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## Legal Writing in the Time of Recession: Developing Cognitive Skills for Complex Legal Tasks

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# Legal Writing in the Time of Recession: Developing Cognitive Skills for Complex Legal Tasks

*Elizabeth Fajans\**

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For over a decade, the MacCrate Report,<sup>1</sup> the Carnegie Report,<sup>2</sup> Best Practices for Legal Education,<sup>3</sup> and many practitioners and academics<sup>4</sup> have been calling for greater legal skills training, including increased writing opportunities. There are numerous justifications for this. First is the centrality of written and oral communication in practice<sup>5</sup> and the explosion in the availability of legal authority that requires ever greater research skill in selecting tools and synthesizing material.<sup>6</sup> Second, time, credit, and

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1. ROBERT MACCRATE, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 234-35 (1992).

2. See WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, (2007).

3. See ROY STUCKEY ET AL., CLINICAL LEG. EDUC. ASSOC., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

4. See, e.g., Karen Sloan, *Professor: Ivory Tower Faculty Undermines Practical Legal Education*, 244:44 N.Y. L.J. 6 (Sept. 1, 2010); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 234-36 (1996).

5. See, e.g., Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73 (2004); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997).

6. See, e.g., Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Research Instruction for the New Millenials*, 8 J. ASS'N LEGAL WRITING DIRECTORS (forth-

class size constraints prevent first-year programs from introducing students to a wide range of legal documents and writing skills that law students and practitioners need for practice.<sup>7</sup> Third, students need to write constantly to prevent their skills from atrophying.<sup>8</sup> The most recent argument for skills training is an outgrowth of the 2007 recession, which is pushing new lawyers to be ready for practice from the start. Aside from big firms centered primarily in large cities, law firms no longer have the budget for protracted training or mentoring programs.<sup>9</sup> Even mega-firms are moving towards apprenticeship programs, where training comes at the cost of salary.<sup>10</sup>

Thus, the legal writing community must reflect on its teaching responsibilities in a time of recession. In thinking about this and the recession's impact on the next generation of legal writing courses, a theme of the 2011 legal writing symposium at Duquesne,<sup>11</sup> I was unable to think of beneficial new courses that fall outside of the four approaches Michael Smith describes in *Alternative Substantive Approaches to Advanced Legal Writing Courses*,<sup>12</sup> namely, the horizontal, vertical, survey, and integrative approaches. The first, the horizontal approach, acquaints students with "new 'genres' of legal writing, genres that are different from the types of documents introduced in a first-year course."<sup>13</sup> This type of change might also present new writing skills. Transactional, litigation, and legislative drafting courses fall into this category, as would a judicial opinion course or a scholarly writing course, which would also focus students on critical analysis, on evaluating and creating legal principles, concepts, and policy.<sup>14</sup> The vertical approach builds on "a genre to which the students have already been exposed[.]" but "goes deeper into a previously covered sub-

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coming 2011); Susan McClellan & Constance Krontz, *Improving Legal Writing Courses: Perspectives from the Bar and Bench*, 8 J. LEGAL WRITING 201 (2002).

7. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, COMMUNICATIONS SKILLS COMMITTEE SOURCEBOOK ON LEGAL WRITING PROGRAMS 170 (2006).

8. *Id.* at 172.

9. Daniel Thies, Note, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 605-06 (2010).

10. Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 635 (2010).

11. *The Arc of Advanced Legal Writing: From Theory through Teaching to Practice*, the Second Colonial Frontier Conference, Duquesne University School of Law, March 4, 2011.

12. Michael R. Smith, *Alternative Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119 (2004).

13. *Id.* at 121-22.

14. *Id.* at 121-27

ject,” as in an appellate brief writing course.<sup>15</sup> A course in advanced persuasive writing or legal story telling also falls within this category and might incorporate more rhetorical theory than a traditional appellate brief course.<sup>16</sup> Survey courses are the third approach. These courses introduce students to a range of new documents and writing skills and might include both vertical and horizontal instruction.<sup>17</sup> Finally, there is the integrative approach, which synthesizes advanced writing instruction with instruction on another topic: either writing in the context of other lawyering skills such as interviewing, counseling or negotiating, or writing in the context of a doctrinal subject.<sup>18</sup> Writing in context courses allow students “to see how legal writing fits into the broader context of effective lawyering and . . . to appreciate the interrelationship between practical lawyering skills and the skills associated with mastering the substance of a particular doctrinal area.”<sup>19</sup>

These approaches seem to me to be fairly comprehensive, and all four are commendable in that they better prepare students for practice. For example, drafting courses in the context of a doctrinal subject such as international trademark law might give a student that needed edge to obtain a job in her chosen field. In addition, courses instilling transferable skills are particularly useful in the current job market because the National Association for Legal Career Professionals reports that 25% of all jobs in 2009 were temporary and 10% were part-time.<sup>20</sup> As a result, young lawyers may find themselves moving between jobs and fields of law and skills that carry over are important.

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15. *Id.* at 128.

16. *Id.* at 129.

17. SMITH, *supra* note 12, at 130.

18. SMITH, *supra* note 12, at 130-31.

19. SMITH, *supra* note 12, at 134. As the teacher of one writing-in-context course notes, “[i]t is easier to incorporate realistic ethical and professional responsibility concerns when the students learn enough of a substantive area to become familiar with its inherent issues and . . . cutting-edge concerns. The students must get deep enough into the area to recognize how much they do not know.” Susan L. DeJarnatt, *In Re MacCrute: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 J. LEGAL EDUC. 50, 56 (2000).

20. James Leipold, *Class of 2009 Faced New Challenges with Recession: Overall Employment Rate Masks Job Market Weakness* (May 20, 2010), <http://www.nalp.org/2009selectedfindingsrelease?s=james%20leipold>. The National Association for Law Placement also reports that 5% of all law firm jobs for the class of 2009 were solo practitioner jobs, *id.*, a scary statistic since no amount of law school training renders new graduates ready to practice without mentoring.

In addition to thinking about the types of upper class courses we should teach, we must also think about the analytical skills we need to instill to help prepare our students for a tough job market and high employer expectations. One notable change the recession has had on recent law school graduates is that their apprenticeship is shorter. When there was enough work that new hires could bill heavily for work they already knew how to do or could quickly learn—like wading through discovery document requests, reviewing documents, and researching and writing—they could acquire more complex skills slowly, skills like creative problem solving, negotiating, or counseling, for example.<sup>21</sup> Now staff or contract attorneys and paralegals have taken over some of these more mundane tasks and partner-track associates are expected to perform complex work sooner.<sup>22</sup> Moreover, some empirical surveys suggest that regardless of recession, practitioners would like greater stress placed on practice issues: “juggl[ing] multiple projects at the same time” and “teaching [students] ways to help clients do things, within the limits of the law, rather than tell clients why they cannot do things.”<sup>23</sup> A review of an attorney evaluation form for first and second year associates establishes that a “distinctive” first or second year associate should be able to consistently grasp, assimilate, and synthesize a large of volume of complex legal or factual information, be a creative problem-solver, and think strategically.<sup>24</sup>

These realities suggest that upper-level courses should deliberately elicit analytical skills that go beyond the analogical, inductive, and deductive reasoning students learn in first-year legal writing. Those analytical skills are foundational—essential modes of thinking for office memoranda, briefs, and exams—and I am not suggesting we abandon them. They are intrinsic to the case method, which challenges students to predict the legal consequences of every change in facts or precedent. They are also at the heart of “the lawyer’s core task of advising clients about the legal consequences of particular courses of action.”<sup>25</sup>

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21. THIES, *supra* note 9, at 602.

22. THIES, *supra* note 9, at 605.

23. MCCLELLAN & KRONTZ, *supra* note 6, at 216.

24. SCOTT WESTFAHL, NAT’L ASSOC. FOR LEGAL CAREER PROFESSIONALS, YOU GET WHAT YOU MEASURE: LAWYER DEVELOPMENT FRAMEWORKS & EFFECTIVE PERFORMANCE EVALUATION 37 (2008).

25. Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 7 (1996).

However, the emphasis in law school teaching on appellate court opinions, Socratic dialogue, and trial and appellate moot court programs reinforces the idea that lawyering is litigating. Although the adversary process is an important way of solving individual and societal problems, a major part of legal practice entails helping individuals or entities to arrange their personal and business affairs to avoid suit. Thus, even if preventive law “cannot be properly practiced until the practitioner knows what must be prevented and how it can be done,”<sup>26</sup> law students also need to learn analytical skills directed both at the practice of preventive law and at practice in a rapidly changing, increasingly global context where law quickly becomes dated. The Internet, for instance, generates new legal issues almost constantly, while developments in social and cognitive sciences have shaken some of law’s foundational assumptions.<sup>27</sup>

To respond effectively to these challenges, lawyers need to employ modes of thinking that go beyond analyzing and applying law. They need to be able to evaluate an “aspect or area of the law in terms of relevant legal principles, policy considerations, and/or jurisprudential concepts,”<sup>28</sup> and create new or better solutions for old and new challenges. Thus, I focus in what follows on two analytical skills that are central to legal and non-legal problem-solving, strategizing, policy making, and decision making—namely, evaluating and creating. I think no matter what approach an upper level writing course takes, we can integrate tasks that hone the higher modes of thinking and turn future lawyers into better thinkers.

## I. HIERARCHY OF MODES OF THINKING

In *Taxonomy of Educational Objectives*,<sup>29</sup> Benjamin Bloom describes educational objectives not just in terms of knowledge acquisition, but in terms of a hierarchy of modes of thinking, that

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26. Janeem Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 370-71 (1998). As Mary R. Falk notes, “it is not possible to be original except on a basis of tradition.” *“The Play of Those Who Have Not Yet Heard of Games”: Creativity, Compliance, and The “Good Enough” Law Teacher*, 62 J. ASS’N LEGAL WRITING DIRECTORS 200, 214 (2009) (citing D.W. WINNICOTT, *THE LOCATION OF CULTURAL EXPERIENCES IN PLAYING AND REALITY* 129 (2d ed. 2005)).

27. FALK, *supra* note 26, at 211-12. See *infra* notes 78 to 97 and accompanying text.

28. SMITH, *supra* note 12, at 125.

29. BENJAMIN S. BLOOM, *TAXONOMY OF EDUCATIONAL OBJECTIVES* (1st ed. 1956).

moves from simple to complex conceptual operations.<sup>30</sup> The hierarchy has six stages: (1) remembering, (2) understanding, (3) applying, (4) analyzing, (5) evaluating, (6) creating.<sup>31</sup>

Remembering involves the relatively simple art of recall. Understanding or comprehension is demonstrated in summary, description, interpretation, and translation, while the third level requires applying knowledge to a new situation. Analyzing involves conceptual operations such as categorizing information, drawing inferences, recognizing unstated assumptions, and distinguishing facts from supporting generalizations.

In the context of lawyering, the first two stages—remembering and understanding “the client’s situation, the relevant area of law, and the client’s goals”<sup>32</sup>—involve intellectual skills required of every law student and lawyer, as do the mid-level processes of applying the law and analyzing the facts to predict and advise a client about choices and likely outcomes.<sup>33</sup> Yet these conceptual operations largely look back in time, using *stare decisis* as a basis for prediction and advice. When dissatisfied with old solutions or confronted with novel situations, lawyers need to use higher modes of thinking that look forward in time—namely, evaluation and creation. In the context of client representation,

evaluation requires the student to make substantive judgments about the material she is considering, and about how to approach the client’s preferred outcome. The student is not only classifying and categorizing, but also judging and prioritizing. Having considered all sides of the legal problem and visualized the big picture, she can now compare the validity of the arguments that might be propounded, and support her client’s case by both the facts and her own judgments.

Alongside evaluation, moreover, the student may find opportunities to create. ... [After] having prioritized her points, she also has to be able to adapt, adjust, and modify them in re-

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30. Benjamin Bloom was an educational psychologist at the University of Chicago who developed an influential hierarchy of learning. <http://chronicle.uchicago.edu/990923/bloom.shtml> (last visited March 13, 2011).

31. See LINDA G. BARTON & BENJAMIN S. BLOOM, QUICK FLIP QUESTIONS FOR CRITICAL THINKING (1997) (abridged from Lorin W. Anderson & David R. Karathwohl, A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING (2001)). Kris Franklin, Director of Academic Support at New York Law School, teaches the hierarchy using this compact “flip chart.”

32. Kris Franklin, *Sim City: Teaching “Thinking like a Lawyer” in Simulation-Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861, 872 (2008-2009).

33. *Id.*

sponse to input from other parties . . . [so] she can best act to maximize her client's position or options. While analysis and evaluation are, to varying degrees, reactive, the realm of creation is generative and imaginative, interweaving possibility with probability and pragmatism.<sup>34</sup>

To make judgments about the validity or quality of information and ideas, a person must develop criteria for judgment by probing data or ideas, it helps to ask questions such as the following:

[(1)] What data was used to draw this conclusion or inference, and is it valid?

[(2)] How could you prove or disprove this fact, explanation or result?

[(3)] What is the importance of this fact, theory, factor, or result, and what is its impact?

[(4)] Do you agree or disagree with these outcomes, explanations, alternatives, or strategies?

[(5)] What would be better than this model, approach, alternative, solution, or strategy?

[(6)] How could you figure out, explain, defend, support, or justify your position, explanation, proposal, or result?<sup>35</sup>

Creating, or putting material together in new and different ways, requires asking questions similar to the following:

[(1)] What changes could solve this problem, situation?

[(2)] What would happen if this occurrence arose, change was made, or objection was raised?

[(3)] What could minimize or maximize this result?

[(4)] How could you improve or test this hypothesis, proposal, or result?

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34. *Id.*

35. BARTON & BLOOM, *supra* note 31. The questions were Adapted from *Quick Flip Questions*.



[(5)] Can you invent, adapt, extend or modify this theory, test, approach, model, doctrine, or principle to solve this problem, account for this possibility or avoid this outcome?<sup>36</sup>

These are the kind of probing inquiries that take students to a higher level of analysis.

## II. CREATIVE PROBLEM SOLVING AND MODES OF THINKING

In the context of law, cognitive operations and their progression from lower modes of thinking to higher modes resembles the steps many clinical teachers describe in the creative problem solving process, a process that requires an ability to think outside the box. One leading voice in creative problem solving, Professor Carrie Menkel-Meadows, invokes a three step process.<sup>37</sup> First, using client knowledge, public information, and research, the lawyer should explore the needs, goals, and priorities of the client. Then, the lawyer explores the same for the other parties.<sup>38</sup> [This first step requires the remembering and understanding functions.] Second, the lawyer examines the complementary and conflicting needs and interests [the analyzing and applying stages] to find solutions that maximize joint gain.<sup>39</sup> [This is the creating and evaluating stages.] In examining these needs and goals, the author suggests lawyers keep six additional types of concerns in mind:

(1) legal [concerns], the need for a ruling, judgment, legal status, or precedent; (2) economic [concerns], including transaction costs and present and future values; (3) social [concerns], including dealing with the parties' group or membership needs and objectives such as family, workplace, organizational, joint responsibility or community; (4) psychological [concerns], including all individually important needs or objectives including risk preferences, reputational, emotional, mental and physical health concerns, needs to assert, fear of shame, guilt, publicity; (5) political [concerns], such as rule change, justice, internal or public organizational concerns,

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36. BARTON & BLOOM, *supra* note 31. These questions were also adapted from *Quick Flip Questions*.

37. See Carrie Menkel-Meadow, *Aha—Is Creativity Possible in Problem Solving and Teachable in Legal Education*, 6 HARV. NEGOT. L. REV. 97, 109-110 (2001).

38. *Id.* at 109.

39. *Id.*

precedent setting, relation to other problems, constituents, and finally, (6) moral, ethical or religious [concerns], including concerns about traditions, and fairness.<sup>40</sup>

Once the parties' needs, goals, and priorities are understood in all these contexts, the lawyer can begin to devise solutions responsive to the parties.

Another clinical professor uses the acronym S.O.L.V.E.: "1. State the problem; 2. Observe and Organize the problem by identifying the conditions, resources, goals, etc.; 3. Learn by questioning all parts of the problem; 4. Visualize Possible solutions, Select One, Refine it; 5. Employ the Solution and monitor the results."<sup>41</sup> This description also resembles Bloom's stages of thinking.

Professor Menkel-Meadows is particularly insightful when describing the creative stage, which leads to new solutions and legal ideas. Although she acknowledges that some new ideas are radically inventive, and seem to spring from thin air, she notes that knowledge, technical and cognitive skills, and heuristics for exploration within a domain are often sufficient to generate innovative thought.<sup>42</sup> She singles out several forms of creative thinking that can transform law, all of which involve combining information in new ways, the cognitive operation essential to the highest mode of thinking. These include the following techniques:

1. Use of analogy (direct, fanciful) and use of metaphor;
2. Aggregation/disaggregation/re-combination of elements of a problem;
3. Transfer (cross-disciplinary use of concepts, ideas, information, solutions from other fields);
4. Reversal (either extreme polarization or gradual modification of ideas)—which is done both in cognitive and in personal forms (as in role-reversal efforts . . .);

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40. *Id.* at 109-110.

41. Kerper, *supra* note 26, at 367-370. Still another commentator says problem solving involves a six step process: it focuses on the interests of individuals and society, rather than positions; it analyzes the values of the parties and lawyers, and the values of society and rules; it investigates disciplines and resources other than law; it emphasizes problem prevention; and it requires self-reflection. See Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 378 (1998).

42. Menkel-Meadow, *supra* note 37, at 112-14.

5. Extension—extending a line of reasoning, principle or solution beyond its original purpose;
6. Challenging assumptions—re-examining givens . . . ;
7. Narrative—fully describing facts and problems to elaborate on complexity . . . ;
8. Backward/forward thinking—focusing on how we came to a particular situation (reasons why, causes) in order to figure out how we get to desired end-state(s) . . . .<sup>43</sup>

Some of these techniques lead to what Professor Menkel-Meadows calls “creative misreadings.”<sup>44</sup> Cases have been creatively interpreted to “alter, expand, contract or even radically change a legal concept or doctrine.”<sup>45</sup> As an example, she points out legal memes or tropes like “clear and present danger” and “free trade in ideas” resulted in the notion of a “marketplace of ideas,” an image that changed “legal doctrine from one restricting speech to one increasingly tolerant of even subversive speech.”<sup>46</sup>

A second form of creative thinking involves the cognitive process of extension, where principles in one area of law are applied or extended to another. Traditional property principles are applied to new forms of property like welfare and other government entitlements, for example.<sup>47</sup> A related cognitive process is that of transfer of doctrine from one legal domain to another. For example, historic preservation law comes to use public trust doctrine and the concept of cultural patrimony.<sup>48</sup> Third is the process of characterization. Here, lawyers re-categorize facts, claims, or rules, so, for example, toxic torts are seen not as personal injury cases but dignitary torts.<sup>49</sup> Also, creative lawyers use aggregation or disaggregation of principles to respond to new events. Thus,

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43. Menkel-Meadow, *supra* note 37, at 122-23.

44. Menkel-Meadow, *supra* note 37, at 128-29.

45. Menkel-Meadow, *supra* note 37, at 128.

46. Menkel-Meadow, *supra* note 37, at 128. Professor Menkel-Meadow defines memes as “the cultural equivalent of genes—units of information that are passed on to future generations and that can be changed. Like successful mutations, if a changed meme is accepted by enough people in the culture the culture will change.” Menkel-Meadow, *supra* note 37, at 116. She gives, as an example, the change from the norm of separate physical custody of a child to the notion of joint custody. Menkel-Meadow, *supra* note 37, at 116.

47. Menkel-Meadow, *supra* note 37, at 129.

48. See Nathaniel C. Guest, *Putting History on a Stone Foundation: Toward Legal Rights for Historic Property*, 18 TEMP. POL. & CIV. RTS. L. REV. 699 (2009).

49. Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257, 282 (2005).

“basic property principles which combine space and time (time bounded estates in land)” are borrowed to create “co-ops, condominiums and time shares.”<sup>50</sup> These creative cognitive processes are the very essence of complex lawyering tasks and an educational goal for advanced legal writing classes.

### III. ASSIGNMENTS THAT REQUIRE HIGHER MODES OF THINKING

The cognitive skills of evaluation and creation may arise in almost any type of legal job or legal task, be it individual client or group representation, legislative initiatives, or scholarly pursuits. Thus, these cognitive processes need to be taught in an array of writing courses.

In a general legal drafting course, problem solving can be taught in the context of individual client representation and in the context of preventive law. For instance, an employer may want her lawyer to draft an anti-moonlighting provision for an employee handbook. The lawyer would need to probe the employer to discover her true concern: is she worried about trade secret disclosure, unavailability of employees for overtime, or loss of productivity because her employees are over-extended or doing outside work on the job? The law would need to be researched: is this provision a violation of labor law—an illegal covenant not to compete, for example? Then the lawyer would need to consider the concerns of other interested parties—employees who have taken on extra work because they have college age children or extraordinary medical expenses or are thinking of a career change. [Remembering and Understanding] Finally, unintended consequences would need to be explored: for instance, could the restrictions anger skilled employees and cause them to seek other employment? [Analyzing and Applying] In light of this brainstorming, a lawyer would need to determine if a blanket prohibition is unnecessary, if the provision can be limited to a class of employees or a type of job, or if decisions could be made on a case by case basis. [Evaluating and Creating] Only after such a sophisticated cognitive process could the provision be drafted.<sup>51</sup>

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50. Menkel-Meadow, *supra* note 37, at 131.

51. One professor who teaches drafting in the context of consumer bankruptcy takes students through a simple Chapter 7 bankruptcy case, from client interview and advice to filing the petition, then from motions practice to a pretrial statement and development of a trial brief. The pretrial statement required students to think through what they had to prove, what was at issue and what facts were truly in dispute. To get the document finished, students had to cooperate with their opponent, as they would in real life. See Susan

In a breach of contract action, to take another example, a student can be asked to consider the client's goals (including non-legal goals like business productivity and good will), confer with the client about negotiation possibilities, analyze the risks and benefits of non-litigation alternatives, weigh the pros and cons of different types of settlement, assess the likelihood of prevailing at trial [Analyzing and Applying], and devise a litigation or negotiation strategy in light of the parties and interests involved [Evaluating and Creating].<sup>52</sup>

Complaint drafting presents another opportunity for creative and strategic thinking. For example, ask students to draft a complaint and to include a cover sheet explaining their strategic decisions about what claims to bring against whom by whom. Tell them to consider whether the defendants will most likely respond with a settlement offer, motion, or answer (and whether it would include affirmative defenses, counter-claims, or cross-claims) and how the type of response affects the decisions above and the specificity of their factual allegations [Evaluating and Creating]. Or, in the context of preventive law, students could be asked to write an advice letter explaining that the client cannot do what she proposed, but alternative or partial solutions could be implemented [Evaluating and Creating].

All these situations can be simulated in a legal writing course and all culminate in a writing project. Sometimes the end result could be an actual legal document, but it could also be a reflective memo exploring how obstacles arose and were dealt with or why some strategies or options were chosen.

Problem solving and the higher modes of thinking it requires are not limited to individual client representation. For example, in a subject-specific drafting course, students can be asked to work on a project for a larger community or client base. For instance,

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DeJarnatt, *supra* note 19, at 51-52. Such collaboration with the opponent is an interaction that truly teaches students how to weave, as Kris Franklin says, "possibility with probability and pragmatism." Franklin, *supra* note 32, at 873. Another example involves a sole business owner who consults a lawyer about how to give her business to her three children as equal partners. She wants to "create a partnership and transfer her interest to the children in a way that minimizes the gift tax consequences." However, two children have different positions of authority in the company and one has never been involved in it at all. The stability of the business and their relations could change once the mother ceases to run the enterprise. Thus, the lawyer must foresee these future problems and find ways to implement the client's goals. See Brest, *supra* note 25, at 9-10.

52. See Jess M. Krannich, James R. Holbrook, Julie J. McAdams, *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. L. REV. 391 (2009).

they could examine the problems of *pro se* family law litigants in the prison context. Then they could envision possible solutions, solutions like writing information brochures for inmates, drafting legal forms with written instructions, and setting up a network of inmate paralegals to assist other inmates.<sup>53</sup>

In one advanced writing course, students are asked to identify a problem in the world that bothers them that could be fixed by a statute, ordinance, or regulation.<sup>54</sup> They are encouraged to seek out federal, state, and local officials and interest groups who may be willing to work with them to produce a document that has a chance of making it into law. Several students produced legislation or ordinances that were enacted or mirrored in later bills (“no call lists” for telemarketing and regulations for changing Pennsylvania T-tag license plate/auto registration system). Others produced articles based on their final projects. One student, a professional umpire, wrote *The Restatement (Second) of Baseball*, complying with actual practice and plain English rules.<sup>55</sup>

The evaluating and creating modes of thinking could also be exercised in a seminar or paper course. Assignments could ask students to engage in Menkel-Meadows’s creative misreading or cognitive processes of extension, applying doctrine from one domain to another. For example, a teacher could assign a paper asking students to figure out how historic preservation rules could apply to works of art.<sup>56</sup> Professors could ask students to write about how the negligent publication test used in gun for hire advertisements, which weighs the burden of taking precautions against the potential harm, would work out in a suit involving the publication of violent pornography.<sup>57</sup> A short paper assignment like this, which requires the cognitive process of creation (arranging information in a new way), is a good practice for a longer seminar paper or publishable student article.

Policy arguments and decision-making also require evaluation and creation. Social developments that require new legislation,

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53. Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 415-17 (2002).

54. E-mail from Jan Levine, Associate Professor of Law and Director of Legal Research and Writing, Duquesne University School of Law, to author (Dec. 21, 2010, 9:24 EST) (on file with author).

55. *Id.*

56. Michelle Orloski, *Preventing Gross Injury to Local Culture Patrimony: A Proposal for State Regulation of Deaccessioning*, 81 TEMP. L. REV. 605, 628 (1998).

57. Edith L. Pacillo, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U. L. REV. 123, 141-43 (1994).

cases of first impression, cases raising novel application of constitutional provisions, and rules requiring first-time statutory interpretation, often require lawyers to make policy arguments and compel courts to make policy. In other words, lawyers and courts “may need information similar to the information generally available to the legislature in enacting a statute.”<sup>58</sup> Yet, first-year writing courses offer only basic instruction in types of policy argument. Students, at best, summarize the policy arguments they find in decisions or legislative records. Typical student policy arguments fall into four broad categories:

[N]ormative arguments, that is, arguments about shared values and goals that a law should promote [these include moral arguments, social policy arguments, and corrective justice arguments]; economic arguments, which look at the economic consequences of a rule; institutional competence arguments, that is, structural arguments about the proper relationship of courts to other courts and courts to other branches of government; and judicial administration arguments, arguments about the practical effects of a ruling on the administration of justice.<sup>59</sup>

Each category is associated with familiar types of legal argument. Under judicial administration, for instance, students are exposed to the debate over firm versus flexible rules, i.e., ease of administration and consistency of application versus fairness to the parties and their individual circumstances. There are also floodgates and slippery slope arguments. Law students learn this basic taxonomy and become somewhat adept at making institutional competence and administration of justice arguments.

More problematic, however, is students’ unfamiliarity with researching, evaluating, and using the non-legal studies and theories that often underpin policy arguments. These sources may include scientific and empirical studies; social, psychological, or economic theory; or analysis of historical and current events. Such sources can be of infinite help in fashioning arguments and solutions. At the appellate level in particular, social science research may be used as a source of authority. Thus, for example, in

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58. Ellie Margolis, *Beyond the Brandeis: Exploring the Uses of Non-Legal Material in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198 (2000); see also Ellie Margolis, *Closing the Floodgates: Making Persuasive Arguments in Appellate Briefs*, 62 MONT. L. REV. 59 (2001).

59. HELENE SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 264 (5th ed. Foundation Press 2008) (1999).

*McClesky v. Kemp*,<sup>60</sup> the United States Supreme Court accepted the findings of social science research showing “that killers of whites were four times more likely to receive the death penalty than killers of blacks,” although it held the defendant had to show “his trial was in particular infected by racism.”<sup>61</sup> Courts have similarly relied on research establishing that sexual abuse of children in pornographic films extends beyond the filming.<sup>62</sup>

In addition, expert testimony on scientific or social science research is often given before a jury or other factfinder.<sup>63</sup> For instance, psychologists have long testified at trials about syndromes like post-traumatic stress disorder to help factfinders assess a party’s actions.<sup>64</sup> Sometimes this research is presented in a trial brief to provide a perspective from which to evaluate evidence. These briefs might be used “to propose and justify a set of jury instructions” responsive to the research.<sup>65</sup> For example, studies about the fallibilities of eyewitness identification might be presented.<sup>66</sup> More rarely, research is actually done to supply facts pertinent to a particular case. In a trademark infringement case, for example, the plaintiff’s counsel surveyed children to prove that they identified a particular toy vehicle as a “Dukes of Hazard” car.<sup>67</sup> The court said this was convincing evidence of an infringement.

We must teach students how to find and use non-legal studies, and we must teach them how to evaluate such studies to ensure that the information is not misconstrued and therefore misused,<sup>68</sup> particularly because individual studies can be used to legitimize or delegitimize a decision even when the validity of those studies is contested. Thus, for instance, an advocate or a court may rely on an isolated study showing that capital punishment deters crime when the body of evidence shows capital punishment has a brief deterrent effect, but no net long term effect.<sup>69</sup> Law students must be taught, therefore, how to assess empirical research correctly.

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60. 481 U.S. 279 (1987).

61. Richard Lempert, *Between Cup and Lip: Social Science Influences on Law and Policy*, 10 LAW & POLY 167, 187 (1988).

62. Sharon E. Herzberger, *Social Science Contributions to the Law: Understanding and Predicting Behavior*, 25 CONN. L. REV. 1067, 1070 (1993).

63. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 584 (1987).

64. Margolis, *supra* note 58, at 215.

65. Walker & Monahan, *supra* note 63, at 588.

66. Herzberger, *supra* note 62, at 1080.

67. *Id.* at 1070, citing *Processed Plastic v. Warner Communications, Inc.*, 675 F.2d 852 (7th Cir. 1982).

68. ROYCE SINGLETON ET AL., *APPROACHES TO SOCIAL RESEARCH* 5 (Oxford 1988).

69. *Id.*



The tests for social science research are not unlike the legal tests for expert testimony on scientific research, namely the *Frye* and *Daubert* tests. As one researcher says, social science "findings that are supported by a substantial body of work and that have survived critical appraisals by other social science professionals should receive more attention and more weight by legal decision-makers."<sup>70</sup> As the authors of one law review article note, the process here is not that different from how lawyers assess legal precedent.<sup>71</sup> First, attorneys and courts "should test the quality of empirical research in much the same way in which they have long tested the quality of case precedents."<sup>72</sup> They should find out if the "researcher's work has been subject to the critical review of his or her peers in the scientific community,"<sup>73</sup> and if there is a positive consensus about its validity. Publication in reputable journals with independent editorial boards is one indication of such acceptance.<sup>74</sup> Second, they should assess the quality of reasoning in a research study the way we assess the reasoning in precedent, noting whether it rules out competing hypotheses and explains how it minimized factors that could have compromised its validity.<sup>75</sup> Third, just as the precedential value of a case turns on the closeness of the analogy between the precedential case and the current case, so the findings of a study must bear closely on the issue before a court.<sup>76</sup> Finally, the trustworthiness of a decision like the trustworthiness of a study increases as other courts or other independent investigators arrive at a common conclusion.<sup>77</sup> Thus scientific, economic, or social science studies can be evaluated using the criteria we use to evaluate precedent, and once evaluated, used to bolster legal arguments.

To teach students how to find and use this research, legal writing teachers could assign a brief, paper, or judicial decision on an

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70. Herzberger, *supra* note 62, at 1072.

71. Walker & Monahan, *supra* note 63, at 585.

72. Walker & Monahan, *supra* note 63, at 589 (citing Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 498-99 (1986)). Another article suggests looking at a body of research as opposed to one specific study, looking for replicated results, looking for limitations in research methodology, and looking for variables that could change results. Lempert, *supra* note 61, at 188-89.

73. Walker & Monahan, *supra* note 63, at 589 (citing Monahan & Walker, *Social Authority*, *supra* note 72, at 499.)

74. Walker & Monahan, *supra* note 63, at 590.

75. Walker & Monahan, *supra* note 63, at 589 (citing Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 11 (1966)).

76. Walker & Monahan, *supra* note 63, at 589.

77. Walker & Monahan, *supra* note 63, at 591.

issue where such research is appropriate, but has not been extensively reviewed in precedent. For example, ask students to research studies on whether an individual's duty to inform another of sexually transmitted disease has been an effective deterrent to transmittal. Then ask them to read critical commentary on those studies so they can be properly evaluated.

Once law students have become educated consumers of non-legal studies, they must learn to use them in fashioning policy arguments. Michael Smith categorizes policy arguments into two groups: first, those that have an immediate implications on our moral or social values by showing they advance or protect those values, and second, those policy arguments that have future impact because they encourage or discourage a type of conduct in the future. Thus, policy studies can be molded to fit these persuasive frameworks.<sup>78</sup> Other assignments could require students to write policy arguments based on moral or ethical theory,<sup>79</sup> on historical changes,<sup>80</sup> or on rhetorical theory.<sup>81</sup>

Negotiation and decision-making are two other tasks that require creative problem solving and higher intellectual operations. If a drafting course requires a negotiated agreement, students must know about the two basic approaches to negotiation: (1) the adversarial negotiation strategy—the winner take all approach, as well as (2) the cooperative approach—which seeks common ground and tries to find a solution that meets the interests of both par-

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78. Michael Smith, "Cognition and Policy-Based Persuasion," presentation at Duquesne University School of Law, Second Colonial Frontier Legal Writing Conference: The Arc of Advanced Legal Writing: From Theory through Teaching to Practice (Mar. 4, 2011).

79. See Gary Miller, *Exporting Morality with Trade Restrictions: The Wrong Path to Animal Rights*, 34 BROOK. J. INT'L L. 999, 1043 (2009). This student article applied ethical norms when assessing the Dog and Cat Protection Act of 2000, which makes it illegal to import dog or cat fur for products into the United States. *Id.* Miller concluded that a universalist morality like that of the United States animal welfare movement is an improper premise for restrictive trade laws in that it results in "coercive economic punishment based on a powerful nation's subjective . . . disapproval of a weaker nations [economic and moral] norms." *Id.*

80. See Celine Chan, *The Right of Allocation: A Defendant's Word on its Face or Under Oath?*, 75 BROOK. L. REV. 579 (2009). Chan concluded, after a historical survey, that the rationale for allocation has changed and that the new rationale requires defendants be sworn and subject to cross-examination at allocation. *Id.*

81. E-mail from Gabriel H. Teninbaum to author (Dec. 21, 2010, 10:57 EST) (on file with author). One teacher asks students to write a dissent to a case involving a plaintiff who injured her throat after choking on a bone in a bowl of fish chowder. *Webster v. Blue Ship Teas Room, Inc.*, 347 Mass. 421, 198 N.E. 2d 309 (1964). The majority held that given the tradition of fish chowder in New England life and the fact that diners could reasonably anticipate stray bones, there was no true question of fitness of merchantability. *Id.* In the dissent, the students were instructed to include a pathos-based policy argument explaining why the decision of the majority harms the public good. *Id.*

ties.<sup>82</sup> However, students also need to be introduced to the barriers blocking negotiation before they can evaluate and devise strategies for overcoming them. They need some exposure to cognitive and social psychology's insights into how people compromise and make decisions.

For over a century, the rational actor model dominated predictions about how "normal" persons and groups behave in negotiation situations.<sup>83</sup> Under this model of behavior, an individual considers all the potential options, including their consequences, and makes a choice that will maximize that person's general happiness.<sup>84</sup> "This . . . is the 'rational' decision, and in theory a decision-maker will be able to assess her alternatives objectively to arrive at the choice with the greatest personal utility."<sup>85</sup> However, as contemporary scholars have noted, this behavioral model is not supported by empirical evidence: decision-making does always emanate from rational, logical, or even self-interested behavior.<sup>86</sup>

Admittedly, the cognitive psychologists known as the coherence theorists have discovered that "decisions are made effectively and comfortably when based on coherent mental models,"<sup>87</sup> that is, when there are good reasons for supporting the chosen alternative and only weak reasons for supporting the rejected alternative.<sup>88</sup> This drive for cognitive coherence comports with "story model" research, which has found that jurors accept that story which is consistent, plausible, and complete and which supports the verdict categories.<sup>89</sup> Coherence theorists note, however, that when there is equivocal support for all of the alternatives, decision-makers tend to inflate the importance of the variable that supports the chosen conclusion in order to be comfortable with their decision.<sup>90</sup>

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82. FAJANS ET AL., *WRITING FOR LAW PRACTICE* 508-11 (2d ed. 2010).

83. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 *VAND. L. REV.* 1499, 1500 (1998).

84. Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 *CLINICAL L. REV.* 731, 738 (2003) (citing REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICES IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 25-26 (2001)).

85. Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 *CLINICAL L. REV.* 731, 738 (2003) (citing REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICES IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 18 (2001)).

86. Daniel Simon, *A Third View of the Black Box: Coherence in Legal Decision Making*, 71 *U. CHI. L. REV.* 511, 516 (2004).

87. *Id.* at 516.

88. Langevoort, *supra* note 83, at 1511.

89. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 521-23 (1991).

90. Simon, *supra* note 86, at 522-23.

The resultant decision is therefore often and inherently flawed. For example, since jurors integrate evidence into a coherent mental model before being instructed on the law, they are reluctant to change their decisions after instruction.<sup>91</sup> To take another example, jurors who are slightly inclined to convict or acquit may inflate or minimize evidence of innocence or guilt rather than reassess their decision altogether.

Other cognitive psychologists, working on a parallel track, have demonstrated that cognitive biases and heuristics systematically undermine rational decision-making.<sup>92</sup> Specifically, people rely on cognitive habits inappropriate to the situation, especially in situations that require them to estimate frequency, infer causation, judge similarity, and estimate the probability of future events. Some of these cognitive habits, as Langevoort explains, are of particular interest to lawyers.<sup>93</sup>

### 1. The Status Quo/Loss Aversion Bias & the Framing Heuristic

Cognitive psychology literature shows that people fear losses more than gains and therefore are more willing to assume risk to avoid losing something they have than to assume risk to gain something they don't have. "This tendency produces a natural bias toward the status quo."<sup>94</sup> As a result, options 'framed' in terms of loss or gain affects decisions, even when the framing is arbitrary or manipulable. This bias could affect a judge or jury's decision about a damage award as well as make settlement among negotiating parties harder to reach.

### 2. The Anchoring and Adjustment Bias

People tend to fix upon or 'anchor' themselves on some possibility and fail to adjust when new information becomes available. In the context of negotiation, for example, the first offer may establish the range of possibilities because legal profes-

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91. Thus, a teacher who asks students to rewrite jury instructions so as to unpack legal concepts in a way understandable to a lay audience might want to teach students to keep this reluctance in mind when drafting the basis upon which the jury's decision should rest. The instructions may need to be particularly clear, explicit, and detailed.

92. Langevoort, *supra* note 83, at 1501.

93. Langevoort, *supra* note 83, at 1503-05 (the following abridged summary is taken from Langevoort).

94. Langevoort, *supra* note 83, at 1503.

sionals are no more immune from the anchoring bias as their clients.

### 3. The Representative and Availability Bias

People favor easily retrievable and highly profiled information to estimate the probability of the event rather than rely upon well documented statistical evidence. Thus people will overestimate the frequency of plane crashes, for example, and underestimate deaths from household accidents. This bias can distort the valuation of a case, especially if there is a recent high profile settlement. Lawyers need to guard against such unrealistic expectations.<sup>95</sup>

Lawyers will be better able to negotiate a contract, write a brief or judicial opinion, estimate the desirability of alternative rules, policies, or procedures, or make an effective opening or closing statement to a jury if they understand how these cognitive biases affect both their clients and themselves. Moreover, in so far as some of the biases induce self-serving behavior, they may interfere with ethical deliberation and counseling.<sup>96</sup> Thus lawyers need to familiarize themselves with cognitive bias literature not only to help de-bias themselves and others, but to evaluate strategies and offers realistically.

One interesting way to use cognitive bias literature is to ask a student to trace the history of a case trying to determine if litigation could have reasonably been avoided. Ask them when a different choice could have been made, what compromises it would have entailed, and whether, in hindsight, such compromises would have been worth it. One teacher used Jonathan Harris's *A Civil Action*, an account of a mass tort litigation, to demonstrate how cognitive biases resulted in overconfidence and led the lawyer to discourage

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95. Langevoort, *supra* note 83, at 1503-05. There are two other biases. The three biases described above are collectively called risk assessment biases and affect risk assessment because people prefer any alternative that seems to eliminate uncertainty. Langevoort, *supra* note 83, at 1504-05. A fourth bias is the egocentric bias. Langevoort, *supra* note 83, at 1505. People explain success by reference to their efficiency and control, and explain failure by reference to external circumstances. Langevoort, *supra* note 83, at 1505. Assessments of fairness are biased toward self-interest. Langevoort, *supra* note 83, at 1505. As a result, people become overconfident in their judgments, fail to seek more information, and dismiss information that does not conform to their predictions. Rand, *supra* note 84, at 747-48. If the parties are "overoptimistic in the assessments of cases or construe the fairness of the situation in a self-serving fashion," they may as a result be unable to reach optimal settlements. Langevoort, *supra* note 83, at 1510-11.

96. Langevoort, *supra* note 83, at 1518-19.

his clients from accepting a large settlement award, a decision that proved detrimental in the end.<sup>97</sup>

Students also need to keep these biases in mind when evaluating strategies in a negotiation.<sup>98</sup> To guard against anchoring, for example, students can be taught to set several proposals on the table initially in order to prevent the domination of any one proposal. This is important because “once a frame has become the basis of discussion, it is very difficult to change it. Accordingly if the mediator can orient discussion of topic and issues within a balanced frame, significant communication and problem-solving barriers will be removed.”<sup>99</sup> In addition, it is helpful to brainstorm and co-mediate with a person of a different background both as a curb on unconscious cognitive habits as well as a spur to diverse and creative thinking.<sup>100</sup> A simulation where students are partnered with diversity in mind might sensitize them to these biases. Another idea is to take a fact pattern that raises the possibility of sexism or racism and to use it as a springboard for a variety of exercises. One teacher asks students to assess an advice letter where the client is a developer with racist attitudes. They must determine whether that attitude has affected the client’s judgment about whether a contractor’s African-American foreman committed a material breach, and if so, whether the letter adequately addresses that problem.<sup>101</sup> Additional spin off exercises include small group discussions about how they would address this issue with the client and/or with the contractor’s foreman.<sup>102</sup>

These are just a few ways to incorporate evaluative and creative analytical skills into advanced writing and lawyering assignments. I am sure law teachers will come up with many more ideas.

#### IV. CONCLUSION

We can help our students perform complex legal tasks in a more timely manner if we design assignments that require them to exercise the higher cognitive operations of evaluation and creation.

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97. Rand, *supra* note 84, at 765.

98. Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 *FORDHAM URB. L. J.* 39 (2008).

99. *Id.* at 72.

100. *Id.* at 74.

101. Charles R. Calleros, *LEGAL METHOD AND WRITING* 516-520 (5<sup>th</sup> ed. 2006).

102. E-mail from Charles R. Calleros to Elizabeth Fajans (Dec. 29, 2010) (on file with author).

Undoubtedly, practical experience and expertise in domain knowledge enable lawyers to generate better alternatives and evaluate them more realistically than law students and new lawyers can. However, legal writing courses can provide a base upon which to build. First, laying a cognitive foundation for creative thinking and problem solving in writing courses relieves some of an employer's need to teach complex cognitive skills in "the context of high-pressure and quick turn-around, live-client litigation,"<sup>103</sup> a stressful environment ripe for mistakes to be made. Second, analytical skills improve with repeated opportunities to practice them in increasingly more complex settings, and with repeated feedback. Third, some of the documents professors teach in advanced writing courses including seminar papers, judicial opinions, appellate briefs, or legislation, for example, actually require students to be familiar with higher modes of thinking so they develop well rounded theses, decisions, arguments, or regulations. Finally, the students who can think outside the box, create alternative solutions, extend legal principles to new areas, re-characterize facts, and strategize with cognitive biases in mind are the students most likely to be hired and to retain their jobs in a time of recession.

Legal writing teachers have always known that the legal research and writing course is also an analysis course. In an upper-level writing seminars especially, whatever the approach, we should be searching for ways to stretch students' cognitive abilities so that they become the very best they can be. That is an important goal for the next generation of legal writing courses.

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103. Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 J. LEGAL WRITING 207, 215 (2007).