

# The Grammar Wars Come to Law School

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*The semester begins and you receive the first writing assignment from your students. It's a simple two-paragraph draft that required the use of analogical reasoning. ... [M]uch to your surprise, the deficiencies in understanding what constitutes an effective analogy were dwarfed by the glaring and horrendous number of basic writing errors that appeared in all too many of the papers. These students, you suddenly realize, don't know how to write!*

Like the author of the above quote, many, if not most, legal writing instructors have been surprised by the sometimes astounding lack of basic writing skills exhibited by a few of their students. During each of the major grading cycles throughout the academic year, the legal writing listserv lights up as instructors share their frustrations regarding students' basic skill errors, and the often humorous results of such errors. The larger academic community shares that frustration. One question often asked is where the blame lies. Are our students at fault?

As with most questions posed in legal education, the answer no doubt is, "it depends." Certainly, individual effort accounts for some of the weaknesses we observe in student mastery of punctuation, grammar, and style.<sup>2</sup> However, the degree of effort law students display must be considered in the larger context of their educational backgrounds.

By now, law schools are acutely aware of empirical studies demonstrating that American students underperform in basic knowledge and skill acquisition, including reading and writing skills, and that a powerful domino effect might

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1. Edward H. Telfeyan, The "Grammar Bee"—One Way to Take the Pain Out of Teaching the Mechanics of Writing, 17 *Persp.: Teaching Legal Res. & Writing* 25, 25 (2008).
2. For information derived from a qualitative interview study of how first-year law students use instructor comments regarding basic skill errors, see Aida M. Alaka, Phenomenology of Error in Legal Writing, 28 *Quinnipiac L. Rev.* 1 (2009). For the perspective of one college professor, see Bob Kunzinger, The \$5,000 Approach to Teaching Writing, *Chron. Higher Educ.* (June 29, 2009), available at <http://chronicle.com/weekly/v55/i40/40kunzinger.htm> (expressing his belief that weak writing is primarily caused by the students' awareness that "professors must read their papers, no matter how poorly they might be written," rather than their innate writing ability, for example).

underlie the problem.<sup>3</sup> Indeed, poor writing may be endemic in our society.<sup>4</sup> The precise causes of these disturbing facts are difficult to pinpoint, especially when one considers that complaints about student writing skills are not new.<sup>5</sup> In the 1960s, for example, expanding class sizes were blamed for the inability of high school English teachers to provide students with sufficient writing practice for students to acquire “even passable skill in spelling, grammar, punctuation, sentence structure, and other rudiments of English composition.”<sup>6</sup> One scholar suggests that “freshmen have never arrived at college with impressive writing skills,” and notes that about 25 percent of Harvard freshmen in the 1890s were deemed poor writers who were ill prepared for college coursework.<sup>7</sup>

Among factors that have been identified as contributing to the problem today are the federal No Child Left Behind Act with its reliance on standardized assessments, and the associated state education standards, which do not typically focus on written expression.<sup>8</sup> As important, however, may be the theoretical shifts in English-language pedagogy and the resulting teaching and curricular trends that have occurred in the nation’s English classrooms

3. A recent study by ACT, for example, shows that students entering high school do not possess expected freshman skill levels in key subject areas and that a significant amount of high school classroom time is spent re-teaching those skills. ACT, *Rigor at Risk: Reaffirming Quality in the High School Core Curriculum 19–20*, 25 (2007), <http://www.act.org/path/policy/reports/rigor.html> (last visited June 30, 2009). Formerly known as American College Testing, the organization changed its name to ACT in 1996. See <http://www.act.org/aboutact/history.html>. The report also paints a sobering picture of how ill prepared high school graduates are for college. The ACT study shows that three out of four high school graduates in 2006 who took the recommended number of core courses—English, mathematics, reading and science—were “not prepared to take credit-bearing entry-level college courses with a reasonable chance of succeeding in those courses.” *Id.* at 1, fig.1.
4. Writing-skill proficiency is particularly disappointing. Although studies find that students can write, the research also shows that they cannot write well. A 2003 report by the National Commission on Writing revealed that, although the majority of students performed at or above a basic level in writing, very few performed at a proficient level, that is, able to “create precise, engaging, coherent prose.” The National Commission on Writing for America’s Families, Schools, and Colleges, *The Neglected “R”: The Need for a Writing Revolution 19* (2003), available at <http://www.writingcommission.org/report.html> (last visited June 30, 2009) [hereinafter *The Neglected “R”*]. In eighth grade, for example, only 27 percent of students perform at or above a “proficient” level, although 84 percent perform at a “basic” level. Similarly, by twelfth grade, only 22 percent of students perform at a proficient level, while 78 percent are at a basic level of achievement. *Id.* at 19, fig.1.
5. Derek Bok, *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More 82* (Princeton Univ. Press 2006).
6. Louis Cassels, *Boys and Girls Graduating from School, But Can’t Write*, *Atlanta Daily World*, Mar. 6, 1960, at 1.
7. Bok, *supra* note 5.
8. See *The National Commission on Writing For America’s Families, Schools, and Colleges, Writing and School Reform 13–14* (2006), available at <http://www.writingcommission.org/report.html> (last visited June 30, 2009); ACT, *Aligning Postsecondary Expectations and High School Practice: The Gap Defined 2, 3* (2007) (reporting ACT’s 2005–2006 curriculum survey) [hereinafter *The Gap Defined*].

since the 1980s.<sup>9</sup> These trends provide yet more support for those who advocate change in legal education, specifically more opportunities to write across the law-school curriculum. They also highlight the need for doctrinal faculty to have an integral role in addressing basic writing skills—even without integrating writing assignments into their teaching methods.

### The Grammar Wars

Law professors across the doctrinal spectrum are likely painfully aware that many of their students lack skill and grace in writing. Those instructors who grew up in an era characterized by diagramming sentences and phonics may not be aware, however, of the significant debates that have raged over how to teach children to read, write, and learn spelling, grammar, and punctuation. During the last twenty-plus years, skirmishes in “language wars,” “grammar wars,” and “punctuation wars” have occurred in the nation’s classrooms.

The “language wars” have been fought between educators and researchers who advocate the traditional methods of teaching reading and word recognition through phonics and others who reject phonics in favor of the “Whole Language Approach.” Advocates of the latter method eschew the “‘break-it-up-and-sound-it-out’ approach to basic spelling and word comprehension.”<sup>10</sup>

Similarly, English instructors have been debating whether they can and should teach grammar as a separate subject. On one side of the debate are those who advocate explicit grammar instruction and on the other are those who theorize that children can only learn grammar in the context of reading or writing. The latter believe that “students can learn grammar simply by writing.”<sup>11</sup> Although advocates on both sides of the grammar wars can cite studies purporting to support their positions,<sup>12</sup> the controversy has led many educators to reject traditional grammar instruction altogether.

9. The proliferation of technology-aided writing may also be affecting students’ writing skills. Stanford University is currently engaged in a five-year study of their students’ writing development. The Stanford Study of Writing and other studies examine how blogging, texting, and other social writing affect writing skills. See Josh Keller, *Studies Explore Whether the Internet Makes Students Better Writers*, *Chron. of Higher Educ.*, June 15, 2009, (last visited June 15, 2009).
10. See generally, e.g., Reading, <http://www.edweek.org/rc/issues/reading/> (last visited June 30, 2009); Mackinac Center for Public Policy, *Phonics, “Whole Language,” and Literacy: The Alphabet and American Education*, posted on Feb. 10, 2000 by Thomas Bertonneau. For more information on the debate between “Whole Language” versus “Phonics” as the appropriate method for teaching reading and writing, a simple Google search of those terms will produce countless articles.
11. See, e.g., Ed Vavra, *On Not Teaching Grammar*, 85 *Eng. J.* 32, 32 (1996).
12. Compare, e.g., Constance Weaver, *Teaching Grammar in the Context of Writing*, 85 *Eng. J.* 15, 15 (1996) (noting that “it can be difficult for community members and English teachers alike to believe what decades of grammar studies tell us: . . . the teaching of grammar does not serve any practical purpose for most students) with, e.g., Vavra, *supra* note 11, at 32 (claiming that “many teachers are not aware that the anti-grammar research is simply not valid”).

In 1985, the National Council of Teachers of English (NCTE) formally rejected the traditional approach to teaching English by using repetitive grammar drills and exercises. Based on what it called “ample evidence from fifty years of research [that] has shown the teaching of grammar in isolation does not lead to improvement in students’ speaking and writing, and that in fact, it hinders development of students’ oral and written language,” the NCTE issued the following position statement:

Resolved, that the National Council of Teachers of English affirm the position that the use of isolated grammar and usage exercises not supported by theory and research is a deterrent to the improvement of students’ speaking and writing and that, in order to improve both of these, class time at all levels must be devoted to opportunities for meaningful listening, speaking, reading, and writing; and...that NCTE urge the discontinuance of testing practices that encourage the teaching of grammar rather than English language arts instruction.<sup>13</sup>

NCTE now acknowledges that knowing grammar is important to understanding what makes writing clear, interesting, and precise.<sup>14</sup> The group also recognizes that understanding grammar terminology affords students the ability to think about and discuss individual sentences. But the Council does not believe that teaching grammar will eliminate grammar errors. Instead, it posits, “lots of discussion of language, along with lots of reading and lots of writing, are the three ingredients for helping students write in accordance with the conventions of standard English.”<sup>15</sup>

Although at least some English teachers believed that NCTE had later softened its stance on teaching grammar,<sup>16</sup> the group announced in 2006 that its position was unchanged and reiterated: “Isolated Grammar Drills do not Produce Good Writers.”<sup>17</sup> Citing a Carnegie Corporation study, NCTE claims that in “classrooms where much of the time is spent on grammar exercises,

13. NCTE, Position Statement Resolution on Grammar Exercises to Teach Speaking and Writing, <http://www.ncte.org/positions/statements/grammarexercises> (last visited June 29, 2009).

14. See NCTE, Guideline on Some Questions and Answers about Grammar, <http://www.ncte.org/positions/statements/qandaaboutgrammar> (last visited Dec. 8, 2009).

15. *Id.*

16. Paul E. Doniger, Language Matters: Grammar as a Tool in the Teaching of Literature, 92 *Eng. J.* 101, 104 n.1 (2003).

17. News Release, NCTE, NCTE Position Unchanged: Isolated Grammar Drills Do Not Produce Good Writers (Oct. 26, 2006). Although the NCTE web link for this news release is no longer active, further discussion of language instruction can be found on the NCTE’s web site, <http://www.ncte.org/> (last visited June 29, 2009).

student writing suffers. This happens because, in those classes, students are spending more time underlining random parts of speech or diagramming sentences than actually composing.”<sup>18</sup>

The Council’s position on teaching grammar has proven controversial.<sup>19</sup> In 1996 and 2003, for example, *The English Journal* devoted two issues to “The Great Debate (Again): Teaching Grammar and Usage,” and “Revitalizing Grammar,” respectively.<sup>20</sup> A sample of the article titles in these issues aptly demonstrates the controversy: “Correct Grammar So Essential to Effective Writing Can be Taught—Really!”,<sup>21</sup> “Why Debates About Teaching Grammar and Usage ‘Tweak’ Me Out”,<sup>22</sup> “Why Revitalize Grammar?”<sup>23</sup> and “Grammar—Comma—A New Beginning.”<sup>24</sup>

Similarly, Whole Language theory has had its detractors. In the words of one critic:

By surrounding primary and elementary pupils with literature, by encouraging children to guess at meanings on the basis of pictures in the books or to treat words rather than letters as basic units, and by accepting “invented spelling” as the equivalent to the rule-regulated norms of orthography, the “Whole Language” teachers expect that children will, by a magical osmosis that defies explanation, acquire the same literacy as their parents and grandparents, who got theirs the old-fashioned way.<sup>25</sup>

18. *Id.* See also Beyond Grammar Drills: How Language Works in Learning to Write, <http://www.ncte.org/magazine/archives/125935> (last visited June 29, 2009) (positing that “[s]killed teachers of writing know how to teach grammar to their students as they write, when they have a particular need to know the information”).
19. The NCTE has also been criticized for its Standards for the English Language Arts, which are located at <http://www.ncte.org/standards> (last visited Dec. 8, 2009). The twelve “standards” have been criticized as expressing no more than “a statement of philosophy,” rather than standards, and for lacking in guidance. See Henry B. Maloney, *The Little Standards That Couldn’t*, 86 Eng. J. 86 (1997).
20. See 85 Eng. J. (1996) and 92 Eng. J. (2003). Many of the articles in these issues refer to but do not provide the scholarly research upon which the authors base their opinions. In some cases, the articles appear to be based on the authors’ own experiences.
21. Alvin R. Brown, *Correct Grammar So Essential to Effective Writing Can Be Taught—Really!*, 85 Eng. J. 98, 98–101 (1996). The author shares his approach to teaching grammar and punctuation.
22. John A. Skretta, *Why Debates about Teaching Grammar and Usage “Tweak” Me Out*, 85 Eng. J. 64, 64–67 (1996). The author, an English teacher in Lincoln, Nebraska, argues that explicit instruction in grammar is not relevant to his students. In his experience, students learn grammar naturally and English teachers must recognize that students are already grammatically literate.
23. Patricia A. Dunn & Kenneth Lindblom, *Why Revitalize Grammar?* 92 Eng. J. 43 (2003).
24. Mary Ehrenworth, *Grammar—Comma—A New Beginning*, 92 Eng. J. 90 (2003). Based on her experience, the author criticizes the approach to grading student writing that focuses on grammatical and punctuation errors.
25. See Bertonneau, *supra* note 10.

Complicating matters is the notion that there are plural English “grammars,” which not all agree are suitable for teaching.<sup>26</sup> Moreover, these grammar schema often conflict in that they describe English grammar differently,<sup>27</sup> sometimes with different rules of punctuation and usage.<sup>28</sup> In light of these pedagogical conflicts over whether or how to teach grammar and punctuation, law instructors should not be surprised by the many errors they observe.

### **The Gap between Postsecondary Expectations and High School Practice**

The grammar and punctuation wars may contribute to a disturbing disconnect that exists between the value that high school and college instructors place on grammar and usage skills. Although these two groups largely agree on what writing skills students should possess, they disagree on the importance of these skills.<sup>29</sup> According to a 2003 ACT survey, out of six general writing skill categories, grammar and usage skills ranked highest in importance at the college level but lowest at the high school level.<sup>30</sup>

Writing Skills	Rank Importance		Percent of HS teachers who teach skills
	College instructors	High school teachers	
Grammar and Usage	1	6	69
Sentence Structure	2	2	90
Writing Strategy	3	1	96
Organization	4	3	92
Punctuation	5	5	83
Style	6	4	92

26. Anthony D. Hunter, *A New Grammar That Has Clearly Improved Writing*, 85 *Eng. J.* 102 (1996).
27. Ed Vavra, *Grammar is Back, but When Will We Start Cooking?*, 92 *Eng. J.* 86, 86-89 (2003). The author argues that English teachers cannot return to teaching “traditional grammar” because it no longer exists. Although he contends that teaching grammar is “back,” he notes that grammarians disagree on how to identify different parts of speech, and that until there is agreement on grammar terminology, teachers will be stymied in their attempts to effectively teach the subject.
28. Martha Faulk, *Matters of Punctuation: Open or Close*, 16 *Persp.: Teaching Legal Res. & Writing* 44 (2007); Eugene Volokh, *Correcting Students’ Usage Errors Without Making Errors of Our Own*, 58 *J. Legal Educ.* 533 (2008).
29. *See* Press Release, *Survey Shows Writing Skills Most Important to College Teachers not Always Emphasized in High School Instruction* (Apr. 8, 2003), <http://www.act.org/news/releases/2003/4-08-03.html> (last visited June 30, 2009).
30. *Id.*

According to ACT, these data may explain why “a significant number of first-year college students need remedial help with their writing skills.”<sup>31</sup> Moreover, test scores indicate that 46 percent of students who took the ACT in 2002 “are likely struggling with such fundamental English skills as: [u]sing punctuation to clarify meaning, [s]olving basic grammatical problems such as subject-verb agreement, [and d]etermining the clearest and most logical way to link clauses.”<sup>32</sup>

ACT’s 2005–2006 National Curriculum Survey also found significant differences between high school instruction and postsecondary expectations across the curriculum.<sup>33</sup> Not only does this survey underscore the dichotomy regarding the relative importance placed on teaching grammar and punctuation skills between the two camps,<sup>34</sup> it raises concerns about the development of reading skills. Of particular importance for legal educators, the “survey results indicate a general lack of reading courses in high school and a decline in the teaching of targeted reading strategies after ninth grade.”<sup>35</sup> The report suggests that all high-school courses across the curriculum should provide texts that challenge students to read and understand complex materials and develop students’ strategic reading skills.<sup>36</sup>

Despite the value that college instructors purport to place on basic writing skills, students who perform poorly in writing and literacy in grades K-12 do not appear to catch up on missing skills once they get to college. The U.S. Department of Education’s National Assessment of Adult Literacy demonstrates that the percentage of college students performing at a “proficient” level decreased from 40 to 31 percent between 1992 and 2003.<sup>37</sup> In a three-

31. *Id.*

32. *Id.* ACT also reports that secondary school teachers are more likely to teach such reading skills as “analyzing a text to identify an author’s unstated assumptions, evaluating information in a text for completeness, recognizing and understanding the use of satire, and analyzing a text to identify confusing, ambiguous, or vague language” to students who teachers believe are college bound. *Id.* Based on the results of the 2005 ACT scores, only about 50 percent of high-school graduates were ready for college-level reading. ACT, Reading Between the Lines: What ACT Reveals about College Readiness in Reading 1, 1 (2006), available at [http://www.act.org/research/policymakers/pdf/reading\\_summary.pdf](http://www.act.org/research/policymakers/pdf/reading_summary.pdf) (last visited June 30, 2009).

33. See generally ACT, The Gap Defined, *supra* note 8, which includes information regarding the discrepancies between secondary-school teaching practices and college expectations, and provides policy implications and suggestions for change.

34. *Id.* at 5.

35. *Id.* at 6.

36. *Id.* at 6, 10. For empirical studies linking students’ critical reading skills to successful law-school performance, see Leah M. Christensen, Legal Reading and Success in Law School: An Empirical Study, 30 Seattle U. L. Rev. 603 (2007) and Laurel Currie Oates, Leveling the Playing Field: Helping Students to Succeed by Helping Them Learn to Read as Expert Lawyers, 80 St. John’s L. Rev. 80 (2006).

37. U.S. Department of Education, National Center for Education Statistics, National Assessment of Adult Literacy: A First Look at the Literacy of America’s Adults in the 21<sup>st</sup> Century 15 tbl.8 (2005), available at [http://nces.ed.gov/NAAL/PDF/2006470\\_1.PDF](http://nces.ed.gov/NAAL/PDF/2006470_1.PDF) (last

part series of essays, Professor Stanley Fish recently criticized the paucity of instruction in basic writing skills and rhetoric in college composition courses.<sup>38</sup> He found that only four out of 104 composition sections at an unidentified university at which he taught emphasized training in the “craft of writing.”<sup>39</sup> If his discovery typifies the norm, colleges may not be providing many students with the opportunity to master the art of written communication.

Given these trends, it is probably not surprising that American businesses may spend as much as \$3.1 billion annually to remedy the writing deficiencies of their hourly and salaried employees.<sup>40</sup> It is also not surprising that law school instructors observe basic writing skill deficiencies in their students and that the bench and bar observe the same weaknesses in new attorneys.<sup>41</sup> Whatever promise the NCTE’s approach theoretically holds for the nation’s children, the failure of schools to provide sufficient reading and writing opportunities continues to pose a major challenge.

### **The Implications for Legal Education and the Profession**

Reports such as those discussed above do not bode well for the legal profession. As one scholar noted, “Widespread cultural changes, resulting in overall declining student writing levels and reading efforts, will likely affect incoming law student preparedness for law schools at every tier level.”<sup>42</sup> The failure of practicing attorneys to write clearly, concisely, and precisely

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visited June 30, 2009). Moreover, “[f]or adults who took graduate classes or completed a graduate degree, the percentage with proficient prose literacy fell 10 percentage points between 1992 and 2003.” *Id.* For a short summary of the report, see Sam Dillon, Literacy Falls for Graduates From College, Testing Finds, *N.Y. Times*, Dec. 16, 2005.

38. See his *New York Times* Blog posts, What Should Colleges Teach, Part 1 <http://fish.blogs.nytimes.com/2009/08/24/what-should-colleges-teach/>, What Should Colleges Teach, Part 2, <http://fish.blogs.nytimes.com/2009/08/31/what-should-colleges-teach-part-2/>, and What Should Colleges Teach, Part 3, <http://fish.blogs.nytimes.com/> (Sept. 7, 2009).
39. *Id.* at Part I. Professor Fish argues that “unless writing courses focus exclusively on writing they are a sham.”
40. The National Commission on Writing for America’s Families, Schools, and Colleges, *Writing: A Ticket to Work...Or a Ticket Out; A Survey of Business Leaders 6* (2004), available at [http://www.writingcommission.org/prod\\_downloads/writingcom/writing-ticket-to-work.pdf](http://www.writingcommission.org/prod_downloads/writingcom/writing-ticket-to-work.pdf) (last visited June 30, 2009).
41. 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, 85-86. (2003).
42. Cathaleen A. Roach, *Is The Sky Falling? Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 *J. Legal Writing Inst.* 295, 297 (2005). Ms. Roach, a former instructor at DePaul University College of Law, examined the reports referred to in this article, and others, and determined that the sky *is* falling with respect to law students’ reading and writing skills.



can adversely affect their clients' interests and their own credibility.<sup>43</sup> The consequences of poor grammar, improper spelling and punctuation, and wordiness can range from public rebuke to unintended interpretation of written documents.<sup>44</sup> In late 2006, for example, a Canadian company learned the hard way that one misplaced comma could result in more than \$2 million in unanticipated costs.<sup>45</sup> In 2007, the Second Circuit Court of Appeals criticized Congress for ambiguously drafting and punctuating a statute relating to federal drug offenses.<sup>46</sup>

However the debate about teaching grammar eventually shakes out, several points relevant to legal education are clear. First, if they were educated during a time when curricula de-emphasized grammar, law teachers themselves may not be fluent in the intricacies of English grammar and punctuation rules. Moreover, as with law instructors generally, it would be a mistake to assume that legal writing instructors all begin their academic careers as experts on grammar and punctuation.<sup>47</sup> Many enhance their expertise while teaching.

Second, legal educators should be aware that our students might not know what we are talking about when we suggest they eliminate the passive voice or the improper use of gerunds. Directives to "review rules regarding commas" might be useless because some students might never have studied "rules" to begin with. Despite the theory that students learn grammar and punctuation by reading and writing, studies show that students are not doing enough of either,<sup>48</sup> which raises the question of how students are actually learning these skills. Given the data, it is safe to assume that some students do not have a sufficient foundation to make progress on their own. They must be taught.

Although many, if not most, legal writing instructors address their students' basic writing errors, the practice is not universal.<sup>49</sup> Several factors underlie the reluctance to focus on basic skills, including the primary need to teach first-

43. See generally Judith D. Fischer, Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers, 31 *Suffolk U. L. Rev.* 1 (1997) (reviewing the types and consequences of errors in substance, form, and procedure).

44. See *id.* at nn.165-253 and accompanying text.

45. Grant Robertson, Comma Quirk Irks Rogers, *The Globe and Mail*, Aug. 6, 2006, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20060806.wr-rogers07/BNStory/Business/home> (last visited June 29, 2009).

46. *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007). For a discussion of the punctuation issues involved in this case, see Faulk, *supra* note 28, at 44.

47. An informal survey of legal writing instructors conducted by this author shows that of the 127 respondents, 32 majored, minored, or received an advanced degree in English Literature. The second most common area of study was political science, with history rounding out the top three. Survey responses are on file with the author.

48. See *supra* notes 4, 8, 29-40, and accompanying text.

49. Anne Enquist, Critiquing and Evaluating Law Students' Writing: Advice from Thirty-Five Experts, 22 *Seattle U. L. Rev.* 1119, 1125-1126, 1138 (1999).

year students legal analysis and reasoning skills.<sup>50</sup> Addressing writing errors amplifies the instructors' already daunting task of grading student memos and briefs and takes precious time away from their scholarship.<sup>51</sup> For those who do not teach legal writing courses, the incentives to tackle basic skills are understandably slight. Yet, with traditional legal education under scrutiny and the widespread call to enhance the skill levels of new graduates, law school faculties cannot afford to stick their proverbial heads in the sand and hope that the problem goes away. Moreover, the problem is not isolated to the lower quartile of students. Many of my brightest students have, by their own admission, no grasp of the rules governing writing.<sup>52</sup>

In addition to teaching legal research, analysis, and critical reading skills, legal writing courses will remain the principal setting to address skills that students should have learned before they entered law school. Students must understand that learning to write correctly and persuasively is a skill central to becoming an effective practitioner.<sup>53</sup> Whether legal writing instructors devote specific class time to punctuation and grammar or require particularly weak students to complete extra assignments, students need to understand the relationship between writing well and representing their clients' interests.<sup>54</sup>

The legal writing classroom cannot be the only front in the grammar and punctuation wars, however. Poor writing skills must be addressed across the curriculum before concerns about new lawyers will abate.<sup>55</sup> Many scholars have

50. See, e.g., Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 *U. Tol. L. Rev.* 651, 659 (2007).
51. Not only has grading legal writing papers been characterized as overwhelmingly physically and mentally demanding (Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 *U. Louisville L. Rev.* 383, n.192 (2008)), but it presents obstacles to scholarly endeavors. See Stewart Harris, *Giving up Grammar and Dumping Derrida: How to Make Legal Writing a Respected Part of the Law School Curriculum*, 33 *Cap. U. L. Rev.* 291 (2004) (arguing against addressing basic writing skills and conferencing with students to provide legal writing faculty the time to produce scholarship); Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 *Or. L. Rev.* 1007 (2001) (describing the obstacles presented to a legal writing instructor's scholarly activities by the time spent on student conferences and grading).
52. See Alaka, *supra* note 2, at sec. IIIB.
53. See generally Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 *J. Ass'n Legal Writing Directors* 75 (2006); Angela Petit, *The Stylish Semicolon: Teaching Punctuation as Rhetorical Choice*, 92 *Eng. J.* 66 (2003).
54. Games, such as the one described by Professor Telfeyan, see *supra* note 1; websites such as the Purdue Online Writing Lab, <http://owl.english.purdue.edu/>; Bryan Garner's many resources, including on-line legal writing exercises, <http://press-pubs.uchicago.edu/garner/>; and texts such as Ann Enquist & Laurel Currie Oates, *Just Writing* (3d ed., Aspen Publishers 2009) and Deborah E. Bouchoux, *Aspen Handbook for Legal Writers* (2d ed., Aspen Publishers 2009) can help our students overcome their writing weaknesses.
55. See *supra* note 41.

already made the case for law schools to adopt “writing across the curriculum.”<sup>56</sup> The call for increased writing opportunities in law schools echoes arguments made regarding college, high school, and grammar school curricula.<sup>57</sup> The resistance to such programs is similar—teaching writing skills is labor intensive and requires small classes. Just as undergraduate faculty and administrators stress the primary importance of writing skills while simultaneously pushing responsibility for teaching composition onto adjuncts or graduate students,<sup>58</sup> many law schools assign “legal writing” to adjuncts, “fellows,” or other non-tenure-track instructors.<sup>59</sup>

Upper-level course faculty who recognize their students’ writing deficiencies might wonder why those weaknesses persist after a required year-long course. As some experts note, “good writing—like critical thinking—will never be a skill that students can achieve or retain through a single course.”<sup>60</sup> As with any

56. See generally, e.g., Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 *Ohio St. L.J.* 1965 (1999); Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-The-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 *J. Ass’n Legal Writing Directors* 73 (2004); Pamela Lysaght, *Writing Across the Law School Curriculum in Practice: Considerations for Casebook Faculty*, 12 *J. Legal Writing Inst.* 191 (2006) [hereinafter Lysaght, *Considerations*]; Carol McCrehan Parker, *Writing is Everybody’s Business: Theoretical and Practical Justifications for Teaching Writing Across the Law School Curriculum*, 12 *J. Legal Writing Inst.* 175 (2006); Susan E. Thrower, *Teaching Legal Writing Through Subject-Matter Specialties: A Reconception of Writing Across the Curriculum*, 13 *J. Legal Writing Inst.* 3 (2007).
57. Bok, *supra* note 5, at 87–88. According to Bok, only about one-third of all colleges currently have formal writing-across-the-curriculum programs, which is less than at the height of such programs in the 1980s. Scores of books exist to assist schools in designing and implementing writing-across-the-curriculum programs. See generally, e.g., *Writing Across the Curriculum: A Guide to Developing Programs* (Susan H. McLeod & Margot Soven eds., Sage Publications 1992); Joyce Magnotto Neff & Carl Whithaus, *Writing Across Distances and Disciplines: Research and Pedagogy in Distributed Learning* (Taylor & Francis 2008); *Writing Across the Disciplines: Research into Practice* (Art Young & Toby Fulwiler eds., Boynton/Cook 1986).
58. Bok, *supra* note 5, at 35–36, 83, 100. Bok notes that those who teach writing view it as a “formidable pedagogical challenge,” while most “deans, English departments, and senior faculties continue to underestimate the difficulty.” *Id.* at 96, 100.
59. The majority of legal writing programs are staffed by full-time, nontenure-track faculty or adjuncts. Of the 181 institutions that responded to the Association of Legal Writing Directors and Legal Writing Institute annual survey of legal writing programs, only nine hired tenure-track faculty specifically to teach legal writing. See *ALWD/LWI 2008 Survey Results at 6–7*, available at [http://www.alwd.org/surveys/survey\\_results/2008\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2008_Survey_Results.pdf). Washburn is one such institution.
60. Bok, *supra* note 5, at 98. See also Mark Richardson, *Writing is Not Just a Basic Skill*, *Chron. Higher Educ.*, (Nov. 7, 2008), available at <http://chronicle.com/weekly/v55/i11/11a04701.htm>. (arguing that writing skills develop over a lifetime and cannot be adequately taught in lower-level college composition courses alone); Douglas Downs & Elizabeth Wardle, *Teaching about Writing, Righting Misconceptions: (Re)Envisioning “First-Year Composition” as*

other skill or knowledge, proficiency depends on being able to apply what is learned in one context to other relevant contexts. Understanding the difficulty of such “transfer” is a necessary beginning for those who wish to go beyond bemoaning their students’ lack of skills.<sup>61</sup>

Without realizing it, perhaps, casebook faculties already employ strategies to encourage this transference. In particular, the use of hypotheticals to test students’ mastery of particular doctrine encourages students to apply what they learn to new situations. Thus, students learn that just as Fact A + Law B = Result C, so can Fact D + Law B = Result C, if A and D share certain legally significant similarities. That this method is used across the curriculum reinforces the idea that similar critical reasoning skills must be employed to resolve a variety of legal problems, whether they arise under tort, contract, or employment law. The repetition of the reasoning process throughout the law school curriculum, including legal writing courses, solidifies the ability to utilize the technique and “think like a lawyer.” Similarly, it reinforces the importance of doing so.

Just as a symbiosis exists between the legal writing and doctrinal classrooms when it comes to the development of critical reading and legal analysis skills, so, too, can students learn the importance of writing well in their doctrinal classes. But as it stands now in many institutions, the message for students, regardless of what one expressly says, is that grammar, punctuation, and style are important in only one sphere—the legal writing skills courses. Instead of encouraging students to transfer the writing skills they are learning, students are subtly encouraged to leave those concerns behind them. It is not surprising that students appear not to have studied “legal writing” at all once they finish their first year.

Too often, essay exams in doctrinal classes reinforce the misperception that “it is the thought that counts.” To disabuse students of that notion, professors who teach those classes need not dispense with the timed essay during which students dissect the legal issues presented in hypotheticals, and then articulate and apply legal rules without concern for presentation. As an alternative, however, take-home exams can serve the same purpose while allowing

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“Introduction to Writing Studies,” 58 *C. Composition & Comm.* 552, 552 (2007) (rejecting the proposition that college composition courses can convey all of the information necessary for students to write in other contexts, both in and out of school).

61. The text, *Teaching Law by Design*, provides a good summary of various learning theories, including cognitive learning, which is concerned with the transfer of knowledge. Michael Hunter Schwartz, Sophie Sparrow & Gerald Hess, *Teaching Law by Design* (Carolina Academic Press 2009). The work of Professors Lysaght and Lockwood also provides relevant background on learning theory as it justifies writing across the law-school curriculum. See Lysaght & Lockwood, *supra* note 56, at sec. II. See also Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 *J. Legal Writing Inst.* 1 (1991) (discussing, *inter alia*, why writers in transition, such as new legal writers, write poorly); Robin Fogarty, David N. Perkins, & John Barell, *How to Teach For Transfer* (Skylight Publishing 1991) (noting that students do not automatically transfer learning); Sarah Leberman, Lex McDonald & Stephanie Doyle, *The Transfer of Learning: Participants’ Perspectives of Adult Education and Training* (Gower Publishing 2006).

students to focus on—and professors to grade—language and presentation. Doing so would also mimic the “real world” of practice, clerkships, academia, and other settings, where written legal analysis is judged in the context of its presentation.

Casebook faculty can also educate students about the potential impact of writing-skill weaknesses through the cases they assign. Many contracts, wills, trusts, and other writings are scrutinized in casebooks precisely because of technical errors, whether the location of a comma or the choice of particular language. Highlighting those aspects of the assigned cases and devoting classroom time to group rewriting projects to cure the errors reinforces the concept that technicalities of language and punctuation do indeed matter outside of writing skills classes. Drafting an ambiguous contract provision and asking the students to fix it in class, for example, would engage students in a writing exercise without over-burdening the instructor.<sup>62</sup>

When faculties who teach statutory courses devote time to the structure of the law, and the purpose and consequences of particular phrasing and punctuation, they are engaged in precisely the type of contextual discussion about grammar, punctuation, and usage that Whole Language mavens would advocate. The additional benefit is that mainstreaming discussions regarding writing techniques encourage the transfer of writing skills. Students will “see” writing skills outside of the narrow legal writing context.

Doctrinal courses present a natural setting for discussing grammar and punctuation for another reason. Although many English teachers reject teaching rules alone and advocate instead for context-based instruction, the law-school classroom is focused on teaching and learning rules. Law students become conditioned and motivated to “learn the rules.” But as they learn the principles of contract formation, they can also strengthen their understanding of grammar, punctuation, and style, thus bridging the gap between theory and practice, doctrine and writing.

Finally, law school administrators should also evaluate the institutional support for language instruction. Even in these times of strained budgets, hiring “writing specialists” or other experts who can work individually with particularly weak-skilled students might need to be a critical component of any broad-based education reform effort. In 2008, forty-three law schools reported employing full- or part-time writing specialists and thirty-one reported having a formal writing center in the law school in connection with the legal writing program.<sup>63</sup> Writing specialists spend the majority of their time in one-on-one student conferences and group workshops. Although their specific duties and job descriptions vary by program, the essential job of a writing specialist is to assist students with basic grammar, punctuation, and usage. While they might

62. For a discussion of how to draft effective writing assignments for casebook classes, including examples from the author’s criminal law course, see Lysaght, *Considerations*, *supra* note 56.

63. 2008 ALWD/LWI Annual Survey of Legal Writing Programs, 16 (answer to question 28) available at [http://www.lwionline.org/uploads/FileUpload/2008Surveyresults\(REVISED\).pdf](http://www.lwionline.org/uploads/FileUpload/2008Surveyresults(REVISED).pdf).

spend most of their time with first-year students, most writing specialists also assist upper-level students. If “[w]riting today is not a frill for the few, but an essential skill for the many,”<sup>64</sup> writing centers staffed by professionals who can focus individual effort on the mechanics of writing well may have to become as commonplace as law journal offices in law schools.

Before coming to law school, many students failed to learn the principles that govern written communication. For many who did not receive explicit instruction in grammar and punctuation, “osmosis” did not work.<sup>65</sup> It is unlikely to work in law school, either. Though law schools cannot fill the gap between what students should have learned in grade school, then had reinforced in college, law schools can provide motivated students with the opportunity to learn better communication skills.

The next time students submit assignments with poorly structured sentences, law school instructors can reflect again on the question of who is at fault: Could these students be victims of the grammar wars? Knowing that they could be, the next logical question focuses on how to help them overcome the impairments they have suffered as a result.

64. The Neglected R, *supra* note 4, at 3.

65. See *supra* note 25 and accompanying text.