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Writing on the Envelope: An Exploration of the Potentials and Limits of Writing in Law

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Writing on the Envelope: An Exploration of the Potentials and Limits of Writing in Law

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Advanced legal writing has had an extraordinary history, originating at a discussion at the Association of American Law Schools ("AALS") Annual Meeting in 1989¹ to currently being a national

* Acknowledgement must also go to Annie Hank, who helped me locate resources and complete the footnotes.

1. Panel, Association of American Law Schools Annual Meeting, The Pedagogical Justification for Advanced Legal Writing Courses (Jan. 1989).

requirement for all law schools, and a topic of many text books² and burgeoning scholarship.³ With the emergence of advanced legal writing, we pushed the envelope of previous curricula, exploring the possibilities of legal writing beyond memos, briefs, and basic questions of convention, correctness, and conciseness. Now we have the opportunity to explore this envelope of legal writing again, looking at legal writing in a larger context of research in writing from many different perspectives. Exploring that larger envelope is necessary because pushing the envelope involves knowing the limits as well as the space within. Until we understand what writing cannot do, we cannot appreciate all that it can do. This article explores the envelope of writing, drawing from a variety of disciplines, and proposes ways this research can inform our discipline of legal writing. Finally, the article suggests some implications from this research for pushing the envelope of advanced legal writing's current structure.

I. EXPLORING THE LARGER ENVELOPE

To understand what legal writing is, we need to understand more about writing itself. Legal writing is a subset of the larger envelope of writing. Writing is a specialized form of verbal communication, newer than the communication forms of listening, speaking, and thinking. It differs from other forms of communication in fundamental ways. Historically, writing was created in response to particular social challenges; it grew out of a need to capture and control meaning, as much as to convey that meaning. Writing was created to preserve meaning so that it could rise above the limits of human memory and common agreement.

2. See generally ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES, AND LAW REVIEW COMPETITION PAPERS* (3d ed. 2005); ELIZABETH FAJANS, MARY R. FALK & HELENE S. SHAPO, *WRITING FOR LAW PRACTICE* (2004); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *ADVANCED LEGAL WRITING & ORAL ADVOCACY: TRIALS, APPEALS, AND MOOT COURT* (2d ed. 2009); JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* (2000); MARY BARNARD RAY & BARBARA J. COX, *BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING* (2d ed. 2003); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2d ed. 2008).

3. See generally Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 *LEGAL WRITING: J. LEGAL WRITING INST.* 3 (2010); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 *LEGAL WRITING: J. LEGAL WRITING INST.* 3 (2009); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *LEGAL WRITING: J. LEGAL WRITING INST.* 53 (2008); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 *VT. L. REV.* 483 (2003); Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 *J. ASS'N OF LEGAL WRITING DIRECTORS* 75 (2009).

Writing provides opportunities and challenges that differ from other forms of communication. Writing enables the writer to communicate beyond the span of his or her own life. It enables the writer to escape personal limitations in ways speaking cannot. Writing involves both physical and cognitive skill, and this combination, by its very complexity, enables the writer to develop more complex thoughts. It makes the thinking process more apparent, creating a communication venue that allows the writer to think more consciously and systematically. This in turn helps the writer manage the twin processes of creativity and critique. This process facilitates the revision of a creative thought so that it can be developed and improved.

Many academic disciplines have studied writing, each looking at it from a particular aspect. Like blind men exploring the proverbial elephant from different positions, these disciplines offer different limited perspectives. It is only by drawing information from all of these sources that we can begin to understand the behavior, craft, and art that is the envelope of writing itself.

A. *Writing as One Form of Communication*

Writing differs from other communication forms⁴ in that it is more permanent, escaping the boundaries of time, space, and context.⁵ The written word can be read centuries after the writer is gone, outlasting the context and even the culture in which it was created.⁶ It can be applied in contexts that the original writer could not have imagined, as evidenced by the endurance of Hamlet, the Odyssey, and the Bible. Writing travels through space and time, whether on the Voyager or in e-mail. Writing, by escaping its context and the person of the writer, gives a separate existence to the words themselves.

Writing is also more permanent because it can exist in many locations at once. The written word can be replicated with precision, so that many readers can read exactly the same communica-

4. "Allen, for example, asserted that 'written English is one of the systems of English—a separate dialect, if you will—with its own rules, its own conventions, its own signals.'" Wallace Chafe & Deborah Tannen, *The Relation Between Written and Spoken Language*, 16 ANN. REV. OF ANTHROPOLOGY 383, 387 (1987).

5. "[T]ext endures whereas speech is fleeting." ALLAN PAIVIO & IAN BEGG, *PSYCHOLOGY OF LANGUAGE* 335 (1981).

6. For example, archaeologists found information about an ancient Peruvian language in 2008 on the back of an old letter. Brian Handwerk, "Lost" Language Found on Back of 400-Year-Old Letter, NATIONAL GEOGRAPHIC NEWS (Aug. 27, 2010), <http://news.nationalgeographic.com/news/2010/08/100827-lost-language-letter-peru-science>.

tion, although their understandings may differ. In contrast, "Speaking, handwriting, dancing, acting, miming, and other human performances are dense and autographic in that each act is unique."⁷ Even new technologies, such as audio or video recordings, do not overcome this quality.⁸ Writing, however, does escape this limitation.

In advanced legal writing, we should acknowledge the significance of writing's innate permanence. Examples of the permanence of legal writing will not be hard to find; we have the Ten Commandments, Leviticus, and the Hammurabi code. In fact, law was one of the first subjects to be made permanent through writing. The very idea of laws applying to an entire society and existing apart from the particular power that decrees the law, is facilitated by writing.

Writing's ability to escape the boundaries of time, voice, and context actually adds some understanding to the ways that law works and the way various interpretations of the law emerge. Just as the literary world has debated the significance of a writer's intent, historical context, and a reader's experience to literary critiques, judges debate the significance of those factors in interpreting the law.⁹ Thus, we have difficulty interpreting texts from the past when the context has become obscured, whether interpreting scripture, previously unknown forms of writing,¹⁰ or metaphors in older Supreme Court opinions.¹¹ Especially in a class on opinion writing, students need to understand the debate and explore ways to write that will help them control meaning across various methods of interpretation.

In its permanence, however, writing has limits. It cannot replicate the spoken word. Even in literature, which has more latitude in grammar and word usage than does legal writing, dialect cannot be perfectly recreated.¹² It has only a limited ability to convey

7. RONALD T. KELLOGG, *THE PSYCHOLOGY OF WRITING* 7 (1994). "[Researchers] Kolers and Smyth use the terms *articulated* and *allographic* to mean that the symbol can be copied precisely." *Id.* They describe "a noncopiable symbol as being *dense* and *autographic*," like a speech or dance. *Id.*

8. *Id.* A recording "exists as an articulated, allographic symbol that can be copied reliably, but it is not identical to the unique original performance." *Id.*

9. See Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention* (forthcoming) (providing an extensive study of the Supreme Court's reliance on the debates of the Constitutional Convention).

10. Handwerk, *supra* note 6 (discussing a recent discovery related to an ancient Peruvian language).

11. See Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459 (2011).

12. For example, See MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (1885).

the writer's gestures, through description in the writer's pacing and punctuation, such as commas and dashes. Writing loses the inflection that can convey undertones of irony, humor, or bitterness. Even the most effective irony in writing can be misunderstood, while finely tuned irony in an oral presentation is not likely to be misunderstood. As an illustration, compare the reaction to Jonathan Swift's written essay, *A Modest Proposal*,¹³ with Stephen Colbert's performance at the White House Correspondents' Association dinner.¹⁴ Even though Swift's writing made the outrageous claim that Irish children could be used for food,¹⁵ some readers thought he was literally proposing the idea. In contrast, Colbert's performance was subtler than Swift's essay, but was nevertheless understood by almost all listeners as being ironic in its praise of then-President Bush.

Writing cannot, for example, communicate as quickly as a drawing.¹⁶ "The discrimination between the two classes of stimuli [letters and figures] is so fundamental that it apparently uses anatomically distinct neural mechanisms: letters are identified better by the side of the brain (usually the left) that is specialized for speech processing than by the non-speech (right) side, whereas the reverse is true for some nonlinguistic patterns."¹⁷ In contrast, viewers understand scenes so quickly that "the gist is . . . obtained even before the eyes begin to move."¹⁸

Writing is not simply speech in written form. "Writing is in essence a more conscious process than speaking . . . spontaneous discourse is usually spoken, self-monitored discourse is usually written."¹⁹ Writing allows us to reflect on our own thoughts and revise them.²⁰ "[Writers] engage in a special form of thinking—the

13. JONATHAN SWIFT, *A MODEST PROPOSAL* (1729).

14. Stephen Colbert, Address at the White House Correspondents' Ass'n Dinner (Apr. 29, 2006), in STEPHEN COLBERT, *I AM AMERICA (AND SO CAN YOU!)* 221-26 (2007).

15. SWIFT, *supra* note 13.

16. PAIVIO & BEGG, *supra* note 5, at 325. "[C]hildren learned to identify writing without formal instruction, apparently as a result of having plenty of pictorial and written materials around to look at."

17. PAIVIO & BEGG, *supra* note 5, at 324.

18. Keith Rayner, *The 35th Sir Frederick Bartlett Lecture: Eye Movements and Attention in Reading, Scene Perception, and Visual Search*, 62 Q.J. OF EXPERIMENTAL PSYCHOL. 1457, 1476 (2009) (citing Peter De Graef, *Prefixational Object Perception in Scenes: Objects Popping Out of Schemas*, in *EYE GUIDANCE IN READING AND SCENE PERCEPTION* (Geoffrey Underwood ed., 1998)).

19. KELLOGG, *supra* note 7, at 17 (quoting M.A.K. Halliday, *Spoken and Written Modes of Meaning*, in *COMPREHENDING ORAL AND WRITTEN LANGUAGE* 67-69 (Rosalind Horowitz & S. Jay Samuels eds., 1987)).

20. "[T]he orality-literacy hypothesis posits that writing makes possible verbatim memory and abstract and sequentially logical thought, and that written discourse is decon-

making of meaning—that may well define one of the most unique characteristics of our species.”²¹ Writing allows us to develop and express more complex relationships between ideas.²² The feedback that writing provides helps writers clarify their thoughts.²³ Writing differs from simply thinking about a point; “there is a difference between thinking in the private realm of individual consciousness and communicating in the public realm of cultural and social consciousness.”²⁴

Perhaps the most fundamental difference between writing and other forms of verbal communication is the fact that the receiver of this form of communication is not present when the communication is crafted. While a speaker can usually see the audience and adjust the presentation in light of the audience’s reaction, the writer must imagine the reader, anticipate what the reader’s likely reaction will be, and make writing decisions based on that assumption.²⁵ The writer cannot adjust in response to the reader’s reaction. If the reader misunderstands a point, the writer cannot see that confusion, stop, and explain a point in a different way. The writer has to get it right before handing the text over to the reader.

The reader’s control in this form of communication makes the writer much more accountable for his or her statements.²⁶ The reader controls the pace and, to a certain extent, the sequence of the information provided. For example, the reader has the freedom to stop and consider a point, to re-read a section of reasoning, and even to read alternative sources discussing the point.²⁷ The

textualized or autonomous, whereas nonliterate culture is associated with constructive memory and concrete and rhapsodic thought, and that spoken discourse is context bound.” Chafe & Tannen, *supra* note 4, at 391-92.

21. KELLOGG, *supra* note 7, at 3.

22. Lester E. Harrell, Jr., *A Comparison of the Development of Oral and Written Language in School-Age Children*, 22 MONOGRAPHS SOC’Y FOR RES. CHILD DEV. 1, 69 (1957).

23. Writing affords “a more stable mental representation of the developing text within working memory, and that such a representation was especially crucial in expository writing.” *Id.* at 309.

24. KELLOGG, *supra* note 7, at 6-7 (citing Paul A. Kolers & William E. Smythe, *Symbol Manipulation: Alternatives to the Computational View of Mind*, 23 J. VERBAL LEARNING & VERBAL BEHAV. 289 (1984)).

25. “One of the key factors in distinguishing both reading and writing from spoken communication skills is that they are associated with word forms that are written down rather than listened to.” Lorna Bourke & Anne-Marie Adams, *Cognitive Constraints and the Early Learning Goals in Writing*, 33 J. RES. IN READING 94, 105 (2010).

26. “As a consequence of developing literacy, written texts can be scrutinized, comprehended, learned from, and interpreted by the skilled reader.” KELLOGG, *supra* note 7, at 7.

27. “Reading provides more opportunity for rehearsal than does listening.” PAIVIO & BEGG, *supra* note 5, at 335.

reader can therefore evaluate the writer's logic more reliably than can the listener. This ability forces the writer to be more accountable for the accuracy of statements, because the reader is able to catch inaccuracies. A writer cannot depend on the glib sound of his or her oratory, the superficial believability of an example, or the emotion of the moment.

In light of this higher accountability, the significance of writing decisions becomes apparent. The reader's control explains why people are hesitant to "go on record," why persons involved in confidential discussions are told not to discuss an issue via email, and why written documents provide the smoking gun in many cases. This significance must not be lost to our students.

B. Writing as a Historical Invention to Preserve Meaning

The distinction between writing and other forms of communication has existed since writing began²⁸ and since the beginning of history. We have no way of knowing when human spoken language began, but it must have begun very early.²⁹ In fact, spoken language may have been the transformative event that made us human.³⁰ With spoken language came directions, conversation, and stories. In contrast, writing was invented later, when we needed to communicate with precision to someone not present.³¹ Writing's development began around 8000 B.C., in the Middle East.³² Its development began as a collection of small clay tokens,³³ each representing an "amount of a commodity."³⁴ For example, a lenticular disk represented one flock of sheep.³⁵ Five similar tokens would have represented five flocks of sheep.³⁶ A cone represented "a small measure of grain,"³⁷ five cones repre-

28. See DENISE SCHMANDT-BESSERAT, *HOW WRITING CAME ABOUT 1* (1992).

29. "The emergence of personal symbols in evolutionary history is surely much older than the history of consensual symbols. Comparative psychologists and ethologists generally agree that the ability to represent or model the environment in some fashion is pervasive in the animal kingdom." KELLOGG, *supra* note 7, at 9.

30. "As Havelock . . . reminded us, 'our oral inheritance is as much a part of us as the ability to walk upright or use our hands.'" KELLOGG, *supra* note 7, at 8 (quoting Eric Havelock, *The Oral-Literate Equation: A Formula for the Modern Mind*, in LITERACY AND ORALITY 21 (David R. Olson & Nancy Torrance eds., 1991)).

31. "The written text is a consensual symbol system in the sense that it allows the sharing of meanings among members of the culture." KELLOGG, *supra* note 7, at 7.

32. SCHMANDT-BESSERAT, *supra* note 28, at 102.

33. SCHMANDT-BESSERAT, *supra* note 28, at 1, 7.

34. SCHMANDT-BESSERAT, *supra* note 28, at 95.

35. SCHMANDT-BESSERAT, *supra* note 28, at 96.

36. See SCHMANDT-BESSERAT, *supra* note 28, at 96.

37. SCHMANDT-BESSERAT, *supra* note 28, at 93.

sented five measures of grain, and so on.³⁸ The system spread and was used throughout the Near East.³⁹ This system was, in effect, the beginning of writing.⁴⁰ What this implies is that writing had its beginnings in accounting and commerce,⁴¹ and it was used to transport data across distances.⁴²

The earliest form of writing was, in essence, contract drafting. Sometime between 3700 and 3500 B.C., the small clay tokens were placed in clay pouches, which were then sealed.⁴³ This created a record, protected from tampering,⁴⁴ of goods paid or promised. This precursor of writing was created to preserve meaning over time, thus freeing meaning from the vagaries of human memory.⁴⁵ There could no longer be debates about the number of sheep or wheat promised because the meaning had been preserved.⁴⁶ These pouches, however, had to be broken open to recover the meaning,⁴⁷ an inconvenience solved between 3500 and 3000 B.C.⁴⁸ Creators of the pouches began impressing a token in the outside of the envelope,⁴⁹ repeating the imprint as many times as needed to reflect the number of tokens enclosed in the envelope.⁵⁰ About one thousand years later, these protowriters realized that the tokens within the envelope were redundant and that only the marks in the clay were needed.⁵¹ Thus, the first inscribing in clay tablets began. Soon these writers began using a stylus and began drawing representations for the figures, which removed the need to keep many tokens on hand.⁵² These drawings of the tokens morphed into characters⁵³ and gradually became pictographs or letters. Thus, true writing systems began to emerge.⁵⁴

38. SCHMANDT-BESSERAT, *supra* note 28, at 95.

39. SCHMANDT-BESSERAT, *supra* note 28, at 96.

40. SCHMANDT-BESSERAT, *supra* note 28, at 97.

41. SCHMANDT-BESSERAT, *supra* note 28, at 93.

42. SCHMANDT-BESSERAT, *supra* note 28, at 94.

43. SCHMANDT-BESSERAT, *supra* note 28, at 39-44.

44. SCHMANDT-BESSERAT, *supra* note 28, at 7, 39.

45. SCHMANDT-BESSERAT, *supra* note 28, at 93-4.

46. *See* SCHMANDT-BESSERAT, *supra* note 28, at 93-4.

47. SCHMANDT-BESSERAT, *supra* note 28, at 45, 50.

48. SCHMANDT-BESSERAT, *supra* note 28, at 57.

49. SCHMANDT-BESSERAT, *supra* note 28, at 50-1.

50. SCHMANDT-BESSERAT, *supra* note 28, at 50-1.

51. SCHMANDT-BESSERAT, *supra* note 28, at 55.

52. SCHMANDT-BESSERAT, *supra* note 28, at 54.

53. SCHMANDT-BESSERAT, *supra* note 28, at 54, 63-79.

54. SCHMANDT-BESSERAT, *supra* note 28, at 85.

The next innovation in writing allowed abstract thought to develop.⁵⁵ This innovation was the separation of the idea of a number from the idea of a concrete item being enumerated.⁵⁶ Around 3100 B.C., symbols for numerals were invented.⁵⁷ Rather than repeating the symbol for a unit of wheat five times, for example, a symbol for “five” was now placed next to one symbol for the unit of wheat.⁵⁸ This basic change, adding a symbol for a number, created an abstract meaning, allowing writers to acknowledge the idea of “five” apart from the concrete item.⁵⁹

Historically, writing was created to facilitate more permanent and complex communication. The permanence was a key to privilege and power.⁶⁰ It kept track of taxes paid as well as goods and land owned or traded.⁶¹ It provided evidence justifying punishment.⁶² The complexity it enabled came about as writing opened the door to abstract ideas, perhaps advancing human capacity for thought in the process.⁶³

Writing, from this historical perspective, was and still is, the province of law and business more than literature. Great stories existed without needing to be written. It was the need for control and law that engendered writing. Control over meaning across time, space, and context is still at the core of writing’s purpose, and law is still a central aspect of that purpose. To move toward an advanced understanding of how legal writing works, our students need to understand and respect the essential qualities of the written word, for those are the essential qualities of law itself.

II. WRITING AS AN ESCAPE FROM PERSONAL LIMITATIONS

Even without the passing of centuries, writing differs from other forms of verbal communication in that it can escape the bounda-

55. Conversation with Denise Schmandt-Besserat, professor emerita of Art & Middle Eastern Studies, Univ. of Tex. at Austin, in New Orleans, La. (Apr. 3, 2008).

56. SCHMANDT-BESSERAT, *supra* note 28, at 124.

57. SCHMANDT-BESSERAT, *supra* note 28, at 124.

58. SCHMANDT-BESSERAT, *supra* note 28, at 124.

59. SCHMANDT-BESSERAT, *supra* note 28, at 124.

60. SCHMANDT-BESSERAT, *supra* note 28, at 106.

61. [W]hen we consider the first uses to which writing was put, it would seem quite clear that it was connected first and foremost with power: it was used for inventories, catalogues, censuses, laws and instructions; in all instances, whether the aim was to keep a check on material possessions or on human beings, it is evidence of the power exercised by some men over other men and over worldly possessions.

SCHMANDT-BESSERAT, *supra* note 28, at 55 (quoting Claude Lévi-Strauss).

62. SCHMANDT-BESSERAT, *supra* note 28, at 108-09.

63. SCHMANDT-BESSERAT, *supra* note 28.

ries of the author's identity and the document's context. If a writer has a lisp, it disappears in writing. If the writer has a habit of talking too much, that writer can edit for conciseness. A writer can escape the boundaries of reader expectations based on gender, race, height, attractiveness, voice quality, or any of those other factors that research shows us factor into evaluations of a speaker. A writer can escape personal limitations.

In writing, lawyers have the opportunity to build the professional images they desire. In advanced legal writing, we can move beyond basic issues of correctness and usage to explore the range of options that are acceptable within the constraints of legal writing, such as tone or register.⁶⁴ We can help students consciously control these options and use them to their best advantage in various particular situations.⁶⁵ For example, we can help students use their understanding of register to make writing sound appropriately conversational in a letter to a client or appropriately formal in a brief to an appellate court.⁶⁶ Editing a text, like airbrushing a photo, can improve a legal writer's image through skillful editing. Thus writing's limitations—losing gesture, pacing, and all the other aspects of the speaker's personal delivery—are also its potential strengths.

A. *Writing as a Physical and Cognitive Act*

Writing also differs from other forms of communication in its complexity and physical constraints. A full understanding of writing requires some understanding of how we humans accomplish the task, about what writing involves physically and mentally.⁶⁷ It is an amazingly complex process.⁶⁸ A writer must first develop

64. "A register is a set of linguistic variations that are context-dependent." Olga Volckaert-Legrier, Josie Bernicot & Alain Bert-Erboul, *Electronic Mail, a New Written-Language Register: A Study with French-Speaking Adolescents*, 27 BRIT. J. DEVELOP. PSYCHOL. 163, 164 (2009).

65. See Kathleen Ferrara, Hans Brunner & Greg Whittemore, *Interactive Written Discourse as an Emergent Register*, 8 WRITTEN COMM 8 (1991) (for interesting research and general background information on register).

66. "[One researcher] stated an increasingly popular opinion that 'differences in syntactic complexity between the spoken and written modalities which previous studies have found often turn out to result from differences in the formality and purpose or register of the discourse rather than true differences between spoken and written language.'" Chafe & Tannen, *supra* note 4, at 389 (internal quotation omitted).

67. McCutchen at 310.

68. Stephen P. Witte, *Pre-Text and Composing*, 38 COLLEGE COMPOSITION & COMM. 397, 409 (1987). See Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 COLLEGE COMPOSITION & COMM. 365 (1981) (for one classic sample model of the task of writing). See McCutchen (for a discussion of how writers translate ideas into words).

an idea,⁶⁹ which may be primarily an image⁷⁰ and is probably not solely linear.⁷¹ The writer then attempts to transmit that idea through a limited, linear medium in such a way that another person at a remote location can recreate the idea.⁷² To do this, the writer must put this idea into words.⁷³ The writer must choose the right words (nouns, verbs, adjectives, and adverbs) to convey the content, choosing categories, naming those concepts.⁷⁴ The writer also has to choose the correct structural words (prepositions, conjunctions, and articles) to cue the reader about how the concept-naming words relate to each other.⁷⁵ The writer must structure the idea within a linear process⁷⁶ that limits the writer's variables to choosing words that are within his or her memory,⁷⁷

69. N. Ann Chenoweth & John R. Hayes, *The Inner Voice in Writing*, 20 WRITTEN COMM. 99, 112 (2003).

70. The image may give rise to an emotional reaction. See Ronald T. Kellogg, Heather K. Mertz & Mark Morgan, *Do Gains in Working Memory Capacity Explain the Written Self-Disclosure Effect?*, 24 COGNITION & EMOTION 86 (2008) (for one discussion of how emotion and writing interact).

71. Pierre Coirier & Monik Favart, *Ordering and Structuring Ideas in Text: From Conceptual Organization to Linguistic Formulation*, 17 EUR. J. PSYCHOL. EDUC. 157, 158 (2002).

72. "Often the ideas that writers try to translate into language are mentally represented in modes rather incompatible with the restricted, linear nature of the verbal code (Flower & Hayes, 1984), and translating ideas of this sort (e.g., visual images) into clear, concise sentences can be difficult." Deborah McCutchen, Amy Covill, Susan H. Hoyne & Karen Mildes, *Individual Differences in Writing: Implications of Translating Fluency*, 86 J. EDUC. PSYCHOL. 256, 256 (1994).

73. "[A] writer's mentally translated (but unwritten) pre-text may have an immediate and direct influence on written on written and rewritten text." Witte, *supra* note 68, at 401. "Pre-text can function as a critical link among planning written text, translating ideas into linguistic form, and transcribing ideas into visible language." Witte, *supra* note 69, at 409.

74. "Some scholars argue that all thinking involves and depends on categorizing, which in turn hinges on the human capacity to infer from sign to significate." KELLOGG, *supra* note 7, at 14 (referring to JEROME S. BRUNER, JACQUELINE J. GOODNOW & GEORGE A. AUSTIN, *A STUDY OF THINKING* (1956)).

75. "[C]ueing seemed to exacerbate less-skilled writers' difficulties with meaning errors by narrowing their revision focus still further." McCutchen at 318.

76. Monik Favart & Jean-Michel Passerault, *Acquisition of Relations Between the Conceptual and Linguistic Dimensions of Linearization in Descriptive Text Composition in Grades Five to Nine: A Comparison with Oral Production*, 79 BRIT. J. EDUC. PSYCHOL. 107, 108 (2009); Coirier & Favart, *supra* note 71, at 158.

77.

[I]t is not surprising that linguistic processes such as sentence generation and lexical retrieval are involved during writing. What is surprising is that it has taken the field this long to recognize the extent of the effect of these seemingly lower level linguistic processes. We have certainly been long aware of effects of poor sentence-level and word-level skills in the written product, but we are now recognizing their implications for the process of writing, specifically as they may hinder the writer's ability to plan and revise on-line.

See McCutchen, Covill, Hoyne & Mildes, *supra* note 72, at 264 (for research in retrieval of words).

sequencing and grouping those words,⁷⁸ and inserting structural signals, such as transition words, commas, periods, tabulation, and italics.⁷⁹ Each choice affects the next, so the range of options is in constant flux.⁸⁰

If the writer is successful, a reader can reconstruct the writer's initial idea in his or her own mind. The reader reads the text linearly, using the signals as a construction diagram to rebuild the thought, without any further help from the writer.⁸¹ Writing is like taking a mosaic recreation of the Mona Lisa, breaking it into separate tiles, placing those tiles onto a conveyer belt, adding occasional bits of directions, and expecting someone at the far end of that conveyer belt to recreate the Mona Lisa in the time it takes for all the tiles to reach the end of the belt. The writer can only hope that the mosaic will at least look like a face, and perhaps the face of a smiling woman with long hair, and perhaps the constructor in the other room will realize that all of the pieces together represent the Mona Lisa and correctly place any remaining, confusing tiles.

With careful instruction, our students can benefit from a better understanding of the complexity of this process. The writing process is so complex that prolonged reflection about it can overwhelm a writer: "Even a casual analysis makes it clear that the number of things that must be dealt with simultaneously in writing is stupendous To pay conscious attention to all of these would overload the information-processing capacity of the most towering intellects."⁸² Nevertheless, a writer who understands the process enough to appreciate the wonder of it, the impressiveness of his or her own mind, can become more impressed than overwhelmed, and more empowered than inundated.

Our own understanding of this complexity can help us become wiser teachers of advanced writing techniques. With this understanding, we can teach advanced techniques without overwhelm-

78. See, e.g., María Luisa Silva, Verónica Sánchez Abchi & Ana Borzone, *Subordinated Clauses Usage and Assessment of Syntactic Maturity: A Comparison of Oral and Written Retellings in Beginning Writers*, 2 J. WRITING RES. 47 (2010).

79. Coirier & Favart, *supra* note 72, at 158.

80. "[E]ach word in the growing text determines and limits the choices of what can come next." Flower & Hayes, *supra* note 68, at 371.

81. See Rayner, *supra* note 18 (for an excellent, accessible article about the current scientific understanding of reading).

82. Stephen L. Benton et al., *Cognitive Capacity Differences Among Writers*, 76 J. EDUC. PSYCHOL. 820, 821 (1984) (quoting Marlene Scardamalia, *How Children Cope with the Cognitive Demands of Writing*, 2 WRITING: NATURE, DEV., AND TEACHING WRITTEN COMM. 81 (1982)).

ing our students. We can tie specific writing concerns to different stages of the writing process so that students understand that they do not need to get all of their writing choices correct on the first draft. We can help students understand why writing sometimes feels overwhelming, and we can teach them how to deal with those moments more comfortably.

We may even be able to help students become more efficient and better writers, for example, by changing their perceptions about how hard writing is. One study found that actual writing is not actually hard when measured by the time students spend writing drafts.⁸³ Planning and revising constitute a greater portion of the overall effort involved in producing a document.⁸⁴ Thus, by correcting our students' perception of their actual effort, we may be able to make the process more comfortable for them, although we may not make it less complex. We can encourage them to complete initial writing earlier and with less stress. We can teach them to allow more time and energy for revision, where they are more likely to be able to improve the final product. Ironically, understanding the complexity of the writing process can help both teachers and students find ways to make the process more comfortable and more successful.

B. Writing as a Venue for Thought

The complexity of the writing process, rather than incapacitating the writer, can provide different benefits than other forms of communication, provided that process is managed well.⁸⁵ For example, the feedback loop that writing creates provides unique advantages.⁸⁶ Research done by cognitive psychologists and composition scholars has already added knowledge in this area and can further improve our field of legal writing, particularly in its focus

83. C. Michael Levy & Sarah Ransdell, *Is Writing as Difficult as it Seems?* 23 *MEMORY & COGNITION* 767 (1995).

84. *Id.*

85. "Good writing in any discipline is supposed to make difficult subjects easier for us to understand, suggesting that writers must have a deep understanding of the content about which they are writing, in order to make it clear to readers." Sarah W. Beck, *Composition Across Secondary and Post-Secondary Contexts: Cognitive, Textual and Social Dimensions*, 39 *CAMBRIDGE J. EDUC.* 311, 322 (2009) (internal quotation omitted).

86. See, e.g., Thierry Olive & Annie Piolat, *Suppressing Visual Feedback in Written Composition: Effects on Processing Demands and Coordination of the Writing Processes*, 37 *INT'L J. PSYCHOL.* 209 (2002).

on process rather than product.⁸⁷ From the study of cognition, we can understand how skilled writers, in contrast to novices, use the writing process to reshape information, moving beyond mere summary.⁸⁸ The most commonly referenced model of the writing process divides the writing process into three parts: planning, translating, and reviewing.⁸⁹ Writers move back and forth between the parts, so that writing is a recursive process.⁹⁰ Expert writers use this process to their advantage. "More skillful writers are found to carry out a variety of problem-solving operations involving content—identifying goals and constraints, searching, testing, revising goals, and modifying knowledge in response to gaps, inconsistencies, and the like that are encountered in the course of writing."⁹¹ We can help our students become advanced legal writers in the sense of having advanced writing processes.⁹²

Managing the writing process entails dividing the task into steps that do not overwhelm the writer with complexity. The importance of this aspect of writing is illustrated by research involving the concept of working memory. Working memory describes the temporary information storage capacity of the brain, which we use when performing complex cognitive tasks such as writing.⁹³ The Baddeley and Hitch model of working memory shows it as including four parts: a phonological loop (represented by the short term memory you use when remembering a phone number by reciting it in your mind), a visual-spatial sketchpad (represented by understandings that may be pulled from long term memory and that are stored for the short term in the right hemisphere of the brain), a central executive that manages these two parts,⁹⁴ and an

87. Probably the most outstanding researchers in this area are Linda Flower and John R. Hayes, whose seminal work in the 1980's transformed writing instruction and was a major influence for decades.

88. McCutchen at 304-05.

89. Flower & Hayes, *supra* note 68, at 370. See also John R. Hayes & Linda S. Flower, *Identifying the Organization of Writing in Cognitive Processes*, in COGNITIVE PROCESSES IN WRITING 12 (1980).

90. Hayes & Flower, *supra* note 89.

91. Carl Bereiter, P.J. Burtis & Marlene Scardamalia, *Cognitive Operations in Constructing Main Points in Written Composition*, 27 J. MEMORY & LANGUAGE 261, 261 (1988).

92. "[T]he ability to analyze and transform knowledge during the writing process is what distinguishes expert writers from novice ones." Beck, *supra* note 85, at 314.

93. "[C]entral to the concept of working memory are the assumptions that it can involve the storage, manipulation and processing of verbal and visuospatial information over brief periods of time within a capacity limited system in order to meet the goals associated with current learning." Bourke & Adams, *supra* note 25, at 96. See Alan Baddeley, *The Episodic Buffer: A New Component of Working Memory?*, 4 TRENDS COGNITIVE SCI. 417, 417 (2000) (for accessible explanations of working memory).

94. Chenoweth & Hayes, *supra* note 69, at 100.

episodic buffer that has limited capacity but can integrate information from a variety of sources.⁹⁵ Just as a computer can begin to malfunction when its working memory is overloaded, students begin to make more errors in their writing when they are experiencing an overload in working memory. We may be more helpful to those students if we seek ways to unburden their working memory, rather than overloading it further with detailed explanations of the errors they have made. For example, we can help them break the writing process into smaller components or encourage them to summarize individual sources before integrating them into a larger idea.⁹⁶ More broadly, by understanding the components of working memory, we can identify which aspect of writing is difficult for an individual student and provide more focused and applicable advice.⁹⁷

We can and should teach our advanced students about the ways writing can either benefit thought or make it more difficult. This awareness is important even to advanced writers because writing performance is not consistent over time. For example, “even sophisticated writers sometimes rely on the less sophisticated and less demanding process of knowledge telling when learning a new genre.”⁹⁸ Furthermore, our students’ understanding of the ways writing benefits thinking can give them another tool to aid them in complex legal analysis. Although they may instinctively write to remember—it is why we make notes for oral arguments, for example—they do not fully understand how writing can improve thinking. Understanding this aspect of writing can help students

95. See Baddeley, *supra* note 93, at 417 (for an accessible description of these concepts). See also *THE ELEMENTS OF TEACHING WRITING: A RESOURCE FOR INSTRUCTORS IN ALL DISCIPLINES* 90 (Katherine Gottschalk & Keith Hjortshoj eds., 2004) (for a more general understanding of how cognitive psychology informs the teaching of writing).

96. This aspect of working memory may, in part, explain why students sometimes resort to organizing by cases, rather than synthesizing the law. We may have more success by teaching them how to revise these case summaries into a synthesis, rather than encouraging them to focus initially on the synthesis itself.

97.

Although the validity of cognitive processing theory has been called into question by the emergence of sociocultural theory as a lens for understanding writing (Prior, 2006), the body of knowledge produced by research conducted within this paradigm remains relevant today, in that it has illustrated qualitative differences in how writers of different levels of experience approach texts, and has shown that instruction focused on teaching new thinking skills can have a positive effect on students’ compositions.

Beck, *supra* note 85, at 314.

98. McCutchen at 315.

recognize and reorganize their own text as needed, thus sharpening their thought as well as their writing.⁹⁹

C. *Writing as Management of Creativity and Critique*

Writing also differs from other forms of verbal communication in that it involves managing two very different tasks. One is the creative task of generating words and ideas. This task focuses on possibilities, such as the variety of words that could be used to express an idea: "I could use this word or this word or this." This creative process is a fundamental thinking task, perhaps best described by Peter Elbow's description of it as "the believing game."¹⁰⁰ "The believing game" is the process whereby we identify something by first positing what it might be rather than focusing on what it is not. For example, when scanning a crowded room, one might think, "I think that tall, bald person over there is my friend Mike." This basic, creative approach is essential to writing, even though it is often overlooked in advanced teaching. But it is only after a thought is created that we can compare that hypothesis to known data and evaluate the possibility. The other writing task, also a thinking task, is that critical, evaluating phase, where we critique the choice and decide whether to keep it. For example, we might evaluate our tentative identification at a party: "Now that he's turning and I see his profile—that's not his nose, so it's not him."

A successful writer must learn to shift appropriately between these two tasks. These tasks are both essential, but they push the mind in different directions. The creative task gets the words on paper, and the critical task edits that text to make it better. For example, many writers edit extensively as they write, rather than completing a draft before starting to revise. This requires the writer to shift roles frequently, often several times a minute, as the following example illustrates. In this example, the writer's thoughts are in italics.

OK, let's get started.

The court must grant this motion to dismiss because the plaintiff has failed to state a claim.

99. "An abundance of research indicates that individual differences in writing skill are related to differences in planning and reviewing." McCutchen, Covill, Hoyne & Mildes, *supra* note 72, at 256.

100. See PETER ELBOW, WRITING WITHOUT TEACHERS 147-81 (2d ed. 1973).

That sounds too pushy.

This motion to dismiss must be granted

Shoot, that's passive voice.

This motion to dismiss is justified because

Is that still passive?

We respectfully ask this court to grant this motion to dismiss

Oops, no personal references in the argument.

This motion to dismiss rests solidly on the law because

That sounds weird. Let me try a different subject.

The plaintiff's complaint should be dismissed because

That focuses on the other side, and it's still passive.

The plaintiff's complaint fails to state

That's still focused on the other side. I need a break.

This pattern of thought is common for writers; but, as this example illustrates, this process involves a great deal of switching between tasks. In this example, the writer has experienced seven switches between creating and critiquing, and he or she is only about one-third of the way through the first sentence, and a routine sentence at that. For most writers, this frequent switching, caused by editing as you go, is not the most efficient or comfortable way to write.¹⁰¹

Focusing on critique can also distract the writer from more important tasks, leading the writer to make larger errors because he or she has been too busy correcting small errors. In the early stages of writing, our students "don't need to be immediately belabored about error; they need practice with their subjects."¹⁰² Indeed, such an early focus on such details is a hallmark of less-skilled writers.

101. See Carl Bereiter & Marlene Scardamalia, *From Conversation to Composition*, in *ADVANCES IN INSTRUCTIONAL PSYCHOLOGY* (Robert Glaser ed., 1982) (for information on this issue and others).

102. Peter Elbow, *Teaching Writing at the Sentence Level*, in *THE ELEMENTS OF TEACHING WRITING: A RESOURCE FOR INSTRUCTORS IN ALL DISCIPLINES* 90 (Katherine Gottschalk & Keith Hjortshoj eds., 2004)

Sondra Perl found that the basic writers she observed were . . . applying ineffective rules throughout the composing process. These writers would often stop and scan and correct their papers at the sentence or word level. This self-imposed interruption would keep the students from achieving any type of global development in a piece of writing.¹⁰³

This interruption prevents students from seeing large-scale weaknesses in a piece of writing, which further reduces their potential for creating quality documents. For example, a writer who edits frequently may fail to stay on topic, include accurate content, provide sufficient evidence and reasoning, or organize paragraphs effectively, all of which are critical to good writing.¹⁰⁴ As McCutcheon explains, “[D]iagnosing meaning errors in our texts required consideration of the whole text and the chronology of events across multiple paragraphs. Thus, diagnosis of the meaning errors required holding more information in working memory.”¹⁰⁵

Managing the flow of creativity and criticism can help advanced legal writing students gain fluency. As students become more aware of the freedom writing gives them to change their words, they can sometimes generate text more readily, which is the very definition of fluency. Our students can focus on the larger issues of organizing and reshaping their thoughts as they allow their early drafts to be less polished. They can separate the creative and the critical aspects of writing and become better at both. While thinking does allow change, reflection is more challenging, for the previous thought has to be remembered before it can be evaluated. Writing, by capturing ideas on paper, frees up working memory,¹⁰⁶ which provides more mental energy for evaluation. Capturing thoughts in writing, no matter what the medium, allows the writer to achieve higher quality thought.¹⁰⁷

103. WENDY BISHOP, ETHNOGRAPHIC WRITING RESEARCH: WRITING IT DOWN, WRITING IT UP, AND READING IT 8-9 (1999) (referring to research by Sondra Perl, *The Composing Processes of Unskilled College Writers*, 13 RES. TEACHING ENG. 217 (1979) and MINA P. SHAUGHNESSY, ERRORS & EXPECTATIONS: A GUIDE FOR THE TEACHER OF BASIC WRITING (1977)).

104. Elbow, *supra* note 102, at 90-91.

105. McCutchen at 317.

106. See Jeroen J. G. van Merriënboer & John Sweller, *Cognitive Load Theory and Complex Learning: Recent Developments and Future Directions*, 17 EDUC. PSYCHOL. REV. 147 (2005) (discussing research in cognitive load).

107. Chafe & Tannen, *supra* note 4, at 385 (“Horowitz [and] Berkowitz compared hand-writing, typing, and stenotyping and found that the faster the mode of writing, the more

Writers need to learn to manage the creative and critical tasks comfortably and efficiently. If our students experiment with the pacing of the creative and critical parts of their writing processes, they can become more comfortable and more productive because even small changes in the writing process change the result.¹⁰⁸ In light of the amount of time lawyers spend writing throughout their careers, improvements in their writing processes could help our students add months to their lives—either through helping them write good documents in less time or by reducing their stress and the related cost to their bodies.

III. WRITING AS IT INTERSECTS WITH OTHER AREAS OF STUDY

Many other disciplines have studied writing, and their approaches offer insights into this complex task that we teach our students. Although each of these disciplines and approaches has its own limits, those limits should not preclude us from taking advantage of the benefits they offer to teachers of advanced legal writing. The following summaries provide snapshots of many of these disciplines and approaches. This sampling is intended to encourage advanced legal writing teachers to explore areas that spark new ideas for them. In this way, our field can push the envelope of legal writing in many different directions without forgetting that the envelope does, indeed, exist.

A. *Writing as the Subject of Reading*

Reading is the central purpose for which writing exists; therefore, information about how reading works is central to the teaching of writing. Furthermore, reading research deserves more attention from the field of advanced legal writing.¹⁰⁹ For each reader, the text becomes an interaction with the content and writer, as the reader understands that content and visualizes that writer. While an audience may experience collective reactions and be affected by the reactions of people around them, a reader has a pri-

spoken-like the language, although all forms of writing remained significantly different from speaking.”) (citation omitted).

108. McCutchen at 310.

109. PAIVIO & BEGG, *supra* note 5, at 319 (Cognitive psychology, while not the focus of this section, also provides useful information regarding reading. “[C]ognitive psychologists have generally treated reading in terms of information–processing stages . . .”).

vate interaction with the writer.¹¹⁰ Our students can benefit from understanding how that interaction works.

Research into how people read offers us advanced understandings that can show us how writing is or is not effective. With its sophisticated research tools, reading research has revealed the reader's eye movements in great detail, which has allowed researchers to infer much about the reader's cognitive processes.¹¹¹ "It is generally agreed that lexical processing has to have a strong influence on the decision of when to move the eyes."¹¹² Each reader reads text sequentially, stopping to first focus on part of a line of text and then moving quickly to a subsequent portion of the text.¹¹³ Interestingly, the duration of these fixations on text are similar across languages, even in languages as different as Chinese and Hebrew.¹¹⁴

Readers have a broader focus than writers often realize, and they use signals of structure to facilitate their understanding of the text. Readers anticipate what is coming next in the text, and this anticipation helps them understand the material. Readers skip some words during reading and may not read words in exact sequence, but they are nevertheless able to mentally process the words in correct sequential order.¹¹⁵ Readers are even able to focus each eye on different letters and still read successfully.¹¹⁶ In a given fixation, the reader's focus is a bit to the left of the letters perceived, providing the reader with a slight preview of upcoming letters.¹¹⁷ Readers focus, or fixate, on content words about 85% of the time, but fixate on function words only 35% of the time, suggesting that readers often anticipate what the upcoming function words will be.¹¹⁸ Skilled readers, who can process large chunks of

110. Beck, *supra* note 85, at 323 ("[T]he effectiveness of textual features of writing needs to be considered in light of the . . . context for the writing and how it is received by a reader. Anticipating reception – and mitigating the possibility of misinterpretation – depend not only on the writer's ability to anticipate readers' needs and backgrounds, but also on his or her familiarity with conventional uses of different registers and their implications for meaning.").

111. Rayner, *supra* note 18, at 1475 ("[G]reat advances have been made in understanding eye movements in reading (and inferring the mental processes associated with reading).").

112. Rayner, *supra* note 18, at 1475.

113. Rayner, *supra* note 18, at 1460.

114. Rayner, *supra* note 18, at 1461.

115. Rayner, *supra* note 18, at 1461.

116. Rayner, *supra* note 18, at 1462 (citing Julie A. Kirkby et al., *Binocular Coordination During Reading and Non-Reading Tasks*, 134 *PSYCHOL. BULL.* 742 (2008)).

117. Rayner, *supra* note 18, at 1462-63.

118. Rayner, *supra* note 18, at 1461.

text simultaneously, made more correct predictions than unskilled readers about what would come next in the text.¹¹⁹ Thus, readers can anticipate what is coming and interpret the cues imbedded in the text by the writer.¹²⁰

A writer who understands this broader reading focus can also understand the importance of inserting frequent, perhaps subtle, signals into sentences and paragraphs. These signals of organization speed the reader through the text and help insure that the reader anticipates correctly what is coming next in the text. Rather than worrying only about the content, the writer can understand the importance of the grouping of that content, whether in phrases, sentences, paragraphs, or sections. These signals also help the reader recover more quickly when the text becomes confusing, such as when the writer uses a word that is not quite right for the intended meaning.¹²¹ For example, an *if-then* structure tells the reader the logical sequence of the content, and the word *nevertheless* prepares the reader for a point that will override the previous point with a more important one.

A writer who understands readers can also appreciate the importance of careful sequencing and wording of ideas. Although readers group words, they still read sequentially. Despite some reading programs' claim that readers focus on several lines of text at once, even fast readers move along lines of text, although they may read that material in chunks.¹²² How quickly they can move, or how large a chunk the reader can absorb easily, depends on the words that the writer has chosen. Shorter words do not require eye fixation as frequently, while words of eight or more letters almost always require fixation.¹²³ Unfamiliar words require longer fixations,¹²⁴ supporting the assumption that unfamiliar words increase reading difficulty. The mechanics of reading thus support the conventional wisdom that shorter words are easier to read.

This sequential process is not a simple matter of forward movement. Readers regress, or move eyes backwards, at times to

119. Rayner, *supra* note 18, at 1462.

120. Rayner, *supra* note 18, at 1466-67.

121. Rayner, *supra* note 18, at 1474 (“[C]ontextual information did not eliminate the initial disruption [caused by an illogical word choice], but moderated it quickly thereafter.”).

122. Rayner, *supra* note 18, at 1460-61.

123. Rayner, *supra* note 18, at 1461.

124. Rayner, *supra* note 18, at 1471. See also PAVIO & BEGG, *supra* note 5, at 330 (“Pause duration is particularly relevant to meaningful reading because it varies with the difficulty of the text. For example, average pause duration is longer for difficult prose than for easy prose.”).

understand reading, with skilled readers regressing about ten to fifteen percent of the time.¹²⁵ Usually, this regression focuses on the preceding word, but in difficult text the regression may move back farther.¹²⁶ Although the reason for an increase in regressions is hard to prove experimentally, difficulty with sentence structure is likely an important factor.¹²⁷ Even difficult fonts can increase the number of regressions, as well as slowing down the reader overall.¹²⁸ This supports the need to pay attention to fonts and text size, as several of our colleagues have suggested in recent articles.¹²⁹

The smoothness with which a reader can process a text is also measured by looking at eye-voice span. Eye-voice span is the distance that a reader's eyes are ahead of the voice when reading aloud.¹³⁰ "The eyes are normally ahead of the voice because the reader must have advance information about the sentence in order to read with natural intonation."¹³¹ When the text is problematic, the eye-voice span can decrease and more regressions can occur¹³² because "there is no doubt that cognitive processing abilities have a strong influence on when the eyes move."¹³³ This result supports the importance of careful sequencing of phrases within and between sentences.

We can simulate some of these results in our advanced legal writing classes simply by having students read each other's work aloud. With an awareness of the concept of eye-voice span, students can become aware of the ease with which they can read aloud, signaled by an ability to increase the size of the eye-voice span and the speed of reading aloud. Reading aloud can also help our writers become aware of the reader's regressions, because they

125. Rayner, *supra* note 18, at 1460.

126. Rayner, *supra* note 18, at 1460.

127. Rayner, *supra* note 18, at 1460 (citing D.C. Mitchell et al., *Accounting for Regressive Eye Movements in Models of Sentence Processing, a Reappraisal of the Selective Reanalysis Hypothesis*, 59 J. OF MEMORY AND LANGUAGE 266 (2008)).

128. Rayner, *supra* note 18, at 1460. See generally Ruth A. Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 109 (2004) (discussing the significance of font choices).

129. See, e.g., Robbins, *supra* note 128.

130. PAIVIO & BEGG, *supra* note 5, at 331.

131. PAIVIO & BEGG, *supra* note 5, at 331.

132. PAIVIO & BEGG, *supra* note 5, at 331 ("The eye-voice span, like eye movements, is affected by the difficulty and grammatical structure of the material being read. The more difficult the text is, the shorter the eye-voice span; and the more grammatically structured the text is, the longer the span.") (citations omitted).

133. Rayner, *supra* note 18, at 1473.

will often show up as a mis-intonation of a phrase in a sentence, causing the reader to stop and re-inflect the sentence. With practice, students can learn to hear these regressions in their own writing, thus becoming more effective proofreaders of their own writing.

Evaluating the memorability of content in writing is another way reading research helps reveal how writing can become more effective. For example, reading research has revealed the following, including information both familiar and newer:

[A]ctive sentences were easier to learn than their passive counterparts, and nonembedded sentences were easier than embedded ones. The organization of sentences within paragraphs or longer passages is also important. . . . Chunking, integration or unitization were the key explanatory concepts in that context, and they are equally applicable here. Any factor that helps the reader to organize information into meaningful chunks will promote learning from text.¹³⁴

Just as the concept of active voice has been useful in helping our students improve writing, “chunking,” which refers to the way information is organized into conceptual units, is a concept with great potential to help our students understand how to improve writing.¹³⁵ Chunking can help students understand why and how careful sentence structure is not just an abstract grammatical requirement, but a tool that is actually used by skilled readers. Other basic writing concepts can get fresh reinforcement as well. For example, “‘sticking to the point’ seems to be more important than various stylistic features of text when it comes to memorable writing.”¹³⁶

Our students, as well as the discipline of advanced legal writing in general, need to understand more about reading because the written text is always experienced individually. No matter how many people ultimately read a law, contract, letter, or other legal document, each person reads the text personally. We teach about the “discourse community” and “audience,” but these concepts all deal with broader groups; none of them focus precisely on this essential component of written text, the individual reader. The importance of envisioning the reader is not a new concept to legal

134. PAIVIO & BEGG, *supra* note 5, at 336.

135. PAIVIO & BEGG, *supra* note 5, at 175.

136. PAIVIO & BEGG, *supra* note 5, at 326 (citations omitted).

writing, but there are gaps in our understanding of the skilled legal reader. We have been describing the legal reader for years and helping our students understand what the skilled legal reader needs. Yet, as a discipline, advanced legal writing needs more research into the “reader” of our students’ writing.

As an extra benefit, the experienced legal reader presents a golden research opportunity for legal writing scholars. If we combined the expertise of legal writing scholars with that of reading researchers, we could discover powerful insights that would enrich both fields. Research on skilled legal readers, especially on the judiciary, could reveal extraordinary detail about how skilled readers process information. The legal writing community knows what we need to learn about these readers and can identify the readers we most need to understand. The reading research community has the expertise to determine how people read. Advanced legal writing teachers need only connect with reading research scholars to mine this rich vein of future scholarship. If we combine forces, we can produce new understandings that have the potential to transform our understanding of how legal writing actually works. We can move from general statements about the legal reader to actual data about how they read. We can use this data to understand how legal writing needs to work, and we can use that understanding to make legal written communication work better.

B. Writing as Rhetoric

Rhetoric is an ancient discipline that has been associated with writing only in relatively recent times. Rhetorical studies have existed for over two millennia.¹³⁷ The origins of rhetoric lie in oral speech, not writing.¹³⁸ Rhetoric was born in the context of public discourse in Greece and Rome, growing out of a tradition of oral debate as “ritual male combat.”¹³⁹ The word “rhetoric” focuses on the concepts of *words* or *speech*.¹⁴⁰ Rhetoric comes from the phrase for “teacher of oratory or the art of the orator.”¹⁴¹ By Cicero’s time,

137. Robert J. Connors, *Writing the History of our Discipline*, in THE ELEMENTS OF TEACHING WRITING: A RESOURCE FOR INSTRUCTORS IN ALL DISCIPLINES 49 (Katherine Gottschalk & Keith Hjortshoj eds., 2004).

138. LOUISE WETHERBEE.PHELPS, COMPOSITION AS A HUMAN SCIENCE: CONTRIBUTION TO THE SELF-UNDERSTANDING OF A DISCIPLINE 61 (1988) (“Speech and writing were associated with different modes of thought and experience, starting with Plato.”).

139. Chafe & Tannen, *supra* note 4, at 397.

140. EDWARD P. J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 20 (1965).

141. CORBETT, *supra* note 140, at 20-21.

rhetoric was divided into invention, disposition or organization, style, memorization, and performance or delivery.¹⁴² Thus, it included two skills omitted or used very differently in legal writing.

Rhetoric's applicability to legal writing is limited in that it focuses on persuasion,¹⁴³ often in relation to political issues.¹⁴⁴ Ancient rhetoric specifically excluded several forms of legal writing as being "non-artistic": laws, witnesses, contracts, and oaths.¹⁴⁵ This exclusion tells us something about the initial assumptions behind rhetoric: it is about persuasion, but also about something slightly short of truth or established fact. Persuasion lies in the matter of opinion, at least historically. Determining fact, or truth, was not quite the goal of rhetoric.

In fact, writing was not viewed as a vehicle for rhetoric and persuasion until relatively recently: "[I]t was not until the Renaissance, after the invention of printing in the fifteenth century, that the precepts governing the spoken art began to be applied, on any large scale, to written discourse."¹⁴⁶ Until the early nineteenth century, rhetoric, as an academic topic, focused primarily on speech rather than written composition.¹⁴⁷ English departments taught philology, literature and composition, but did not include oral rhetoric.¹⁴⁸ Rhetoric scholars, therefore, formed their separate departments of speech¹⁴⁹ and composition scholars returned to rhetoric only in the late 1950s.¹⁵⁰

The integration of rhetoric and writing was, in part, externally imposed, rather than coming from the decisions of scholars in the respective fields. In response to public outcries for better writing from college students, courses in composition or rhetoric were created in the late nineteenth century.¹⁵¹ According to Robert Connors, "Composition-rhetoric is a modern rhetoric, quickly changing

142. CORBETT, *supra* note 140, at 22-29.

143. CORBETT, *supra* note 140, at 21.

144. CORBETT, *supra* note 140, at 22 ("One fact that emerges from a study of the history of rhetoric is that there is usually a resurgence of rhetoric during periods of violent social upheaval.").

145. CORBETT, *supra* note 140, at 23.

146. CORBETT, *supra* note 140, at 21.

147. Connors, *supra* note 137, at 51.

148. Connors, *supra* note 137, at 51.

149. Connors, *supra* note 137, at 51.

150. Connors, *supra* note 137, at 51.

151. ROBERT J. CONNORS, COMPOSITION-RHETORIC: BACKGROUNDS, THEORY, AND PEDAGOGY 7 (1997) ("It is not [like other academic fields of study], primarily because the development of composition-rhetoric between 1885 and 1910 was externally imposed. It was a field decreed necessary and continued by social fiat. No other college discipline I know of has had anything like this history.").

and adapting, driven by potent social and pedagogical needs, and running on the rails of an ever cheaper, ever quicker, and ever more competitive printing technology.”¹⁵²

Over the years, classical rhetoric has been reinterpreted in various ways.¹⁵³ For example, much research about persuasion has been conducted in other fields, such as speech communication¹⁵⁴ and journalism.¹⁵⁵ Rhetoric scholars have also introduced new approaches to developing arguments, such as describing the structure of arguments as “crystalline” or “fractal.”¹⁵⁶ Currently, rhetoricians and compositionists continue to debate the interrelationship between rhetoric and writing.¹⁵⁷ Nevertheless, advanced legal writing can benefit from the insights of rhetoric, especially with respect to persuasion.

Within the area of persuasive writing, we may want to explore some of these newer forms of rhetoric and about alternative approaches to logical reasoning, beyond those of traditional logic.¹⁵⁸

[I]n science and philosophy alike, an exclusive preoccupation with logical systematicity has been destructive of both historical understanding and rational criticism. Men demonstrate their rationality, not by ordering their concepts and beliefs in tidy formal structures, but by their preparedness to respond to novel situations with open minds—acknowledging the shortcomings of their former procedures and moving beyond them.¹⁵⁹

152. *Id.*

153. *Id.* at 7–22 (providing an interesting overview of the history of composition and rhetoric).

154. See Daniel J. O’Keefe, *How to Handle Opposing Arguments in Persuasive Messages: A Meta Analytic Review of the Effects of One-Sided and Two-Sided Messages*, 22 COMM. Y.B. 209 (1999).

155. See generally Christopher R. Wolfe, M. Anne Britt & Jodie A. Butler, *Argumentation Schema and the Myside Bias in Written Argumentation*, 26 WRITTEN COMM. 183 (2009).

156. J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1835–36 (1991) (“[O]ne of the most common methods of legal semiotics is studying the recurring forms of legal argument.”).

157. Regarding the relationship between rhetoric and composition, “Anyone who pre-sumes to assert what the relationship *really* is or ought to be is looking for trouble.” John T. Gage, *On ‘Rhetoric’ and ‘Composition’*, in AN INTRODUCTION TO COMPOSITIONS STUDIES 15 (Erika Lindemann & Gary Tate eds., 1991).

158. See MONROE C. BEARDSLEY, *THINKING STRAIGHT: PRINCIPLES OF REASONING FOR READERS AND WRITERS* (4th ed. 1975); STEPHEN TOULMIN, *General Introduction and Part 1: Collective Use and Evolution of Concepts*, in *HUMAN UNDERSTANDING* (1972).

159. TOULMIN, *supra* note 158, at vii–viii.

Similarly, understanding the theory of cognitive dissonance can help our students understand how to construct persuasive letters, as well as persuade more effectively in formal briefs.¹⁶⁰ “Critical thinking” is yet another concept that provides a somewhat different approach to constructing logical arguments.¹⁶¹ Within this envelope of tradition and persuasion, however, rhetoric still provides a powerful source of insights for advanced legal writing, enough to justify courses with a rhetorical focus and to spark exciting recent legal writing scholarship.¹⁶²

Although rhetoric is useful to us as teachers of advanced legal writing, it too has its limits.¹⁶³ We need to explore other approaches to writing when we address the many kinds of writing that do not involve persuasion so directly. Advanced legal writing can benefit from developing our students’ expertise in writing business correspondence, memoranda of understanding, instruction manuals, white papers, press releases, jury instructions, contracts, trusts, administrative regulations, city ordinances, interrogatories, and documents related to all sorts of business agreements. We need to help our students understand that communication is not always about arguing for a particular position; persuasion will only be a subset of the writing our students produce during their careers.

C. *Writing as Narration*

Narration, one of the four traditional forms of discourse,¹⁶⁴ is much older than writing.¹⁶⁵ Stories, which have probably existed

160. See DANIEL J. O’KEEFE, *PERSUASION: THEORY AND RESEARCH* (Jesse G. Delia, ed., 1990) (for a good source of understanding of this and other persuasion theories).

161. “Critical thinking helps one in making judgments because it relies on explicit criteria of what makes for good judgment Critical thinking is also self-correcting in that the thinker monitors the process and seeks to steer it toward the truth” KELLOGG, *supra* note 7, at 12.

162. See, e.g., Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1 (2000); Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL OF WRITING 61 (2001-2002); Kristen K. Robbins, *supra* note 3.

163. See Gage, *supra* note 157, at 15-32 (for a more thorough discussion of this point). See also Balkin, *supra* note 156, at 1841-42.

164. The other forms are argumentation, exposition, and description. CORBETT, *supra* note 140, at 21.

165. “I suggest that the narrative structure of consciousness provides the basis for children learning narrative text structures at an early age and for the relative ease with which narratives are written.” KELLOGG, *supra* note 7, at 43.

as long as human speech, convey meaning and deep truths.¹⁶⁶ The narrative structure creates meaning by making causal connections between separate events or experiences.¹⁶⁷ In all cultures, stories have been remembered and handed down orally for many generations long before they were written, whether those stories are called *myth* or *fable* or *scripture*. This long oral history is evidenced by the number of variations of common stories that have been found in writing, such as the many variations of stories about a great flood, and the two variations of the creation story in Genesis.¹⁶⁸

One interesting point suggested by the length of this oral history is that humans did not feel a need to control the meaning of these stories. If we had, we would have invented writing sooner, since the need to write arose from the need to control meaning. Stories, however, are not the same as contracts, memos, financial accounts and other genres of writing.¹⁶⁹ Skilled storytellers do not worry about telling a story exactly the same way each time.¹⁷⁰ That is not the goal or purpose of telling stories.¹⁷¹ Differences in the details of a story do not rob the story of its meaning or reduce the credibility of the storyteller. Storytelling is not testimony.

Legal narration is not, then, quite the same as storytelling.¹⁷² The purposes behind the legal story are narrower, and the constraints upon the legal narrator are much greater. The legal narrator must tell the truth, even if it ruins the flow of the story. In this era of confusion about fact and opinion, we need to teach our students to be mindful of the difference. We, as writing teachers,

166. See Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 48-49 (1996) (listing ways legal writing courses can use narrative techniques). See also Fajans & Falk, *supra* note 3.

167. KELLOGG, *supra* note 7, at 43.

168. *Genesis* 1:27; *Genesis* 2:7-23.

169. "It should be observed that each kind of rhetoric has its own appropriate style. The style of written prose is not that of spoken oratory." Chafe & Tannen, *supra* note 4, at 384 (quoting Aristotle).

170. Conversation with Moji Olaniyan, Ghanan storyteller (Feb. 9, 2011).

171. The purpose of storytelling also varies across cultures. See Chafe & Tannen, *supra* note 4, at 394 (for an interesting example of the difference between Greeks and Americans).

172. "[N]arrative's communicative capacity is rooted in the way that the mind interprets, processes, and understands information. . . . [N]evertheless . . . narrative has distinct limits as a tool of legitimation and . . . is itself constrained by preexisting social understanding and practices." Steve L. Winter, *The Cognitive Dimensions of the Agony between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2271 (1989). "The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional abstracted rhetoric of law." *Id.* at 2228.

need to be mindful of the limits of storytelling as a vehicle for teaching legal writing.

The differences between storytelling and legal writing reflect differences between speaking and writing. Speaking is learned by human beings without specific instruction and by all those with the physical ability to do so. Writing, however, is seldom completely self taught. While some people do teach themselves to read, few are able to teach themselves to write. Whether this is caused by the different uses of fine motor skills involved in writing, or the unique visual feedback that writing allows, or some other factor, is not certain. On the other hand, it is certain that, of the language skills, writing is the least naturally acquired. Writing is the last of the five verbal skills to be acquired.

The art of narration, while a wonderful resource to us as advanced legal writing teachers, is not an exact match to the envelope that is the world of writing. Legal writing limits narration in that it does expect consistency and accuracy. Lawyers do quibble about differences in detail, and juries decide facts and make decisions based on those details, while such decisions have clear legal consequences.

D. *Writing as Sign*

The discipline of semiotics, or the study of signs, offers interesting and potentially useful insights into writing, and it has become a lively area of application to law and legal writing.¹⁷³ The focus on writing as a sign introduces a greater awareness of visual aspects of writing, such as font, type size, length of lines and spaces between lines, and the other graphic visual cues that are now added to the mix of writing tools. These tools, which have been so well explained by others in our field¹⁷⁴ provide additional new topics for our classes.

173. For a focus on legal reasoning, see Balkin, *supra* note 156, at 1835 (stating that “one of the most common methods of legal semiotics is studying the recurring forms of legal argument”). See also Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991). For legal scholars application of semiotics, see Duncan Kennedy, *A Semiotics of Legal Arguments*, 42 SYRACUSE L. REV. 75 (1991). For information about how text design affects learning, see Jeff Bezemer & Gunther Kress, *Writing in Multimodal Texts: A Social Semiotic Account of Design for Learning*, 25 WRITTEN COMM. 166 (2008). See also Robbins, *supra* note 129.

174. See MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS* (2010); Derek Kiernan-Johnson, *Telling through Type: Typography and Narrative in Legal Briefs*, 7 J. OF THE ASS’N OF LEGAL WRITING DIRECTORS 87 (2010); Robbins, *supra* note 128.

However, we also need to remember the limits of semiotics. As we explore these tools, it can be easy to get drawn into the visual aspects of writing so deeply that the meaning of the writing moves into the background. Appearance can become more important than content. We must remember, and remind our students to remember, that substance can never be overlooked. We need to remember the potential long life of a legal document, and the potential for multiple readers and countless readings. We need to remember that eventually readers will get past the appearance of the text, and the content will become paramount.

E. Writing as Ethnography

Yet another source for insight into the writing process is ethnographic research, which has existed for about twenty years.¹⁷⁵ The ethnographic researcher works in close contact with writers in a particular field and writes down in detail the researcher's observations about that field's writing process.¹⁷⁶ Rather than trying to avoid reporting the researcher's own personal reactions, the ethnographer memorializes the potential bias by reporting those reactions. This form of research "represents a complicated hybridization of research tradition—sociological, cognitive, and anthropological."¹⁷⁷

Advanced legal writing teachers could explore this approach to writing in several ways. They could keep journals of their observations within their own classes, developing their results into subsequent articles to inform others of the particular nuances they see in upper level legal writing students. They could also require students to keep reflective journals about their writing experiences and discuss such reflections periodically during class. This process, besides giving students an opportunity to write in a less restrictive format, could encourage each student to become more aware of his or her own writing process, evaluate its strengths and weaknesses, experiment with different approaches, and over time develop writing habits that will benefit the student for the rest of his or her career.¹⁷⁸

175. WENDY BISHOP, *ETHNOGRAPHIC WRITING RESEARCH: WRITING IT DOWN, WRITING IT UP, AND READING IT* 6 (1999).

176. *See id.* (for more information about this field).

177. *Id.* at 4. *See* JOHN J. McDERMOTT, *COMPOSITION AS A HUMAN SCIENCE* (1988) (for yet another approach to composition as a field).

178. *See* BISHOP, *supra* note 175 (for more on procedures for using this approach).

The limits of ethnography lie most immediately in the economic and social realities of the legal world. Advanced legal writing teachers may not be able to devote enough time to this kind of writing to make it feasible. Lawyers, monitoring billable hours, are not the best candidates for reflective writing. Law students, aware of this pressure, may not be willing to spend their educational time writing something that does not resemble a legal product.

F. Writing as Sociology

It is also possible to approach teaching writing from a sociological perspective. "Because writing is an act not easily separated from its functions in a particular discourse community, it is incumbent on those who seek to understand or teach the use of written language to keep up with such changes and to expand research beyond the familiar territory of composition research"¹⁷⁹ A great deal of legal writing certainly does function within particular contexts and within a community with a specialized, common professional background. Additionally, law, as with other professions, certainly has its traditions and conventions. Viewing legal writing from this perspective can help us explain how traditional legal forms came into existence, how they function, and how they can be changed.¹⁸⁰ "The notion of 'effective writing' always is framed in terms of effectiveness *in what context* and *for what purpose*."¹⁸¹ Effective legal writing is no exception.

This sociological point of view can be particularly useful when discussing whether something should in fact be written down at all. For example, a lawyer would be ill advised to write a joking threat, such as "so sue me," even in the most informal of office memos. Otherwise innocuous personal references at the end or beginning of a business letter may be inappropriate in light of the fact that so many legal documents may be read by others besides the recipient of the letter. Examples abound of e-mail messages that should never have been written, and judges have gotten into

179. Kathelyn Ferrara, Hans Brunner, and Greg Whittemore, "Interactive Written Discourse as an Emergent Register" *Written Communication*, vo. 8, no. 1, 8-34 p. 9 (1991).

180. "We can also see these writing conventions as a repertoire of options that allow writers to actively and publicly accomplish an identity through discourse choices." Ken Hyland, *Community and Individuality: Performing Identity in Applied Linguistics*, 27 *WRITTEN COMM.* 159, 159 (2010).

181. See Beck, *supra* note 85, at 319.

trouble for inappropriate communications on Facebook.¹⁸² E-mail alone is a topic worthy of a class discussion.¹⁸³ For our students, for whom texting and email are frequent and convenient forms of communication, these restrictions go against ingrained habits, and can be surprisingly difficult to honor.

A sociological approach to writing, however, can only be applied within limits. Because this approach emphasizes context, it can tempt us to forget that legal writing must communicate accurately even when it is read out of context, a fact should not be forgotten. Legal writing is not as adaptable in meaning as literature, and the meaning of a text, if ambiguous, is a subject that will be decided in a courtroom rather than in a classroom discussion.

G. *Writing as Technical Expertise*

Another body of research shows that gaining automaticity in skills in composition frees cognitive capacity, which can improve overall writing.¹⁸⁴ For example, student writers who make basic grammar errors may be evidencing mental overload rather than a lack of grammatical knowledge: “concurrent tasks that make heavy demands on phonological or verbal [working memory] . . . can cause subject-verb agreement errors”¹⁸⁵ Research in sentence composition can deepen our own understanding of the writing process and help us teach our students with greater sophistication.¹⁸⁶ Writers who have prior knowledge of sentence structures are able to compose sentences more quickly even when they do not have prior knowledge of the content,¹⁸⁷ which suggests that

182. For example, the Florida Judicial Ethics Advisory Committee recently dealt with the issue of judges Facebook “friending” attorneys and parties involved in cases in the judge’s court. John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 10, 2009, <http://www.nytimes.com/2009/12/11/us/11judges.html>.

183. For example, as a member of a campus committee reviewing consulting firms vying for a contract, I was told to avoid putting any comments in e-mail to other committee members because anything in writing could become subject to open record laws. Students can benefit from knowing about such real life restrictions, which often surround contracts and other negotiated issues.

184. Tracy L. Brown & Thomas H. Carr, *Automaticity in Skill Acquisition: Mechanisms for Reducing Interference in Concurrent Performance*, 15 J. OF EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION AND PERFORMANCE 686, 690, 698 (1989).

185. Ronald T. Kellogg, Thierry Olive, & Annie Piolat, *Verbal, Visual, and Spatial Working Memory in Written Language Production*, 124 ACTA PSYCHOLOGICA 382, 383 (2007) (citation omitted).

186. For example, research has shown that “writers typically compose sentences in 6 to 10 word parts. Expert writers were found to compose in longer sentence parts than novices.” David S. Kaufer, John R. Hayes, & Linda Flower, *Composing Written Sentences*, 20 RES. IN THE TEACHING OF ENG. 121 (1986).

187. *Id.* at 138.

a ready understanding of English sentence structure can improve our students' writing. Although "the teaching of formal grammar has a negligible or, because it usually displaces some instruction and practice in composition, even a harmful effect on improvement in writing,"¹⁸⁸ this evaluation is based on grammar teaching that focuses on drills and use of examples that are not taken from the students' own writing. Even spelling education could be useful, if re-conceptualized in light of the research.¹⁸⁹

In light of this research, our advanced legal writing classes could include instruction on grammar in the broader sense.¹⁹⁰ Advanced legal writing, rather than the introductory courses, could include a focus on how the English language is structured and understood by native speakers. We could give our students a clearer understanding of English grammar and structure, as long as it is closely tied to their application of that knowledge in their writing.

H. Writing as a Collection of Genres

A genre approach to teaching writing organizes teaching about writing around different kinds of documents, just as a literature teacher might organize a course around different forms of poetry or fiction. This approach focuses on the nature of the document and its use by readers and writers.¹⁹¹ These genres have forms and traditions that writers need to understand.¹⁹² Understanding and mastering these genres, in effect, provides writers with access to social influence and power. This perspective can prepare students to write a variety of documents because they understand the

188. RICHARD BRADDOCK, RICHARD LLOYD-JONES, LOWELL SCHOER, RESEARCH IN WRITTEN COMPOSITION 37-38 (1963).

189.

[T]he spelling-to-sound correspondence of English is much closer than is ordinarily assumed, provided that one considers the deep structure of the language. Thus, the spelling of words correspond more closely to the abstract, underlying representations of the sound system of English than they do to the surface structures of spoken words.

PAIVIO & BEGG, *supra* note 5, at 328.

190. See Patrick Hartwell, *Grammar, Grammars, and the Teaching of Grammar*, 47 C. ENG. 105 (1985) (for examples of what this might entail).

191. THE POWERS OF LITERACY: A GENRE APPROACH TO TEACHING WRITING 7 (Bill Cope & Mary Kalantzis eds., 1993).

192. *Id.* Genres are social processes, with texts that are patterned in reasonably predictable ways according to patterns of social interaction in a particular culture. *Id.* "Genres are textual interventions in society; and society itself would be nothing without language in all its patterned predictability." *Id.*

writing aspects that differ among the documents and the purposes behind each of the documents.¹⁹³

A genre approach is well suited to advanced legal writing courses in general. Legal writing is certainly a path to accessing influence and power, and it also is a field that includes many genres of writing. Whether a course focuses on one genre, such as appellate briefs, or multiple genres, such as the survey approach,¹⁹⁴ a genre approach is a logical way to approach different legal documents. While the reader should never be forgotten when learning how to write a document, many legal documents do not have a specific reader and may even have a wide variety of readers. This reality limits the usefulness of a reader-based approach on these documents. A genre approach to these documents can therefore provide a clearer focus for understanding how to write the documents successfully.

I. Writing as Media

A great deal of useful research has gone into the question of how both writers and readers are affected by the specific medium used in writing. Research regarding the effect of different media on writers can help our students develop more comfortable and efficient writing processes. Research about the media effect on readers can help our students improve their writing overall.

Writers are noticeably affected by the medium they use when producing text. For example, organization is more challenging when writing on a computer because “[w]riters who dictate their text to a machine need to make a mental representation of the text.”¹⁹⁵ Writers who compose on a computer, however, are also more likely to focus on small-scaled editing on the first draft. They are drawn to making these edits simply because of the visual presence of a blinking cursor.¹⁹⁶ Thus this new technology, which makes generating text easier, does not work well for the higher order revision needed to improve that text.¹⁹⁷ Interestingly, the influence of the medium has been occurring since the beginning of

193. Sarah W. Beck & Jill V. Jeffrey, *Genre and Thinking in Academic Writing Tasks*, 41 *J. LITERACY RES.* 228, 233 (2009).

194. RAY & COX, *supra* note 2.

195. Marielle Leijten, Luuk Van Waes, & Sarah Ransdell, *Correcting Text Production Errors: Isolating the Effects of Writing Mode from Error Span, Input Mode, and Lexicality*, 27 *WRITTEN COMM.* 189, 199 (2010).

196. *Id.*

197. Kevin Garrison, *An Empirical Analysis of Using Text-to-Speech Software to Revise First-Year College Students' Essays*, 26 *COMPUTERS & COMPOSITION* 288, 292-93 (2009).

writing: "Choice of writing implement and the medium upon which written symbols are inscribed can influence the shape of the representational system, as when pictograms evolved into arbitrary wedge shapes in ancient Mesopotamia because of the difficulty of etching curves in clay."¹⁹⁸

In advanced legal writing, we may want to discuss these effects with our students and help them choose the best medium for each stage of the writing process. We can encourage our students to vary their medium whenever they find that writing is not productive. For example, we might encourage writers to work on paper when planning larger organization. Alternatively, we might encourage them to look away from the screen as much as possible when they are writing a first draft, to avoid getting distracted from the larger issues by making small scale edits.

Emergent forms of written communication have also been researched in linguistics and other fields, addressing writing challenges faced by our students as well as other writers.¹⁹⁹ This research has found that these new types of media are creating new rules for appropriate communication, blending the more informal communication patterns of speech with more formal patterns from writing.²⁰⁰ For example, "The *mode* of [computer-mediated communication], as a communications medium, is neither simply speech-like nor simply written-like."²⁰¹ Text messages and on-line chat are also changing writing. "The findings support three claims about [Interactive Written Discourse]: first, that it is a naturally occurring register, perhaps a reduced register; second, that it is a hybrid language variety, displaying characteristics of both oral and written language; and third, that norms of its use

198. Naomi S. Baron, *Letters by Phone or Speech by Other Means: The Linguistics of Email*, 18 LANGUAGE AND COMM. 133, 136 (1998).

199. "Within the past 20 years, the tide has turned, and writing has emerged as a respected domain of linguistic inquiry." *Id.* at 135.

200. "Over the last century, developments in telecommunications have made possible new communicative modalities that blend the presuppositions of spoken and written language." *Id.* at 134. "In 1979 Halliday wrote that 'spoken language is characterized by complex sentence structures with low lexical density (more clauses, but fewer high content words per clause); written language by simple sentence structures with high lexical density (more high content words per clause, but fewer clauses).'" Chafe & Tannen, *supra* note 4, at 388 (footnote omitted) (quoting M. A. K. HALLIDAY, *Differences between spoken and written language: some implications for literacy teaching*, in COMMUNICATION THROUGH READING: PROCEEDINGS OF THE FOURTH AUSTRALIAN READING CONFERENCE 37-52 (G. Page, J. Elkins, & B. O'Conner eds., 1979).

201. Simeon J. Yates, *Oral and Written Linguistic Aspects of Computer Conferencing: A Corpus Based Study*, in LINGUISTIC AND INTERACTIONAL FEATURES OF INTERNET RELAY CHAT 46 (Christopher C. Werry ed., 1996).

are in the process of becoming conventionalized.”²⁰² Skilled writers adjust to these new levels of formality, rather than rigidly adhering to one pattern or the other.²⁰³

Our students need to adjust subtly and appropriately as they communicate in these new media and need to know how to adjust to future media as it emerges. Written communications on Facebook, Twitter, and other electronic forms may feel like intimate conversation, but are in fact written text that can exist over time and be read out of context. They are forms of writing, and our students need to know how to adjust and master these forms while avoiding serious error. Just as we teach them to adjust form for letters or complaint, we can use this new research to help our students adjust to writing for a blog, e-mail, or Twitter.

While no one area of research offers simple or definitive answers to questions of how writing works, all of these areas contribute valuable insights. All of these different disciplines and approaches to writing provide us with opportunities to expand our understanding and teaching in advanced legal writing. Nor are the possibilities limited to those described here.²⁰⁴ As long as we remember the limits of each approach, we can use these new understandings to push the envelope of research and teaching advanced legal writing.

IV. PUSHING THE ENVELOPE OF ADVANCED LEGAL WRITING'S STRUCTURE

While the research described earlier helps us progress individually in our teaching and understanding, we also need to push the envelope of advanced legal writing as an academic structure. Now that the need for advanced, more sophisticated instruction in legal writing is established, we need to make sure that the definition of that instruction is not inappropriately limited. One possible approach is to create a wide variety of courses, each specializing in different advanced insights into legal writing. The examples described in this article and those of our colleagues give us a starting

202. Ferrara, Brunner & Whittemore, *supra* note 65, at 10.

203. “Participants skilled in computer mediated communication (CMC) deviated more [in register] than unskilled ones did.” Volckaert-Legrier, Bernicot & Bert-Erboul, *supra* note 64, at 163

204. For example, comparisons include “formal vs. informal, monologic vs. interactive, public vs. private . . .” Chafe & Tannen, *supra* note 4, at 395. Additionally, comparisons have been made to “discourse stance.” Ruth A. Berman, *Introduction: Developing Discourse Stance in Different Text Types and Languages*, 37 J. OF PRAGMATICS 105 (2004). Additionally, research in advertising offers insights that are useful in persuasion.

point from which we can explore many options. These specialized courses, however, may not be enough to push our field to reach the limits of its full potential.

One structure that can help us raise the bar in advanced legal writing is establishing a course of study leading to a certificate in advanced legal writing. This certificate could help legal writing establish itself as a topic worthy of specialized study, just like corporate law, legal history, and other specialized sub sets of law. This certificate might also help those outside our discipline escape the assumption that courses in legal writing are at heart a remedial necessity, an assumption that still exists among many lawyers and law professors, if not within our profession itself. Although this approach would not be without risk,²⁰⁵ it would provide an opportunity to communicate the potential of advanced writing topics. If the certificate becomes more popular with students, it would underscore the usefulness of advanced writing skill to the current competitive environment in the practice of law.

In law schools that have programs in WAC (“Writing Across the Curriculum”) or WID (“Writing in the Discipline”), the writing certificate could be developed in conjunction with other specialized upper level courses. For example, writing professionals could teach a composition component linked to a course in secure transactions. This would provide students with more thorough and realistic preparation for their future specialty. When the casebook professor is amenable to collaboration with the writing professor as an equal, this approach can offer students and teachers the best of both worlds.²⁰⁶

This legal writing certificate might also facilitate the development of “legal writing studies,” an area that could facilitate better preparation for future legal writing professionals and could infuse greater understanding of writing into the scholarly study of law. Legal writing studies could include topics beyond the limited focus on techniques for producing better writing. Just as writing studies has emerged as a discipline in its own right,²⁰⁷ legal writing

205. See Susan H. McLeod, *Re-Visions: Rethinking Hairston's "Breaking our Bonds,"* 57 C. COMPOSITION & COMM. 523 (2006) (for a discussion of the jealousy that can develop when a specialized program becomes too popular).

206. See Chris Thaiss & Tara Porter, *The State of WAC/WID in 2010: Methods and Results of the U.S. Survey of the International WAC/WID Mapping Project*, 61 C. COMPOSITION & COMM. 534 (2010) (for an update on WAC programs).

207. See, e.g., Deborah Balzhiser & Susan McLeod, *The Undergraduate Writing Major: What Is It? What Should It Be?*, 61 C. COMPOSITION & COMM. 415 (2010); Douglas Downs & Elizabeth Wardle, *Teaching about Writing, Righting Misconceptions: (Re)Envisioning First-*

studies could become recognized as a sophisticated area of legal research and one needing professors of a status equivalent to other areas of legal research. Thus, identifying legal writing studies might benefit us professionally, just as the development of “writing studies” has benefited composition scholars.²⁰⁸

The construction of legal writing studies can help us sidestep some limitations that arise from the current vision of legal writing, which views legal writing as a study arising out of need, as opposed to a discipline out of potential scholarly growth. While the current emphasis on writing as an area necessitated by legal practice is valid and legitimate, it is limiting. Just as composition has been hampered from attaining full status because it was a discipline created out of social need,²⁰⁹ legal writing risks being hampered by its image as a necessary evil, rather than a chosen field of study. Establishment of legal writing studies can help us escape this limitation.

As we construct “legal writing studies,” we need to proceed with caution and avoid overreaching. We may want to expand beyond writing to include composition of oral presentation, thus drawing from older aspects of rhetoric, from speech communication, and from communication theory, which often has focused on oral forms of communication. If we choose this avenue, however, we must avoid inflicting our own history on others. If we move into oral communication, we must incorporate the expertise of the fields who already address this area. We must advocate for the hiring of oral communication professionals, just as we advocate for the hiring of our own professionals. We must not denigrate the art of oral communication by assuming that we can teach the topic without much knowledge of those disciplines that have spent decades exploring the topic. To do so would be to lower the expectations for quality teachers in both oral and written communication, an outcome that the rest of the legal world would readily accept in these hard financial times.

Year Composition' as 'Introduction to Writing Studies', 58 C. COMPOSITION & COMM. 552 (2007).

208. See Louise Wetherbee Phelps & John M. Ackerman, *Making the Case for Disciplinarity in Rhetoric, Composition, and Writing Studies: The Visibility Project*, 62 C. COMPOSITION & COMM. 180 (2010) (for a discussion of this and more useful references).

209. “One of the results of this narrowing of [composition] theory was to make the teaching of writing an intellectual backwater after 1910.” CONNORS, *supra* note 151, at 13.

V. CONCLUSION

This article has focused, perhaps in dizzying detail, on many possibilities for pushing the envelope of the current version of advanced legal writing in law schools. It has addressed new areas that are currently being developed, such as rhetoric and narrative, and areas that have yet to be explored in depth, such as the reading tactics of judges and genre as a philosophical focus. It has also warned about the limits of the writing envelope. It has explained how writing is not identical to other modes of communication or other disciplines, although areas of overlap may be extensive. This article has not, however, exhausted the possibilities. Furthermore, it has not fully delineated the limitations of those possibilities. It has left much room for future legal writing scholars to determine more details.

What unifies all of these possibilities and limitations, and what has unified this article, is the acknowledgement of the complexity, the art, and the skill that teaching writing requires. The teaching of writing is not a field suited to simplistic answers or careless inquiry. It is a field for curious, restless, cautious scholars and teachers.

Advanced legal writing is a field of study that deserves recognition and requires expansion. It is a big envelope that encompasses much knowledge and many questions. It is an envelope that other fields like to explore, although it does not encompass those other fields. It is our envelope, our field of study. We must own it, we must explore it, we must honor it with careful thought, and we must push it to its very edges.

