of a statute to be related to mischaracterizing the law encompassed in the act or the title is the opposite of the aspirations of the act.¹⁸⁹ Any analysis of modern federal legislation, such as the "Clean Air Act" would be remiss if the reader did not perform this deconstructive reading of the title and other components of the statute. The real meaning of a title can only be understood by understanding the communities who are writing and reading the text.¹⁹⁰

Joel Cornwell argues that deconstruction and other postmodern and poststructuralist tools have been slow to enter the legal writing classroom.¹⁹¹ Certainly, deconstruction has had a greater effect in legal scholarship than in the law school classroom.¹⁹² But Cornwell overstates his case. The teaching of legal writing, like much of the rest of the legal academy, has been affected by deconstruction.¹⁹³ Many in the legal writing community do in fact use deconstruction, either consciously or unconsciously, in their teaching.¹⁹⁴ Deconstruction necessarily creeps into

¹⁸⁸ See *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354 (1920) (stating "[t]he title of an act cannot limit the plain meaning of its text, although it may be looked to aid in construction in cases of doubt"); see also BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS* 197 (West 1992) (1988).

¹⁸⁹ For a wonderful example of a judge recognizing this postmodern irony of statutory drafting see *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005) (reference provided by Joseph R. Bazan).

¹⁹⁰ The use of certain biblical buzzwords in political rhetoric is another example of text that assumes multiple interpretations depending on its audience. The words "left behind" can be read to mean "forgotten or neglected," but to certain evangelical Christian audiences, the words "left behind" invoke the notion of people who have not accepted Jesus Christ as their personal Savior and will be "left behind" at the time of the Rapture. Compare *Left Behind Series*, available at <http://www.leftbehind.com> (last visited October 7, 2006), with *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in various sections of 20 U.S.C.).

¹⁹¹ See Cornwell, *supra* note 11, at 1092 ("Ironically, legal writing courses, the portion of the first-year curriculum ostensibly allotted to techniques of dissecting and manipulating language, have largely ignored the insights of analytical philosophy and literary deconstruction indirectly appropriated in other courses.").

¹⁹² See *id.*

¹⁹³ See WEST, *supra* note 4, 204 ("[A]s a tool of analysis deconstruction has all the usefulness of an unhinged steering wheel in avoiding a collision with a wall."); see also Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2079 (2001); Pollman, *supra* note 130, at 901 ("Legal writing departments (like the rest of the legal academy) were affected by these movements.").

¹⁹⁴ The topics of LWI articles and conference topics reflect the influence of deconstruction. See Eichhorn, *supra* note 2, at 105 (explaining that deconstruction's flipping of traditional

the legal writing teacher's reading of the students' texts. Deconstruction is used to figure out what a student may have meant when she wrote a particular sentence or chose a particular word. Explaining the conventions of legal writing, such as the omission of reference to "I," must be done in the context of explaining the conventions of the particular discourse community that demands such conventions. The difference in tone, style and content between a client letter, an office memorandum and a trial brief implicate deconstruction's view of text as determined by context and requiring purposeful ambiguity or jargon as context requires. Finally, any discussion of the use of footnotes in a legal writing class most likely takes into account the use and power of footnotes in judicial decisions and other forms of legal writing.¹⁹⁵ Examining and critiquing the hierarchy of importance of the footnote in a text is a direct use of deconstruction to analyze and criticize texts.¹⁹⁶

All of these uses of deconstruction can be found in the legal writing classroom in forms ranging from the benign to the radical depending on how they are used by the professor.¹⁹⁷ Most legal writing professors probably do not deliberately teach deconstruction in their classroom. Nor do they blindly teach modernist tropes like IRAC without contexts and tools

hierarchy gave the technique the label of a "dangerous supplement"); see also Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 3-9 (2003); Debra Moss Curtis & Judith R. Karp, "In a Case, In a Book, They Will Not Take a Second Look!" *Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 303-04 (2005); Litowitz, *supra* note 7, at 39-46; Andrea McArdle, *Further Reflections on Voice in Legal Writing Pedagogy: Negotiating the Space Between Lawyerly Discourse and Creativity*, Legal Writing Institute-Publications: LWI 2004 Conference Bibliography Directory (Seattle, WA), available at <http://www.lwionline.org/publications/bibliographies2004.asp>; Pollman, *supra* note 130, at 893. While many in the legal writing profession use deconstruction in some form in their teaching repertoire, I fear that many do so without acknowledging or naming what they do. See *id.*

¹⁹⁵ See Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 649 (1985).

¹⁹⁶ See Kathryn M. Stanchi, *Exploring the Law of Law Teaching: A Feminist Process*, 34 J. MARSHALL L. REV. 193, 205 (2000); see also Brook K. Baker, *Language Acculturation Processes and Resistance to In "Doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131, 149 (2000); Stanchi, *supra* note 164, at 8-9.

¹⁹⁷ See Stanchi, *supra* note 196, at 205 ("To truly educate students, legal writing professors must also teach them that thinking like a lawyer can mean what a good, creative lawyer who is challenging the system might think and do. This way, students can enter law practice knowing that creativity and deconstruction are not solely scholarly activities, but are useful—even essential—to good lawyering.").

emanated from deconstruction. Postmodernism has permeated the teaching of legal writing in such a way that it has not disrupted but simply enriched it. Deconstruction has been incorporated into the writing classroom in a way that supplements rather than supplants the other modernist tools of teaching.

VII. POSTMODERNISM, STORY-TELLING AND THE TEACHING OF LEGAL WRITING

Another way postmodernism has affected the legal academy is by recognizing and promoting the role of stories and story-telling in the law.¹⁹⁸ The power of stories and story-telling in effective legal writing is something legal writing instructors have recognized and discussed for many years.¹⁹⁹ Legal writing instructors' acknowledgment of the power of stories comes directly from postmodern theorists' identification and explication of the role and power of narrative in the construction of thought and manipulation of power.²⁰⁰ Narrative and storytelling are used in two ways by postmodern theorists: first, they are used in a broad manner to identify the underlying assumptions and viewpoints of a piece of writing. Postmodern theorists often will refer to this as the metanarrative behind a piece of writing or an idea.²⁰¹ Metanarratives are stories that provide a scheme or explanation that people use to make sense of the world.²⁰² Postmodern theorists argue all

¹⁹⁸ See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 2 (Peter Brooks & Paul Gewirtz eds., 1996).

¹⁹⁹ See Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell Stories*, 9 *PERSP. TEACHING LEGAL RES. & WRITING* 90, 90 (2001); see also Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 *QUINNIPIAC L. REV.* 1, 12-13 (2004); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 *RUTGERS L.J.* 459, 459-60 (2001) (indicating legal writing texts have been encouraging students to "tell a story" when writing the statement of facts); Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?*, 87 *MICH. L. REV.* 2099, 2104-06 (1989) (discussing empathy and storytelling); Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2075 (1989).

²⁰⁰ See Rideout & Ramsfield, *supra* note 100, at 51-52 (stating that writing is an extension or reflection of thought, thus it would necessarily follow that writing is also connected in this way to narrative). *But see* AMOREY GETHIN, *LANGUAGE AND THOUGHT: A RATIONAL ENQUIRY INTO THEIR NATURE AND RELATIONSHIP* 37 (1999).

²⁰¹ See Anne Ruggles Gere, *Narratives of Composition Studies*, 3 *LEGAL WRITING: J. LEGAL WRITING INST.* 51, 51-52 (1997) (using the term "narratives" to describe how Composition Studies views itself).

²⁰² *THE OXFORD ENGLISH DICTIONARY* (2d ed. 1989).

argument is a form of narrative or storytelling.²⁰³ The legal writer's goal is to persuade that his or her story or narrative is true and should be valued over others' stories or narratives.²⁰⁴ Postmodernism's distrust of one central truth provides the foundation of this viewpoint.²⁰⁵

The idea of metanarrative is a common device used in teaching legal writing which comes under different labels. For example, when writing an appellate brief, students are instructed to develop a theory of the case or a theme that will most effectively move the judge or reader to rule in favor of that client. This theory of the case is usually pitched as a story or metanarrative.²⁰⁶ This story *then* competes with the story or metanarratives presented by the opposing party.

²⁰³ See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989).

The strongest arguments in favor of legal storytelling are best understood within the context of the current intellectual reaction against formalism and grand theory. A broad array of recent legal commentary has suggested a movement away from these dominant forms of legal analysis, which focus on abstract, deductive reasoning from high-level principles or general rules, toward something new, sometimes called practical reason or pragmatism.

Daniel A. Farber & Susanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 820 (1993).

²⁰⁴ Thomas Morawetz, *Law's Essence: Lawyers As Tellers of Tales*, CONN. L. REV. 899, 905-06 (1997).

The conceptual (second) version of critical theory seems to reinforce one of the basic ideas of postmodernism, the rejection of the idea of a master narrative. This is the apparent recognition of the fact that events do not come packaged with an objectively correct or preferred interpretation. Events can be seen from different perspectives and incorporated into different narratives. Neutral or objective description is as much a chimera as neutral principles of law. Abstract theorizing about optimal forms of law must give way to storytelling about the various different ways any legal regime will be experienced.

Id.

²⁰⁵ See Jan M. Van Dunné, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMP. L. 463, 486 (1996) (characterizing the conclusions of her argument as a story's "happy ending"); see also Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2531 (1993) ("Law is a compendium of stories about how we use and abuse rules to manage our social relations and resolve both our differences and commonality. Legal narratives constitute one strand (and a very 'thick' one) in the long-standing conversation about order and disorder in our social and legal existence.").

²⁰⁶ See RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE,

The second and more common, but somewhat controversial, use of stories and narrative is as an analytic and argumentative device. Parts of this component of storytelling are not controversial but firmly established components of legal discourse. War stories are used in teaching and legal scholarship for dramatic and illustrative effect.²⁰⁷ Students are urged to present statements of facts in legal documents as stories. Those who write legal writing problems, exam questions and classroom exercises cannot help but recognize the story-making process involved in these forms of legal discourse as well. A little more controversial, however, is the acknowledgment of the story or narrative components of caselaw and judges' opinions.²⁰⁸ Viewing cases or opinions as stories has been erroneously perceived as somehow denigrating or mischaracterizing the law-making quality of these products.²⁰⁹ To the contrary, recognizing the narrative and storytelling components of these documents adds to their strength and power as pieces of writing and law.

STRATEGY, AND STYLE 291, 387-88 (4th ed. 2001) (stating "the lawyer must articulate the client's story in light of applicable doctrine and public policy. . . . Based on facts, doctrine, and policy values, the lawyer will identify a theory of the case. . . . [which] will influence [the lawyer's] narrative choices Writing teachers can foster awareness of the lawyer's role as interpreter [and] first-year legal writing courses can encourage students to think about the ways in which lawyers construct meaning."); see also Parker, *supra* note 100, at 594-96.

²⁰⁷ See, e.g., Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191, 1191 n.1, 1192 (2006) (defining war stories as "the retelling of an event from the teacher's experience as a practicing lawyer to illustrate a point in the classroom."); Durako, *supra* note 96, at 722; see also Deborah Schmedemann, *Do Best Practices in Legal Education Include an Obligation to the Legal Profession to Integrate Theory, Skills, and Doctrine in the Law School Curriculum?*, J. ASS'N LEGAL WRITING DIRECTORS 127, 128 (2002) (using there more apt term "peace stories").

²⁰⁸ See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 64-65 (1981) (arguing a post modernist construct, that because of the inherent nature of story and its impact in the criminal justice system at trial, the law and legal judgments are not "based on objective pictures of what really happened"); Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 15-17 (Peter Brooks & Paul Gewirtz eds., 1996); see also *NARRATIVE AND THE LEGAL DISCOURSE* (David Ray Papke ed., 1991); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1, 1-2 (1990); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Caron, *supra* note 121, at 409-10; Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 77 (1990) ("Each party in a trial is given the opportunity to tell a story. . . .").

²⁰⁹ See DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 5 (1997); see also Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251-52 (1992).

The most controversial aspect of narrative and story-telling in the law is the use of personal or fictional narrative in legal writing.²¹⁰ Postmodern scholars promote storytelling as a tool for bringing a voice to silenced or marginalized people, particularly racial and religious minorities and women.²¹¹ The stories of those traditionally left from legal writing hold “a distinctive power to challenge and unsettle the legal status quo.”²¹² Stories allow the reader to better understand things beyond normal experience.²¹³ But such use of stories is open to criticism due to a story’s subjectivity and lack of empirical substance. It is ironic, however, that the use of personal stories and narrative can be found in recent United States Supreme Court decisions²¹⁴ and federal and state legislation.²¹⁵ Like any rhetorical device, story-telling and narrative can be used and abused, but undeniably it has effect on both writers and readers of texts and must be considered when constructing legal writings.

The use of fictional narrative is an established part of the oral discourse in law school classrooms and in courtrooms. In a doctrinal class where the professor uses a Socratic method of discussing cases and rules of law, a common device used by the professor to probe the students’ understanding of the rules of law and the holdings of the cases is to ask hypothetical

²¹⁰ See Daniel A. Farber & Suzanna Sherry, *Telling Stories From School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 831–32 (1993).

²¹¹ See Paul Gewirtz, *Victims and Voyeur, in Two Narrative Problems at the Criminal Trial*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra*, note 208 at 135, 136.

²¹² See *id.*

²¹³ See Delgado, *supra* note 203, at 2440 (summarizing the impact of story-telling in the following way: “[s]tories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else’s spectacles.”). The role of story-telling and the power of narrative can be illustrated by the differences between Old and New Testament law. Jesus’ parables or stories in the New Testament have a very different power compared to some of the directive laws in the Old Testament such as the Ten Commandments. See, e.g., *Luke* 11:16, *Exodus* 20:2.

²¹⁴ See *Grutter v. Bollinger*, 539 U.S. 306, 349–51 (2003) (Thomas, J., concurring in part, dissenting in part) (quoting Frederick Douglas speaking to a group of abolitionists “almost 140 years ago”); see also Ronald Turner, *Grutter and the Passion of Justice Thomas: A Response to Professor Kearney*, 13 WM. & MARY BILL RTS. J. 821, 824–830 (2005) (considering Thomas’ opinion in *Grutter*).

²¹⁵ See 42 U.S.C. § 14071 (2004); see also Judicial Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–03, 119 Stat. 15 (2005); Kathy L. Cerminara, *Musings on the Need to Convince Some People with Disabilities That End-of-life Decision-making Advocates Are Not out to Get Them*, 37 LOY. U. CHI. L.J. 343, 347 (2006); David Hyman, *Do Good Stories Make For Good Policy?*, 25 J. HEALTH POL. POL’Y & L. 1149, 1149 (2000).

questions based on alterations of the facts of cases the students have read.²¹⁶ The hypothetical questions are, in essence, mini-stories. More obviously, exam questions are usually written in a narrative or story form. Some professors directly adopt scenarios from popular culture for their questions. Similarly, the dialogue between an advocating counsel, or moot court student, and a judge during oral argument typically has the judge imagining and articulating fictional scenarios or stories that explore the boundaries of the legal rule being argued by the advocate.²¹⁷

These uses of stories and narrative are not new and not attributable to postmodernism. Postmodern theory, however, has allowed those working in the legal writing profession to identify and name these rhetorical devices and acknowledge the powers and dangers of the storytelling and narrative process.²¹⁸ Thus, the power given by postmodernism to name or create jargon about this rhetorical device is not really dangerous in itself but illuminating and crucial to the advancement of the understanding of the power of legal writing. Teaching about story writing and narrative does not supplant careful deductive and analogical reasoning in legal writing, but is a powerful supplement.

VIII. POSTMODERN ACROBATICS IN THE LEGAL WRITING CLASSROOM

In addition to postmodern theories affecting the legal writing classroom, postmodernism's approach to disruptive analysis is a component of the legal writing instruction.²¹⁹ Legal writing classrooms often use the

²¹⁶ See Kennedy, *supra* note 122, at 17-29.

²¹⁷ See E. Barrett Prettyman, Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 556 (1984).

²¹⁸ Michael Grossberg, *How To Tell Law Stories*, 23 LAW & SOC. INQUIRY 459, 460 (1998).

Among the many debates generated by the return to storytelling has been one about authorial intent and authorial voice. This specific debate has been strongly influenced by postmodernism generally and by recent understandings of textual creation and interpretation developed by literary critics more particularly. While I do not want to rehearse all the various arguments here, I do want to emphasize that one of the major results of this debate has been a much greater consciousness about the authorial role in all narratives.

Id.

²¹⁹ See David West, *The Contribution of Continental Philosophy*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 39, 65 (Robert E. Goodin & Phillip Pettit eds., 1993) ("Postmodernists seek to disrupt all forms of discourse, and particularly forms of political

postmodern device of the conceptual flip, which disrupts or upends standard modernist tropes.²²⁰ Professor Feldman uses the term flip to describe a postmodernist ability or dexterity to reposition or view a text through different prisms and, thereby, uncover multiple and varied understandings of it:

A postmodern flip is a gestalt switch or paradigm move that reverses our prior approach to a text (or an event or a concept) and, in so doing, reveals previously unrecognized features of that text. Whereas modernists constantly attempt to reduce the meanings of texts to an essential core or single truth, postmodernists are anti-foundationalists and anti-essentialists. According to postmodernists, the meaning of a text is never grounded or stable, and therefore one can always find multiple meanings or truths. Thus, one performs a postmodern flip by taking a segment of a text, event, or concept that apparently has been reduced to a static meaning or truth and suggesting the possible existence of another (often radically different) meaning or truth. This alternative meaning or truth often emerges after one uncovers and disturbs the usually tacit assumptions underlying the original meaning. The postmodern flip then is completed by exploring how this new meaning or truth of the segment of the text, event, or concept might reorient one's understanding of the whole.²²¹

Legal writing professionals regularly engage in this postmodern flip as a teaching tool. They begin the process of teaching legal writing by formal instruction in thoroughly modernist doctrine. But once this formal doctrine is learned by the student, the professor performs a postmodern flip on the student by disrupting the formulaic or formalistic doctrine instructed to the student. Below are some examples of the flip between modernism and postmodernism often performed by legal writing instructors.

discourse, which might encourage the totalitarian suppression of diversity.”); *see also* Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough*, 12 COLUM. J. GENDER & L. 601, 624 (2003).

²²⁰ *See* FELDMAN, *supra* note 7.

²²¹ *See* Feldman, *supra* note 32, at 1048; *see also* Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-Related Cases on Its 2000-2001 Docket*, 37 TULSA L. REV. 305, 307 (2001).

A. *The Case Briefing Flip*

Legal writing courses often begin by teaching students about case briefing.²²² Case briefing is a method of summarizing cases to understand and digest their particular parts. Students are usually taught a certain form for these briefs. Typically a case brief is made up of sections reciting the title, court, the year of decision, the facts, the procedural posture, the issues raised, the holdings, the rationale of the court and additional considerations such as any dissenting opinions or issues of policy raised by the case. The process of constructing case briefs is a quintessential modernist act. The case brief reduces a complex text and creates a singular meaning for the student. A student is likely to be graded on whether he or she has correctly stated the issue presented or the holding of the case.

Once students have mastered the form of the case brief (or perhaps during the instruction), the task is complicated and problematized by the instructor who will flip the task from a straight-forward modernist exercise into a postmodern task. Students are told or discover there are usually multiple issues in a case and they should keep in mind the purpose of the case when briefing. In other words, if the case is being read for a torts class, the torts issues should be the focus of the case brief rather than evidentiary or procedural issues may also be present in the case. Students are told the holding can be expressed in a variety of ways depending on how the holding is to be used. The holding can be articulated broadly or narrowly, actively or passively. Finally, students are often told case briefing is simply a tool for organizing one's thoughts and notes about cases and hence, there is in fact no one correct way to write a case brief.²²³ Thus, once a student has been fully instructed in case briefing, the straightforward formulaic case brief has been transformed into a more fluid, indeterminate document that raises as many questions about the text of a case as it answers.²²⁴

²²² See SHAPO, *supra* note 162, at 33–37; see also DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING*, 41, 49 (2d ed. 2003); Gail Anne Kintzer et al., *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 *LEGAL WRITING: J. LEGAL WRITING INST.* 143, 145–49 (1997).

²²³ See ANN M. BURKHART & ROBERT A. STEIN, *HOW TO STUDY LAW AND TAKE LAW EXAMS IN A NUTSHELL* 104–06 (1996); Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 *WILLAMETTE L. REV.* 315, 325 (1997).

²²⁴ See Leews, *A Few Basic Truths About Law School*, available at http://www.leews.com/law_school_basic_truths.htm (last visited Sept. 28, 2006) (encouraging

B. The Case Synthesis Flip

Similarly, the case synthesis is often taught using the modernist and postmodernist flip method, as well. Case synthesis is typically taught by giving students a series of cases and asking the students to derive a single rule of law from what appears or may in fact be conflicting holdings from the cases.²²⁵ This exercise might be done by having the student first derive a rule of law from each single case separately, and then, the student must determine a rule of law comparatively, thereby requiring the students to flip, or at least alter, the original unitary rules drafted for each separate case. Such an exercise is grounded in the modernist normative act of bringing unitary order from seemingly disordered law. But this seemingly modernist act of synthesis can also be flipped to lead to create within the student a sense of the indeterminacy of the law. A rule can be subject to change by the introduction of new facts and changing societal norms.²²⁶ Students recognize the rule synthesized is merely a proposed rule and one subject to critique by an opposing counsel or unsympathetic judge or changed circumstances. The case synthesis exercise, which strives to create clear rules of law also—paradoxically—undermines the very sense of certainty a student might have about what constitutes the law under the American common law system.

students to only brief a case in one or two lines or to “book brief”); Richard J. Conviser, First Year Survival Manual, available at <http://stu.findlaw.com/outlines/commercialout/gilbert/survival.html> (last visited Sept. 28, 2006); cf. Christina Kunz, 2003 AALS Questions and Answer Session, 34 U. TOL. L. REV. 728, 732 (2003) (discussing “micro book briefing”); Paul Bateman, Ten Instructions for Briefing Cases, available at <http://www.law.umkc.edu/faculty/profiles/glesnerfines/bateman.htm> (last visited Sept. 6, 2006).

²²⁵ See, SCHMEDEMANN, *supra* note 222, at 42; SHAPO, *supra* note 162, at 57–63; Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*, 54 J. LEGAL EDUC. 201, 209 (2004).

²²⁶ LINDA EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 125 (3d ed. 2002); see also Linda Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUDIES FORUM 8, 32–40 (1996).

C. *The IRAC Flip*

The use of the deductive syllogism commonly known by the acronym IRAC²²⁷ as a legal writing tool has been the subject of much criticism for its modernist characteristics.²²⁸ The IRAC formula has much in common with the five-paragraph essay much derided by the advocates of the process method of teaching writing. The syllogism is a typical modernist construct which reduces the analytical process into a scientific formula compelled by formal logic. Once a legal issue has been identified, the major premise of the syllogism corresponds to the rule relevant to the identified issue. The minor premise corresponds to the application of the rule to the facts of the given case. The conclusion is then derived from the premises. The simple logic and simplicity of this formula makes IRAC a tool embraced by writing professors and students alike. But the drawbacks, stemming from the formula's tendency to be overly reductive, require most legal writing professors to flip this formula and force the legal writer to question the construction of the premises that make up the IRAC formula.

Students, at the beginning of the legal writing course, are usually given assignments containing a limited set of material and facts. These assignments create closed universes where the legal rule is relatively straight forward and can be used to argue in favor or against a particular outcome. In this type of limited assignment in an academic setting, the IRAC syllogism works quite well. As students delve into more complex writing—where the law, facts and underlying policy considerations of a case are uncertain—the IRAC structure begins to break down.²²⁹ In a given case, as often found in appellate brief problems, the issue may be a debate about the interpretation of a given rule of law while the facts of the case are not at issue. In this situation, the IRAC syllogism is less compelling and if applied strictly, might insult the reader or impede effective writing. Thus, once students understand and master IRAC, they are then told to question,

²²⁷ See Pollman, *supra* note 130, at 898 (explaining that IRAC is an acronym for a widely used organizational structure found in legal writing referring to issue, rule, application and conclusion in an attempt to articulate a step-by-step guide to analytical organization).

²²⁸ See Cornwell, *supra* note 11, at 1113–16; see also Pollman & Stinson, *supra* note 107, at 261–62; Mary Beth Beazley, *Point/Counterpoint: Use of IRAC-Type Formulas—Desirable or Dangerous*, THE SECOND DRAFT, Nov. 1995, at 1, 1–20, available at <http://www.lwionline.org/publications/seconddraft/nov95.pdf> (criticizing IRAC).

²²⁹ See Cornwell, *supra* note 11, at 1114; see also Michele G. Falkow, *Pride and Prejudice Lessons: Legal Writers Can Learn from Literature*, 21 TOURO L. REV. 349, 366 (2005).

alter or reject it as need be.²³⁰ The postmodern emphasis on audience, purpose, setting and conventions are, in most legal writing classrooms, more important than the formal application of the syllogism; modernist formalism is flipped in favor of a more postmodern, fluid approach to writing.

The postmodern flip, as practiced in the legal writing classroom, is not particularly dangerous or radical; it is merely a tool for effectively teaching a subject that has fluid and indeterminate components. These postmodern tools supplement and not supplant the regular teaching tools. They are indispensable. Students are ill-served by any instruction in the writing process which oversimplifies or reduces the complexities of legal writing. Postmodernism's supplement to the classroom allows legal writing professionals to be as flexible and adaptive as the subject requires.

IX. POSTMODERN PARADOXES OF THE LEGAL WRITING PROFESSIONAL

The teaching of legal writing has postmodern attributes, not only because of the influence of postmodern theory on the discipline, but also because legal writing embodies characteristics of postmodernism. One of the prime postmodern characteristic found in the teaching of legal writing is its entanglement in paradox.²³¹

Paradox is a key component of postmodernism.²³² Modernism eschews paradox and laments the uncertainty implicit in paradox.²³³ Postmodernism, consistent with its rejection of modernism, celebrates paradox.²³⁴ Paradox is seen as an inescapable component of a person's condition in the

²³⁰ See generally EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, *supra* note 226. See also SHAPO, *supra* note 162, at 113 (stating that some legal writing instruction on IRAC does not use the flip but instead merely prefaces instruction about IRAC with preliminary caveats about its limitations).

²³¹ See generally Susan P. Liemer, *The Quest For Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007 (2001).

²³² See FELDMAN, *supra* note 7, at 169; see also MINDA, *supra* note 7, at 5.

²³³ See MORLEY, *supra* note 30.

²³⁴ See MINDA, *supra* note 7, at 5; JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE. 60 (Geoff Bennington & Brian Massumi trans., 1984); see also KEN VINSON, THE CASE AGAINST THE LAW: LEGAL JARGON, LEGAL LEARNING, AND LEGAL LEGERDEMAIN 3 (2004).

postmodern or post-industrial era.²³⁵ (In a similar vein, irony is celebrated in postmodernism.²³⁶)

One paradox found in the teaching of legal writing is that the legal writing class engages students at some of the highest theoretical levels a student is likely to find in a first-year law class while simultaneously providing the most practical of all first-year classes. It is in the legal writing class that students will analyze the structure of argument and language itself, how the law is constructed or destroyed through the manipulation of language.²³⁷ Some legal writing classrooms introduce students to jurisprudential theory such as formalism, realism, positivism, deconstruction, and critical legal studies issues in the context of how a piece of writing can be read by different audiences.²³⁸ Some instructors begin the semester by questioning what constitutes the law, viewing the process of learning to write about the law as part of the process of learning what is the law and the role of a lawyer.²³⁹ These highly theoretical components of teaching are contrasted by the undeniable practicality of the subject. The skills learned in legal writing classes help students find jobs by giving them skills useful for law office practice and writing samples. In addition, the skills learned in legal writing class directly help students succeed in their other classes. Learning to synthesize cases helps students prepare their outlines in their other classes. Learning to structure a legal argument helps them write a good exam answer in their doctrinal classes.

Legal writing classes are a paradoxical combination of high and low technology. Legal writing is based upon the most basic of subjects and tools: writing done on paper with ink (or done on chalkboard with chalk). Legal writing is also based upon the most complex of technology: laptop and classroom computers which are projected onto screens by LCD

²³⁵ See MINDA, *supra* note 7, at 2.

²³⁶ See Balkin, *supra* note 20, at 1968; see also FELDMAN, *supra* note 7, at 40–41.

²³⁷ See LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 419 (4th ed. 2006); see also Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 *LEGAL WRITING: J. LEGAL WRITING INST.* 167, 168 (1999).

²³⁸ See Falk & Fajans, *supra* note 127, at 163–65; see also Stanchi, *supra* note 164, at 27.

²³⁹ See SCHMEDEMANN, *supra* note 222, at 30–37 (connecting case briefs to the process of learning the law).

projectors.²⁴⁰ This most basic of skills is also taught in a postmodern mix of old and new. While students will certainly use paper and pens in and outside of the legal writing class, the typical class will be a combination of lecture, Socratic dialogue, video, PowerPoint, small groups, one-on-one work and role playing.²⁴¹ Besides writing, students will read, reorganize, revise, edit, recite and manipulate legal text. These activities take place in and outside the classroom, in the library, coffee shops, and online. The diffused and fragmented components of this instruction clearly place it in the category of a postmodern phenomenon in marked contrast to traditional modern lecture-based or instructor-focused classes.

A component of postmodernism is an emphasis on what is traditionally marginal: postmodernism transforms the marginal into the major focus of inquiry.²⁴² There are certainly aspects of the legal writing class where this postmodern trait is apparent, particularly the emphasis in legal writing courses on the minutia of proper citation form, proper formatting (paper, font, margin sizes), and correct grammar, style and usage. The enormous importance of these non-substantive parts of writing in the writing class disrupts the standard modernist preference of substance over form. In contrast to the modernist paradigm of learning from some central text, much of the learning our students perform is from writing in the margins of text. Often our writing to our students is done through marginalia; we comment on their drafts, we respond to their emails, we cross, circle, underline and hyperlink ours and their texts.

There are also essentialist paradoxes in the writing found in legal writing classes. Students are told to remove the word "I" from their legal writing (especially "I believe," "I feel," "I think").²⁴³ But paradoxically students are told to come up with original arguments and think for themselves. If a student does come up with an original argument, she may be, paradoxically, urged to find support for the argument because the idea

²⁴⁰ See Thomas T. Barker & Fred O. Kemp, *Network Theory: A Postmodern Pedagogy for the Writing Classroom*, in *COMPUTERS AND COMMUNITY: TEACHING COMPOSITION IN THE TWENTY-FIRST CENTURY* 1, 23–26 (Carolyn Handa ed., 1990); Smith, *supra* note 103, at 123–27.

²⁴¹ See Kearney & Beazley, *supra* note 175, at 885; see also Lucia Ann Silecchia, *Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writers in the Electronic Age*, 75 NEB. L. REV. 802, 846 (1996).

²⁴² See Litowitz, *supra* note 70, at 729 n.50; see also Sheehan, *supra* note 1, at 121; Barbara Stark, *After word(s): 'Violations of Human Dignity' and Postmodern International Law*, 27 YALE J. INT'L L. 315, 318 (2002).

²⁴³ See OATES & ENQUIST, *supra* note 237, at 678–80.

will be more persuasive if it is not original but grounded in past precedent or scholarship from eminent jurists.²⁴⁴ Students are bombarded with conflicting modernist and postmodernist conceptions of writing. Modernist philosophy is grounded in the idea of the individual, solitary thinker creating ideas from whole cloth. Postmodernism is skeptical of the notion of an original idea and views all ideas emanating from others and the community. Thus, students are urged to be original and recognize their originality is grounded and made stronger by determining the sources of their idea and others who have identified it as well.

Legal writing professionals also face paradoxes which arise from their place and status in the academy. Legal writing is recognized as an important skill, requiring skilled instruction, and devoted teachers. Legal writing teachers however are underpaid and under-recognized in much of the law school academy.²⁴⁵ While great strides have been made to improve the status of legal writing teachers in law schools, their place is one that is still on the margins in many schools.²⁴⁶ While legal writing professionals are marginalized in the academy, their courses are often the most pedagogically sound and practical.²⁴⁷ Legal writing teachers are often

²⁴⁴ See Cornwell, *supra* note 100, at 56 (“Students are taught that the strength of a legal assertion lies in its familiarity; original ideas are by nature idiosyncratic and untrustworthy.”); see also Parker, *supra* note 100, at 597; Rideout & Ramsfield, *supra* note 100, at 59.

²⁴⁵ See Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 353–56 (2001); see also Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 SCRIBES J. LEGAL WRITING 113, 113 (2004); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1, 10–12 (2001).

²⁴⁶ See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 121, 137, 148, 150 (1997); see also Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75, 103 (1997) (pointing out that legal writing professors, who are mostly women, will continue to be marginalized by the legal Academy until schools change their cultures and allow legal writing professors to gain full status in the academy); Eichhorn, *supra* note 2, at 113; Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 320 (1980); Liemer & Levine, *supra* note 245, at 129–34; Stanchi, *supra* note 164, at 1112 (highlighting the paradox (described as Zeno’s Paradox) that arises from the inequity of legal writing faculty salaries—although equity gets closer, it can never be reached because as writing faculty salaries increase, doctrinal faculty salaries increase as well); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 235 (1996).

²⁴⁷ See Neal Feigenson, *Essay Review*, 41 J. LEGAL EDUC. 503, 503 n.1.

called on to perform some of the most important law school functions. In addition, legal writing professionals are sometimes asked to fix bar passage and retention problems, provide academic support and run orientation programs for entering students to boost student performance and satisfaction.²⁴⁸ These additional duties, while they may or may not be compensated, paradoxically, are not truly valued.²⁴⁹ Scholarship is the area that many law faculties indicate is important for advancement in the profession and is used to justify a lower status for legal writing professionals in the academy.²⁵⁰ Paradoxically, legal writing professionals are simultaneously not given institutional support, time, space, and encouragement to perform writing which is so highly valued. It is paradoxical and ironic that those members of the legal academy paid and trained to teach writing are implicitly discouraged from the act of writing.

Other paradoxes arise from the nature of law and language itself. Since both law and language are by their nature changing and evolving matter, reducing law and legal language to terms of art, jargon or elemental rules, paradoxically both advances and hinders the profession.²⁵¹ Legal language, as most irritatingly epitomized by legalese and more benignly by jargon,

[T]he pedagogy of the writing course is often far sounder than that of the typical doctrinal course: in the writing course, for instance, tasks and goals are made explicit, giving students a better context for learning; students produce well-defined work, whether written or spoken, which the instructors critique promptly and with constructive detail; and so on. The paradox, of course, is that the limited resources and inferior status of most legal writing programs ought, if anything, to excuse any perceived ineffectiveness when they are compared to other courses.

Id. (citing JEROME S. BRUNER, *TOWARD A THEORY OF INSTRUCTION* 40–53 (1966)).

²⁴⁸ See M.H. Sam Jacobson, *Providing Academic Support Without an Academic Support Program*, 3 *LEGAL WRITING: J. LEGAL WRITING INST.* 241, 257 (1997); Dionne L. Koller, *Legal Writing and Academic Support: Timing Is Everything*, 53 *CLEV. ST. L. REV.* 51, 52–54 (2005); Nancy L. Schultz, *There's a New Test in Town: Preparing Students for the MPT*, *PERSP.: TEACHING LEGAL RES. & WRITING* 14, 14 (1999).

²⁴⁹ See Liemer, *supra* note 231, at 1017–18.

²⁵⁰ See *id.*; see also Ann C. McGinley *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 *UCLA WOMEN'S L.J.* 1, 15–16 (2005).

²⁵¹ See Pollman, *supra* note 130, at 890. (“[T]he paradox of the developing professional language: that it simultaneously hinders and advances communication about legal writing.”). Language itself raises paradoxes such as the paradox of persuasion: “The harder you argue, the less persuasive you are.” Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 *J. LEGAL EDUC.* 80, 91 (2003).

both advances the profession, by creating a shared language and source for communicating ideas, and hinders the profession, by simultaneously reducing and fixing these ideas, which effectively stifles and oversimplifies the complexity and organic nature of the law.²⁵² Law also contains the paradox of the difference between the aspiration of the rule of law as written and that which is practiced. The law, in its written form, seeks coherence, rationality and consistency in the regulation of society, but the law, as practiced, is often aphasic, contradictory, and perverse.²⁵³ The role of teaching both law and writing places the legal writing professional in the middle of these paradoxes.²⁵⁴ It is these paradoxes which illustrate legal writing profession's postmodern condition.

X. CONCLUSION: ACKNOWLEDGING AND CELEBRATING THE POSTMODERN ATTRIBUTES OF AND POSTMODERNISM'S CONTRIBUTIONS TO THE LEGAL WRITING PROFESSION

Scholars have lamented legal writing's anomalous status in the legal academy.²⁵⁵ Some have stated legal writing "lacks pedigree, has no grand theory" or "pedagogy of its own."²⁵⁶ Others have called teaching legal writing the "art of the impossible."²⁵⁷ Such is not the state of legal writing today. With two national organizations and multiple journals devoted directly to the field and many journals regularly devoting issues to the subject, legal writing has a pedagogy of its own which is as coherent as any pedagogy found in the legal academy.²⁵⁸ As argued in this Article, a component of this pedagogy has a strikingly postmodern bent.

²⁵² See Pollman, *supra* note 130, at 890 (rejecting the regulation of legal writing jargon or language because that approach will stifle creativity and vitality in a new area but embracing the study of the emerging professional language).

²⁵³ See Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1082-83 (1989).

²⁵⁴ See Pollman, *supra* note 130, at 888.

²⁵⁵ See Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883, 884 (1995).

²⁵⁶ See *id.* at 884, 896.

²⁵⁷ See *id.* at 884.

²⁵⁸ The problem is that the legal academy does not have a coherent pedagogy of its own. The McCrate report and numerous articles attest to the schizophrenic nature of law school pedagogy, groping between its academic and trade orientations.

Professors Jill J. Ramsfield and J. Christopher Rideout eloquently described the immense potential for legal writing scholarship: "We are scholars of a new discipline. Our work, so carefully cut out for us by our predecessors, continues. . . . We do not yet

Imagine three legal writing professors, one each from 1980, 1990 and 2000, visiting each other's classrooms.²⁵⁹ The professor from 1980 might have a hard time recognizing the class in 1990 and probably would be lost or amazed in 2000.²⁶⁰ The change which has occurred is attributable, at least in part, to postmodernism; the tremendous change reflects the postmodern attributes found across the academy, the student body, and society as a whole.²⁶¹

The postmodern attributes of and influences on the teaching of legal writing are not bad or dangerous. They do not indicate that the teaching of legal writing is particularly associated with any political movement or left-wing ideology.²⁶² As mentioned earlier, postmodernism is politically neutral as a theory and, similarly, legal writing is politically neutral as a discipline.²⁶³

know the depth of our discipline, nor have we fully articulated its breadth. We own a rare moment in scholarship, a moment of discovery and careful preservation, a moment of intellectual adventure."

Smith, *supra* note 62, at 26 (quoting Jill J. Ramsfield & J. Christopher Rideout, *Scholarship in Legal Writing*, in *THE POLITICS OF LEGAL WRITING* 91 (Jan Levine, Rebecca Cochran & Steve Johansen eds., 1995)).

²⁵⁹ But see Wendy Bishop, *Because Teaching Compositions is (Still) Mostly About Teaching Composition*, *COMPOSITION STUDIES IN THE NEW MILLENNIUM: REREADING THE PAST, REWRITING THE FUTURE* 65 (Lynn Z. Bloom et al. eds., 2003) (recognizing the similarity among the classrooms' pedagogy over the past twenty years). I believe legal writing classrooms have changed more dramatically during this time period.

²⁶⁰ The use of computers and the internet have changed the way legal writing is done, taught and imagined. Teaching methods have changed; there is a vast choice of textbooks, exercises, and resources. The legal writing academy has grown and has become firmly established. See Durako, *supra* note 105, at 115-16; see also Levine, *supra* note 105, at 59; Ramsfield, *supra* note 105, at 123-27; Smith, *supra* note 103, at 123-27; Smith, *supra* note 62, at 6, 8.

²⁶¹ See James Seaton, *The Metaphysics of Postmodernism*, *HUMANITAS*, Spring 1999, at 104, 104, available at <http://www.nhinet.org/seatonr.htm> (reviewing CARL RAPP, *FLEEING THE UNIVERSAL, THE CRITIQUE OF POST-RATIONAL CRITICISM* 272 (1998)) ("The thesis that contemporary society is postmodernist does not assert that most people consciously accept postmodernist doctrines but that these doctrines reflect the working assumptions that most of us live by but refuse to acknowledge. It seems clear that there is little public support for the theoretical notion that there is no significant distinction between truth and falsehood, but it is unclear to what extent we remain willing to acknowledge the authority of objective truth when such acknowledgement is politically or personally inconvenient.").

²⁶² See Balkin, *supra* note 179, at 733-35; see also FELDMAN, *supra* note 7, at 43-44.

²⁶³ See FELDMAN, *supra* note 7, at 132.

The legal writing profession did not consciously embrace postmodernism nor is it deliberately postmodern in character. The profession, however, has attributes of both modernism and postmodernism.²⁶⁴ The movement from modernism to postmodernism is a natural part of the humanist impulse to search for truth and certainty in an unstable world. The tension created between the normative needs of the law and the fluidity and evolving nature of the law is most acute when teaching legal writing. Similar tensions arise from the normative needs of the writer's audience and the writing's purpose conflicting with the fluidity and constructs of the writer's thinking process and writing habits. Both writing and law are uncertain creatures subject to change and flux. Postmodernism is the appropriate theory for exposing what the legal writing profession endeavors.

Postmodernism has been and remains a useful tool in the toolbox of legal writing professionals.²⁶⁵ The process method of teaching legal writing was influenced by postmodernism. As a theory, postmodernism provides insight into the writing process and how to intervene as a teacher in it. Postmodernism's outgrowths such as deconstruction and the recognition of the power of narrative have altered the way the legal profession sees writing and teaches it. The legal writing profession's ability to bridge the modernist needs of the legal academy and profession with the postmodern realities of society and practice is the ultimate strength and value of legal writing.

But the interconnection of postmodernism and the teaching of legal writing might help explain the political issue of its marginalized status in the academy. As Professor Eichhorn pointed out, "legal writing is a dangerous supplement, capable of breaking down the dichotomies upon which the legal academy has relied to keep its hierarchical house in order."²⁶⁶ In addition, the ontological uncertainty raised by the teaching of legal writing and that a scholarly examination of legal writing requires, can also be viewed as dangerous in a profession which privileges modernist and positivist positions regarding the law.

The postmodern characteristics of legal writing, however, do not need to be dangerous or threatening to the legal academy. Postmodernism, at least

²⁶⁴ The relationship between modernism and postmodernism is not necessarily dichotomous. See *id.* at 187.

²⁶⁵ See *id.* at 152, 187.

²⁶⁶ See Eichhorn, *supra* note 2, 117.

in the spirit of the more affirmative postmodernists or pragmatics, is a supplement to modernism not its opposition.²⁶⁷ Indeed the growth of the legal writing movement and the increasing number of legal writing positions that are tenure-track are a testament to the recognition that legal writing is not dangerous but a necessary component of the legal academy.²⁶⁸

It may be the perceived danger of this postmodern bent that causes some to marginalize the profession of the teaching of legal writing. But, like postmodern theory itself, legal writing as a profession has become entrenched in the academy. As generations of law students are graduating from law schools with legal writing pedagogy instilled into their training, legal writing pedagogy in both its modern and postmodern forms will become even more firmly entrenched in the academy and the profession. Through this process, legal writing, like postmodernism, is moving from the margins to the mainstream, ultimately demonstrating that legal writing and postmodernism are neither dead nor dangerous.

²⁶⁷ As discussed earlier in this Article, many of the critics of postmodernism see it as a danger or threat because they put it in opposition to or in duality with modernism. Such dualistic thinking is itself one of the limitations of modernism and modernistic thinking. See FELDMAN, *supra* note 7, at 132.

²⁶⁸ See generally Association of Legal Writing Directors, ALWD/LWI LRN Survey Reports, available at <http://www.alwd.org/> (last visited Sept. 28, 2006) (containing national survey reports of legal writing professors' salaries from 1999 until 2006); see also Liemer & Levine, *supra* note 245, at 119–29.