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Teaching Intellectual Property Law

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*823 WRITING TO LEARN LAW AND WRITING IN LAW: AN INTELLECTUAL PROPERTY ILLUSTRATION

Michael J. Madison [FNa1]

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Introduction

I learned to read when I was a sophomore in high school. Before then, I could follow the words and get the story, but I never really understood what literature meant, the way my English teachers wanted me to, until I wrote an essay in the tenth grade on The Great Gatsby. It was a very short paper--only three or four pages, double-spaced--but the assignment transformed me. Not just the writing itself, but the combination of the writing and my English teacher's feedback. I'd been writing analytic essays on literature for almost four years at that point. For the first time a teacher responded by engaging me on the merits of my analysis--not just on the grammar, syntax, compositional form, and primitive analysis of a fifteen-year-old. He took my thinking seriously! That reaction made me rethink what I had done. In my earlier attempts at literary analysis, I had been reading first, thinking second, and writing third. With Gatsby, I was reading and thinking and writing simultaneously. My thoughts were in the essay. Both in process and product, writing was thinking and reading, and all of them were part of a larger system, reinforced and amplified by how my teacher responded. Writing let me see inside the text. Seeing inside and writing about what I saw were one and the same thing.

By the time I became a law teacher, this anecdotal writing-to-learn lesson had long been submerged beneath the riptide of law's ethos of pure cognition, the conceit that the purpose of law school and the highest calling of a practitioner is "thinking like a lawyer." Traditional legal education holds that a lawyer first learns to think, then exercises the mind via developing the skills of practice: oral advocacy, counseling, negotiation, drafting, and crafting written "work product." That conceptual duality has long been manifested in the duality of law faculties and the legal curriculum. "Doctrinal" courses--thinking courses--are taught by tenured and tenure-stream faculty who are thinkers themselves, that is, who are scholars. "Skills" courses--legal research ***824** and writing, and clinics--are taught by untenured faculty and others who are "do-ers," trained to teach the "mere" skills of the profession. I graduated from law school twenty years ago with that duality neatly inscribed on my professional consciousness.

That duality persisted for a long time, through a career as a practicing lawyer and well into my career as a law teacher. This isn't the place to explore why that was so, nor is it the place for a sustained critique of the traditional law school curriculum and its traditional pedagogy. But while I didn't recognize the lesson at the time, my experience as a practitioner, like the experience of many practitioners, should have taught me something

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similar to what my tenth grade English teacher taught me years before. “Thinking like a lawyer” is a meaningless catch-phrase when it's divorced from the materiality of actual practice. [FN1]

“Thinking like a lawyer” only takes on life when thinking is coupled with “practicing like a lawyer”--or better, practicing and thinking as a lawyer: meeting and talking with clients and other lawyers, with judges and court and government personnel; investigating claims and defenses; structuring transactions; and writing and speaking as part and parcel of all of these things. I could have recognized the lesson. For many years, my own favorite writers and teachers of writing have been authors who specialize in narrative nonfiction, a genre characterized by learning by writing, by exercising the skills of close observation and descriptive detail. My bookshelf is an homage to John McPhee; [FN2] I take my editorial cues from William Zinsser rather than Strunk and White. [FN3] It was only as I invested in the literature of contemporary cognitive science and constructivist social theory--as part of my research and writing on intellectual property and technology law--that I began to see the light anew. I could, and should, practice in my teaching what I was preaching in my scholarship. To teach law, and specifically to teach students my specialty, intellectual property law, I now teach students to do as I do and as I ***825** did, rather than only to think as I would like them to think. I teach them to learn by writing in intellectual property, and I teach them to be intellectual property lawyers.

I. First, Some Theory

I came to this practice largely via personal experience and anecdote, so it is gratifying and somewhat reassuring to realize that my instincts largely (if imperfectly) align with a number of different theories of learning and thinking. This isn't a benign perfect storm of theory, but it's close. In this Part, I highlight some of the theoretical arguments that lie just beneath my practice, in order to provide a high-level roadmap for readers interested in access to more of the conceptual details.

For close to forty years, the “writing across the curriculum” movement has urged greater pedagogical attention to the benefits of teaching students to write, teaching more students to write, and teaching students to write more. [FN4] A big portion of that movement has been devoted to “writing to learn,” an approach with which Zinsser is associated, which suggests-- consistent with my own experience--that both the process and product of writing can produce cognitive benefits. [FN5] Writing-to-learn emphasizes student-centered compositional learning. It emphasizes writing as the personal representation of knowledge. A student can learn through writing, and in particular can learn his or her own mind and place, in addition to learning to write. Exactly how writing-to-learn works is unclear. That it should work and that it does work, in some contexts and particularly in legal education, seem largely beyond debate.

A modest body of literature applies the writing-to-learn approach to legal education, principally in the Legal Research & Writing curriculum. This literature recognizes that writing-to-learn may be more effective when the writing projects are oriented to problem-solving rather than to displays of knowledge. [FN6] For legal educators, that distinction dovetails nicely with law ***826** schools' traditional implementations of the “thinking like a lawyer” pedagogical premise. It is a short step from writing-as-a-form-of-thinking to teaching students to think via analyses of cases and problems, rather than via study of rules alone.

Some scholars, including some legal scholars, distinguish writing-to-learn, which sometimes emphasizes an uncomfortably a-contextual, autonomous, freewheeling methodology, from writing-in-the-disciplines, which is highly sympathetic to writing as learning but which emphasizes the importance of discourse communities, rhetorical forms, institutions, practices, and feedback loops among writers, peers, and more experienced community

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members. [FN7] According to writing-in-the-disciplines, a student can learn by writing, but learning is especially likely if the student needs to learn the conventions and expectations of a particular discipline. In writing-in-the-disciplines, writing is less a path of self-discovery and more a means of socialization into a community. [FN8]

Fortunately for legal educators and especially for legal writing teachers, writing-in-the-disciplines dovetails nicely with emerging theories of the pedagogy of composition, which likewise stress rhetorical communities, discursive forms, and feedback loops between writers and readers. [FN9] It also dovetails nicely with the more pragmatic and less theoretical expectations of law students and of the legal profession. For decades, professional associations have urged law schools both to teach students to write (because, ***827** on the whole, students come to law school with poor writing skills) and to give students more instruction in legal writing and drafting. [FN10]

Similar lessons about the virtues of writing practice emerge from theories of broader scope. The core insight of writing-in-the-disciplines, that practice in the skills of a discipline can produce disciplinary knowledge when that practice is guided by feedback from experienced members of the discipline, is consistent with both cognitivist and constructivist theories of learning. [FN11] Constructivist theories emphasize that learners construct knowledge on their own, via interaction with other learners, in complex environments, building from present understanding to new understanding. [FN12] Learning is not principally a matter of absorbing and understanding pre-existing forms. [FN13] Cognitivist theories emphasize that learning occurs in the mind itself. [FN14] Learned behaviors and uses of language cannot be understood (or taught) without an appreciation or attention to mental processes. Both perspectives emphasize mental constructs that are always present in the mind and ready to be activated. Both emphasize the transferability of knowledge, that is, can the learner transfer what is learned in one context to a new but related context? [FN15] Both emphasize connections between material practice and knowledge structures.

I'm not an educational theorist, so I have little need to specify precisely how cognitivist or constructivist processes work or to explain in detail how ***828** writing-in-the-disciplines connects with either of them. My own experience as a lawyer supplies solid if anecdotal evidence that the connection is there, both as I learned by writing myself and as I observed junior lawyers learning by writing under my supervision. [FN16] As I describe in the next Part, my experience as a teacher has been that my students learn this way as well.

Before turning to a description of my teaching practice, I want to connect my pedagogy to my research. When I noted above that I came to my approach via personal experience and anecdote, I meant not only that I gradually learned that my teaching style should be informed by my experience as a writer and as a practitioner, but also that my teaching could be informed by my scholarship. My interest in cognition and constructivism in the classroom was stimulated by my appreciation of their roles in the law and theory of intellectual property law. I have written at length about how theories of conceptual metaphor (the idea that linguistic structures, and metaphor in particular, reflect mental constructs) [FN17] and embodied cognition (the idea that cognitive processes are "embodied" in material behaviors and practices) [FN18] can inform intellectual property law. [FN19] I have argued that conceptual metaphor coupled with the concept of situated social practices (the notion that individual cognition, including learning, finds expression in social contexts sometimes referred to as ***829** "communities of practice") [FN20] helps illuminate the problem of understanding creativity within the context of copyright law. [FN21] I have noted the constructivist roots of our thinking about the intersection between property and technology. [FN22] Both cognitive theory and constructivism are close cousins of narrative theory, and I have borrowed the narratival insights of Law and Literature [FN23] in studying the law and policy of the

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Internet. [FN24]

In sum, in my scholarly writing I have argued that creativity is a social practice that is material and is closely bound up with uses of language. Designing copyright and patent law structures with that premise in mind is an important strategy if society wants to promote the production of creative and innovative things. To my modest surprise, I have discovered that "being a ***830** lawyer" and "thinking like (or as) a lawyer" are themselves social practices that are material and are closely bound up with uses of language. [FN25]

Little of this was in the front of my mind when I first set about to revise my courses, which were based on traditional law school exams, but as I noted in the Introduction, my research and scholarship prompted me to think about the variety of ways in which I could put social and cultural theory to use. It's nice to know now that much of what I practice can be justified theoretically. Even if little of that theoretical justification relates specifically to intellectual property (IP) or technology law, the subjects that I teach, it seems appropriate to me that I use IP to situate scholarly insights about cognitive science and constructivist theory next to their counterparts in teaching and learning. [FN26]

II. Writing in Intellectual Property Law

This Part describes the nuts and bolts of my method. Rather than try to link each element of my practice to the theories described briefly in the last Part, I simply explain what I do. I leave it to the interested reader to draw theoretical inferences beyond this simple writing-in-the-disciplines premise: Teaching IP students to write as IP lawyers, by giving them sustained, problem-based, collaborative, realistic, and feedback-driven exposure to what IP lawyers (and all lawyers) actually do with the written word, is an effective way to teach them IP law. What I want my students to know is the conceptual vocabulary and syntax of the law. I help them to acquire those conceptual elements by situating them in students' own compositional vocabulary and syntax, and to the maximum extent possible, in a real law practice setting.

A. Creating and Distributing the Assignments

Teaching law through writing requires making some choices. There are lots of kinds and forms of legal writing. I choose to focus on one form throughout a course, rather than putting students through the paces associated with several different forms. In my upper-level intellectual property and technology courses, each student's grade is based on performance on three ***831** research memos produced over the course of the semester. [FN27] I have used this method in courses on copyright law, trademark law, cyberspace law, and the law of electronic commerce, so in specific context the details have varied slightly. [FN28] The basic mechanics, however, are set out below.

A single memo assignment is distributed to the entire class approximately five weeks into the semester. A second assignment goes out approximately ten weeks into the semester. A third and final assignment is distributed at the conclusion of the semester. In some courses, I specify the anticipated due dates of each assignment as part of the initial syllabus. In others, I omit the due dates from the syllabus and schedule the assignments on an ad hoc basis. [FN29] Each assignment specifies a memo to be turned in approximately ten days later. The assignments are distributed electronically, both by being posted on the course website [FN30] and by being distributed via course e-mail list.

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Each assignment contains both a hypothetical fact pattern to be addressed and a set of instructions that is common to all of the assignments. The common instructions are as follows. The memo specified by each assignment is a "standard" legal research memo, that is, it is to comply with the default rules on format, organization, and style that students learned (or should have learned) during their legal research and writing training in their first year. In other words, the work product is the standard work product of a junior practitioner, with a Statement of Facts, Issue Presented, Short Answer, and full Analysis of the problem. The length of the memo is specified. Typically, I permit only very short memos. My default limit is four pages of text, typed or ***832** printed, and double-spaced. [FN31] Students are instructed to adopt the role of a junior lawyer or, in certain cases, a law clerk to a judge, and they are asked to address their work to their supervisor--me, either as a senior lawyer or as a judge. [FN32] In class (more on this below), I tell the students that their work product may be shared not only with the assigning attorney (or judge), but also with a client, and that the client even more than the assigning attorney is concerned with professionalism in form as well as substance. I tell them that the strict length limitation is largely a product of client interests.

The instructions specify that all of the assignments are "open" projects. I advise them orally that the hypothetical can be fairly and fully analyzed using the materials assigned for the course. (I teach from a typical casebook.) I also advise them that they are free to consult any source whatsoever in the course of their work, so long as they comply with applicable ethical rules and cite sources as required by rule and/or practice. [FN33] Beyond that guideline, as part of the initial assignment of the semester, I give them relatively little information regarding how or what to do to prepare the memo. In the context of that first assignment of the semester, initially I do not volunteer the proposition that they may consult with each other. My expectation is that by omitting a reference to collaboration will prompt students eventually to figure out that collaboration is permitted. Before that first memo is turned in, I confirm the proposition by asking the students to note on their memos the names of any students that they talked with about the assignment. (I don't take this information into account when grading the papers. I'm interested in emergent patterns of collaboration.)

The substance of the assignments typically emerges from recently filed or, less frequently, recently decided cases. Intellectual property law lends itself to this approach simply because of the wealth of litigation, the variety of novel and entertaining claims put into play, and the fact that coverage of these cases is usually quick and robust via weblogs. Finding raw material for new assignments has not been a problem. I adapt what I find, modifying the facts for my purposes by simplifying them and condensing them. Because I rely mostly on found material, it is rare that I distribute an assignment that is carefully crafted to capture specific issues--and only those issues. There is, in ***833** other words, a certain crudeness in each assignment. Factual conflicts and inconsistencies remain. There are conflicts or even outright gaps in the applicable law. The crudeness is intentional. Real cases in law practice rarely come into the office with labels that limit analysis to specific issues chosen by the lawyers. The content of the assignment, like the form of the assignment, the process by which it is to be completed, and the work product itself, mirrors the experience of a junior lawyer faced with a problem that may not have a solution. I want students to see the ambiguities and uncertainties that real world circumstances often entail.

The second and third assignments of the semester are identical in form to the first one, though of course the hypotheticals change, and the complexity of the analysis increases somewhat as students are exposed to and are expected to be conversant with more underlying material. Students have had the opportunity to internalize lessons from collaboration, so while students don't necessarily collaborate in practice, they are nominally aware that collaboration is permitted. I might increase the length limits for the memos to account for the increased complexity of the analysis expected, but usually I don't.

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I ask the students to turn in hard copies of their work by hand (not by e-mail), to me in person or to my secretary or the Registrar. [FN34] The due date and time for each memo does not correspond to a class meeting time, to prevent conflicts between class attendance and students' finishing and delivering memos. I tell the students that I do not grant extensions under any circumstances short of catastrophic illness, injury, or family emergency, and even then only with the participation of the Associate Dean.

B. Managing the Assignments

In their written form, the hypotheticals and the accompanying assignments are somewhat cryptic, or at least more cryptic than students prefer. The first time that I gave a memo assignment, students asked me so many questions outside of the classroom that I quickly decided to dedicate class time to answering all questions at once. Doing so has the added benefit of ensuring that all students have access to identical supplemental information about each assignment. Since then, a class briefing has been a standard part of each exercise.

When each assignment is distributed, I tell the students that class time on a designated day will be dedicated to answering any and all questions about the assignment. I also tell them that my policy is not to answer questions about the assignment except as part of the class briefing. I don't answer one-on-one questions in my office or in the hallway; I don't answer questions via e-mail. ***834** The class session is scheduled to take place some days after the assignment is distributed, so that students have enough time to digest the problem, do preliminary research or writing, and come up with questions or concerns. I promise to take a full hour of class time, if necessary, to answer questions. [FN35]

I spend part of the class briefing occupying the role that I have assigned myself as part of the writing exercise: senior lawyer, judge, supervising attorney, or even client. I try to answer in character. As a rule, I don't withhold information from the written assignment in order to see if students can elicit it, but on occasion students will see factual ambiguities in the assignment that require that the “interview” supplement the facts. Sometimes I choose to supplement. Sometimes I choose not to. Both because they see the process unfold, and because I confirm it for them explicitly, students learn that in practice, senior lawyers sometimes assign work to junior lawyers without specifying the scope of the assignment. Junior lawyers need to learn how to elicit clarification. Students also learn that lawyers sometimes have to give advice without knowing all of the facts.

I also spend part of the class briefing session occupying my usual role as a teacher, answering questions about the plausible scope of research that the assignment might entail, confirming that research is permitted but not required, and answering questions about the legal issues involved (and not involved) in the assignment. Typically in the first of these class briefings I confirm (if asked) that collaborating with fellow students is permitted but not required, and I confirm that students are expected to disclose the names of their student collaborators.

C. Grading and Evaluation

Feedback is a critical part of the memo writing approach, so grading the memos takes a very long time. Depending on the number of students in the course, [FN36] I may take up to two weeks to grade and return the memos, though I am careful to return graded memos before distributing the next assignment.

In grading the memos, I evaluate both compositional elements and substantive elements. Grammar, syntax,

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organization, and presentation are important, as is the quality of legal and factual analysis. I often critique each memo line-by-line, so that the students receive graded memos that are shrouded in the proverbial sea of red ink. For many memos, I also include a summary critique at the end of the memo. My preference as a lawyer and now as a teacher is to pull no punches. Poor and mediocre memos are treated harshly. Good memos are praised as such. In the main, students seem to be ***835** taken aback by the bluntness of the assessments, at least at first, but they also seem to appreciate their value. As much as possible, in my critiques, I try to engage their arguments on their own terms. I take their reasoning seriously.

For each assignment, I assess each memo on a one to ten point scale. A truly excellent memo is scored a ten; a mediocre memo receives a seven; a poor memo receives a five or four or even (in the extraordinary case) a three. [FN37] (Even a poor memo typically identifies the parties correctly and wanders, if a bit aimlessly, in the forest of the correct legal domain.) At the end of the semester, I multiply the numerical scores by the weights assigned to each assignment (usually thirty percent for the first and second memos, and forty percent for the third), and assign letter grades according to a curve imposed on the results. By design, straight A grades are extremely difficult to come by. In practice, a student usually has to write at least two ten-point memos, combined with a nine-point memo, in order to receive a straight A.

I use a ten-point scoring scale for the memos, rather than letter grades, partly because I want to limit strategic behavior by students who are too certain of their likely final grade too early in the semester, and partly because I'm not confident of my ability to differentiate the quality of the work at a finer scale. Students who receive a score of ten know that they have done well, but they don't know how well. Students who receive a score of five know that they have done poorly, but they don't know how poorly. I want to keep as many students as possible invested in working hard on all three memos. And I want to conserve my own ability to refine my sense of the relative quality of the work over the course of the semester. After each round of memos is returned to the students, I have several conversations with students in my office, explaining that a five doesn't mean the end of their shot at a B in the course, let alone the end of their legal career. An early ten does not assure an A.

None of the grading is anonymous. I tell students at the outset that their real names should be used on their memos. I tell them that I use a non-anonymous grading system to be consistent with my premise that I am mimicking how work is assigned and critiqued in the real world of law practice. Junior associates are not anonymous. I have never had a student question the practice.

I return the graded memos to students at the end of a class session, distributing the papers according to the class roster organized alphabetically. [FN38]

***836** D. Feedback and Followup

Just before returning the memos, I typically spend part of that class commenting on major themes in the memos and the grading. If time permits and circumstances warrant (for example, if a lot of students devoted a lot of their memos to wild goose chases), I may prepare and distribute a written summary of my overall analysis of both the hypothetical and of issues common to the students' memos.

After the graded memos are returned, I typically ask the authors of three or four of the best memos for permission to post their work as models on the course website. [FN39] Like the classroom briefing sessions, I implemented this aspect of the method in response to student suggestions. Students not only value the specific feedback that I provide on their memos but also value comparing their work to that of the most successful stu-

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dents. I have never had an author refuse my request; in fact, most seem to consider it an honor. Before posting, I remove the authors' names from their memos. [FN40]

As I noted above, I talk to individual students in my office at length regarding questions about their memos and my commentary. Often these are students who fared poorly on a given assignment. I also talk to a considerable number of more successful students who want to confirm precisely what they did well.

III. The Meta of Method

Does it work? Am I following a teaching method that produces better intellectual property lawyers, better legal thinkers, and better writers? Is this an example of appropriate and successful writing-in-the-disciplines? I think and hope so, but it's really too soon to tell, and I'm not sure that I know where to begin determining the answers. In this Part, I offer preliminary thoughts on some of the strengths and weaknesses of the method as I've experienced them.

A. Too Many Notes?

Designing, administering, and grading memos during the semester adds a significant amount of complexity to the ordinary burdens of teaching a course-- designing and managing a syllabus, preparing for class each day, and (perhaps) preparing audio-visual presentations and examples. The added burden is offset only partly by relief from the duty of grading final exams.

***837** In the best of worlds, moreover, classroom teaching style should be modified to prepare students for their responsibilities in writing the memos. I begin my classroom adaptation early in the semester, by laying out for the students many of my pragmatic justifications for using the memo method, so that those who wish to opt out have an opportunity to do so. I also try to adapt class by class, by emphasizing that the problem-solving types of class discussions that I encourage are related to the exercises that they will encounter in the memos.

My approach puts a lot of balls into the air at once. Managing it is clearly a somewhat risky juggling act, especially since I don't rely on teaching assistants or research assistants for any of the work. I am preaching not only mastery of a substantive legal discipline but also mastery of the art of legal writing, and I am wrapping the whole package in a sermon on professionalism and discipline. Throughout, I have to draw a series of balances between making various forms of knowledge explicit, on the one hand, and leaving some forms of knowledge tacit or implicit, on the other hand, so that the students have an opportunity to learn by developing that knowledge themselves, via practice.

To be worth the investment, high risks must bring high rewards, and I believe that they do. Mozart was famously (and fictitiously) accused of using “too many notes,” [FN41] but he was Mozart. The joke was on Emperor Joseph II. I'm no Mozart, and there is no joke to play on the students, but over the course of a semester, the overall quality of the students' work improves. I don't have to wait for final exams to learn whether my students have learned anything. I can monitor their progress during the semester and adjust and address issues accordingly. Anecdotally, I see and hear from students who are actively and energetically engaged with the substance of the legal analysis because they want to get it right, not because they want to earn a grade. In the somewhat odd world of legal education, few things are more satisfying to a law teacher than to watch students debate the finest details of statutory construction passionately, among themselves. Given the opportunity, a large number of stu-

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dents who take one of my memo-based courses come back for more of the same. And practitioners in the local bar consistently tell me that they appreciate my approach to legal education over the conventional exam-based method. It may not be a symphony, but the players are humming a nice tune.

B. Risks and Limitations: Student Background, Pedagogical Consistency, and Ethics

The method has drawbacks that I can do little about. I can't teach writing and thinking to students who don't know how to write and think to begin with. ***838** Some students come into my classes with very good basic writing and thinking skills. Some come to my classes with very poor writing and thinking skills. Some come to the class having already internalized a strong set of professional values; their work is more careful and polished from the beginning. Poor writers and the less disciplined students are at an obvious disadvantage from a competitive standpoint, although there is no reason that they can't learn as much as their colleagues during the course. A similar comparative advantage accrues to students with prior legal or professional work experience, whether in part-time jobs, summer internships, or pre-legal careers.

Students who are non-native English speakers, and students with learning styles not suited to written work, may be challenged to perform well in this environment. LL.M. and other graduate law students who have not experienced the basic American legal research and writing curriculum may need supplemental instruction in the mechanics of this form of legal writing. [FN42] Before I accept an LL.M. or other non-J.D. student into my course, I brief the student (or, in the case of LL.M. students, the administrators of the LL.M. program) on the character of the assessment method and my expectations. Students with different learning styles need to adapt to my teaching style just as they will need to adapt to the demands of clients and their supervisors in law practice. One can opt out of my courses, just as one can choose a professional career that does not require a lot of writing.

Plagiarism is a constant concern. I eliminate one source of potential problems by never re-using an old assignment. I eliminate a second source by sanctioning student collaboration and by permitting outside research, and a third source by trying when possible to draw hypotheticals from pending cases. What remains is the possibility that a student might locate published analysis of the pending case, or analysis of a similar hypothetical, and re-use it in the memo. [FN43] I can't discount entirely the possibility that this goes on, though I try to be familiar with ongoing public analysis, if it exists, and more importantly, I use my own nose for writing that likely was produced by a practicing professional, rather than by a law student. Between Westlaw, LexisNexis, and Internet search engines, checking papers for problems is usually pretty simple. [FN44]

It is possible that the time demands that my assignments impose on students create conflicts with the expectations of other faculty teaching the ***839** same students. On average, I find that each student spends roughly fifteen hours producing the first memo and roughly twenty to twenty-five hours producing each of the subsequent memos. Student attention and time are rivalrous resources. Am I monopolizing the students? To the extent that my colleagues are aware of how I teach (and the Dean of the law school certainly is aware), I have heard nothing but praise. Our faculty has a strong commitment to innovation in teaching and specifically to incorporating writing into upper-level courses.

All of my J.D. students have at least spent a year in law school in the basic legal research and writing curriculum. I rely on that experience, of course, when I assume that all of my students can organize and compose a basic legal research memo. I have learned, however, that students tend to assume that the model of a legal research memo that they learned from a particular instructor is the only true model of a legal research memo. My

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own training and experience may be slightly different, so when I grade memos according to my own expectations rather than according to this only true model of a legal research memo, students complain. In my courses, as in beginning legal research and writing classes, students sometimes err by devoting too much time and space to recitation of legal principles, and insufficient time and space to identifying and analyzing the relevant facts. I solve this complication in a number of ways. First, of course, I confer with the legal research and writing faculty, who tell me that they do not teach anything approaching the only true model, and that my expectation is consistent with their teaching. Second, I advise the students that as practicing lawyers, they should anticipate that different supervisors may expect work product in a variety of forms. Part of determining the scope of an assignment is identifying the correct form of the output, and a quick conversation with the source (or a quick question during a class briefing) can resolve any ambiguity. Third, I describe in class how my expectation and the only true model differ, which is in very modest details.

C. Breadth and Depth, and the Payoff

Teaching substantive law by teaching writing as I do involves one tradeoff above all others. Because of the in-class time dedicated to discussing the hypotheticals and the graded memos, I sacrifice four to six hours of class time over the course of the semester that otherwise would be devoted to coverage of additional substantive topics. My experience with copyright law has been that I lose coverage of substantive law that I think that students otherwise would enjoy and find useful. My experience with trademark law and cyberspace law has been that the loss of substantive coverage is less significant. Each teacher's experience will be different.

The cost in coverage is more than offset by the major pedagogical benefit that the memos offer. I can monitor the progress of each student and of the class in general. On the whole, the first round of memos is typically mediocre. ***840** Students aren't as deeply engaged with the contents of the law as they should be. They don't appreciate the importance of the facts. They don't take their professional obligations seriously. Memos aren't proofread. One or two students will exceed the page limit or otherwise fail to follow instructions. Miscues, both minor and major, are noted in my comments and linked to the scoring. They are repeated in the second memo, but much less frequently and dramatically. The third and final round of memos shows clear improvement overall. Not every student improves, and some students may fall back a bit. But as a group, by the end of the semester the students express a professional sensibility about the law that is quite tangible, welcome, and distinct from the flat reflection of learning that emerges from the typical stack of exam books. Students are still expected to learn to think like or as a lawyer--an intellectual property lawyer. But to a far greater degree than before, I can confirm that this is actually happening. [FN45]

Conclusion

Years ago, a prospective law student appeared in my office, anxious about the wisdom of his choice to attend law school. He had been an English major in college, but his true calling to that point was the visual arts. He showed me a portfolio of his work. The question he asked was whether someone with a truly artistic sensibility had a future in a discipline apparently dedicated to logic and order. I told him that law and law practice were much like art and artistic practice. Just as an artist finds aesthetic order in the world that he perceives and expresses that order in a given medium, understanding law and becoming a lawyer requires appreciating the received materials of the legal system and compiling those materials conceptually into a synthesis that appeals to the mind--much as a completed work of art appeals to the eye, the ear, the touch, or even the nose.

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The student decided to enroll in our law school, and he took my courses. He was (and remains) very smart, and he worked very hard, and he was a senior editor of the law review and was elected to the Order of the Coif at graduation. After the graduation ceremony, he approached me and reminded ***841** me of our conversation more than three years before. He said that I had been exactly right and that my insight was precisely what enabled him not just to survive in law school, but to thrive. Today, he is a successful intellectual property lawyer in a major American city.

As teachers, we collect anecdotes from appreciative students. I particularly like this one because it illustrates my basic point so clearly (even if it doesn't have writing at its core). Teachers need to give students the right tools and to show students those tools to enable them to become the professionals that the students want to be. Much of the time, and more often than most law faculty may realize, doing that involves drawing explicit connections between the knowledge that we want to teach and the practice that the students want to learn. In many respects, knowledge and practice are one and the same. Law professors who teach legal research and writing, and faculty who teach in law clinics, know most if not all of this lesson already. This Essay is one example of the many ways in which the rest of their colleagues can catch up.

[FNa1]. Associate Professor, University of Pittsburgh School of Law. E-mail: madison@pitt.edu. Copyright © 2008 Michael J. Madison.

[FN1]. I'm not the first law professor to suggest that “thinking like a lawyer” fails to capture what legal education is or should be about. For a slightly different take on the problem, see Nancy B. Rapoport, Is “Thinking Like a Lawyer” Really What We Want to Teach?, 1 J. Ass'n Legal Writing Directors 91 (2002).

[FN2]. By acclamation among his peers and his fans, John McPhee is the dean of narrative nonfiction. Over the last thirty-odd years, he has written more than thirty books and countless essays and articles on subjects ranging from orange production to Switzerland's civil defense system to the basketball player Bill Bradley to the geology of the United States. See John McPhee, A Sense of Where You Are: A Profile of Bill Bradley at Princeton (2d ed. 1978); John McPhee, Assembling California (1993); John McPhee, Basin and Range (1980); John McPhee, La Place de la Concorde Suisse (1983); John McPhee, Oranges (1966).

[FN3]. Zinsser is known principally for On Writing Well: An Informal Guide to Writing Nonfiction, originally published in 1976 and still in print. My preferred Zinsser work is Writing to Learn (1988).

[FN4]. See, e.g., William Zinsser, Writing to Learn 12-23 (1988).

[FN5]. The origins of “writing to learn” are usually traced to the work of Janet Emig and James Britton. See James N. Britton et al., The Development of Writing Abilities 11-18 (1975); James N. Britton, Language and Learning (2d ed. 1993) (arguing that language is central to learning, because it is through language that we organize our representation of the world); Janet Emig, Writing as a Mode of Learning, 28 College Composition & Comm. 122, 124 (1977) (arguing that writing is a uniquely effective form of learning, because it is at once enactive (learning by doing), iconic (based on acquisition and storage of images), and representational (restating images in words)).

[FN6]. Examples of legal educators developing the writing-as-thinking framework include Linda L. Berger, Applying the New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J.

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Legal Educ. 155 (1999), and J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35 (1994). Cf. Michael Hunter Schwartz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 San Diego L. Rev. 347 (2001) (elaborating an instructional design methodology for legal education that is informed by learning theories).

While the available evidence does not confirm conclusively that writing is a means of learning, it does suggest that the theory works in the context of problem-solving, rather than "knowledge-telling." Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 Legal Writing 1 (2000). The source of the "knowledge-telling" vs. "knowledge transforming" distinction in writing is Carl Bereiter & Marlene Scardamalia, The Psychology of Written Composition 3-30 (1987).

[FN7]. Susan H. McLeod, Writing Across the Curriculum: The Second Stage, and Beyond, 40 College Composition & Comm. 337 (1989).

[FN8]. For a suggestive account of how writing-in-the-disciplines really consists of writing-to-learn in the context of situated social practices, see Michael Carter, Miriam Ferli & Eric N. Wiebe, Writing to Learn by Learning to Write in the Disciplines, 21 J. Bus. & Technical Commc'n 278 (2007). Ackerman's argument, that writing-to-learn is insufficiently attentive to nuances of institutional settings and practices, is consistent with shifting emphasis from writing-to-learn to writing-in-the-disciplines. See John M. Ackerman, The Promise of Writing to Learn, 10 Written Commc'n 334 (1993).

[FN9]. See, e.g., Susan L. DeJarnatt, Law Talk: Speaking, Writing, and Entering the Discourse of Law, 40 Duq. L. Rev. 489, 506-21 (2002); Philip C. Kissam, Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education, 60 Ohio St. L.J. 1965, 1988 (1999) (urging evaluation of law school writing according to principles of composition theory, that is, writing as a process, and writing as a social act); Rideout & Ramsfield, supra note 6, at 56-61.

[FN10]. See Robert MacCrate et al., Legal Education and Professional Development--An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A Sec. Legal Educ. & Admissions to the Bar. This is universally known as the "MacCrate Report," after the chair of the Task Force that produced it, Robert MacCrate.

[FN11]. See Pamela Lysaght & Cristina D. Lockwood, Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications, 2 J. Ass'n Legal Writing Directors 73 (2004) (arguing that the "writing-in-the-disciplines" thread of the writing across the curriculum movement should dominate the legal education curriculum, rather than the "writing to learn" thread, as most consistent with themes common to behaviorist, cognitivist, and constructivist learning theories); Carol M. Parker, A Liberal Education in Law: Engaging the Legal Imagination Through Research and Writing Beyond the Curriculum, 1 J. Ass'n Legal Writing Directors 130, 136-40 (2002) (describing elements of constructivist learning theory as they relate to compositional learning in law schools).

Some argue that writing-in-the-disciplines is equally consistent with behaviorist learning theories, too. See Lysaght & Lockwood, supra, at 103. As I explain in the text, for reasons having to do with my own scholarly interests, I emphasize cognitivist and constructivist approaches.

[FN12]. See Lysaght & Lockwood, supra note 11, at 90-92.

[FN13]. Id. at 90.

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[FN14]. See id. at 83-84.

[FN15]. Learning theorists refer to the process as "transfer." See Peggy A. Ertmer & Timothy J. Newby, Behaviorism, Cognitivism, Constructivism: Comparing Critical Features from an Instructional Design Perspective, 6 Performance Improvement Q. 50, 55-56 (1993).

[FN16]. I practiced law in private law firms for nine years before entering the academy.

[FN17]. See George Lakoff & Mark Johnson, Metaphors We Live By (1980); George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind (1987). For related research on cognitive linguistics, see, for example, Raymond W. Gibbs, Jr., The Poetics of Mind: Figurative Thought, Language, and Understanding (1994); Eleanor Rosch & Carolyn B. Mervis, Family Resemblances: Studies in the Internal Structure of Categories, 7 Cognitive Psychology 573 (1975). Within legal discourse, Carol Parker draws more explicit connections among compositional theories of writing, constructivist learning theory, and Lakoff's ideas on "embodied cognition." See Parker, supra note 11.

[FN18]. See, e.g., Edwin Hutchins, Cognition in the Wild 353-74 (1995). Cognitive science is subject to the critique that it undervalues individual intentionality in its account of human behavior. Mark Johnson argues that intentionality is itself contextual:

> ... [A]ny statements we make, any directives we give, any rules we lay down are applicable, not because the concepts specify their own determinate conditions of satisfaction, but rather because we understand these concepts and rules relative to shared idealized cognitive models, scripts, and narratives that are tied to embodied experiences, communal histories, practices, and values. The rules can work, when they work, precisely because of these framing cognitive models and practices. They are not ... merely non-propositional, non-semantic background assumptions. Rather, they are part of our conceptual apparatus by which we make sense of and act purposively within concrete situations.

Mark Johnson, Law Incarnate, 67 Brook. L. Rev. 949, 957 (2002).

[FN19]. Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525 (2004); Michael J. Madison, Law as Design: Objects, Concepts, and Digital Things, 56 Case W. Res. L. Rev. 381 (2005); George H. Taylor & Michael J. Madison, Metaphor, Objects, and Commodities, 54 Clev. St. L. Rev. 141 (2006).

[FN20]. See Hutchins, supra note 18; Jean Lave, Cognition in Practice: Mind, Mathematics and Culture in Everyday Life (1988); Jean Lave & Etienne Wenger, Situated Learning: Legitimate Peripheral Participation 98 (1991) (defining "community of practice [a]s a set of relations among persons, activity, and world, over time and in relation with other tangential and overlapping communities of practice"); John Seely Brown, Allan Collins & Paul Duguid, Situated Cognition and the Culture of Learning, 18 Educ. Researcher 32 (1989); Michael J. Madison, Social Software, Groups, and Governance, 2006 Mich. St. L. Rev. 153 (2006).

[FN21]. Madison, A Pattern-Oriented Approach, supra note 19; Michael J. Madison, Rewriting Fair Use and the Future of Copyright Reform, 23 Cardozo Arts & Ent. L.J. 391 (2005); Michael J. Madison, Fair Use and Social Practices, in 1 Intellectual Property and Information Wealth 177 (Peter K. Yu ed., 2007).

[FN22]. Madison, Law as Design, supra note 19.

[FN23]. James Boyd White premised the canonical The Legal Imagination on the following question: "What

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does it mean to learn to think and speak like a lawyer?" James Boyd White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression, xix (1973). He answered that question by asking the law student to "write as a lawyer, judge, and legislator, and to reflect as a mind and a person on what he has done, to speak in his own voice about his experience of writing and thinking." Id. Note the shift from "think like a lawyer" to "write as a lawyer." This is both cognitive and constructivist.

> The effort of the book is not to reach conclusions, even tentative ones, but to define responsibilites. The hope is not that a systematic view of life will be exposed, but that the student will come to some new awareness of his place in the world, of his powers and obligations. In every paper he defines himself as a mind, and you might say that this act of self-expression is our real subject. Not a legal writing course, then, but a course in writing.

Id. at xxi.; see also Thomas D. Eisele, The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities, 54 Tenn L. Rev. 345, 345-54 (1987) (building on Michael Oakeshott, The Activity of Being an Historian, in Rationalism in Politics and Other Essays 137 (1962)); James Boyd White, Teaching Law and Literature, in From Expectation to Experience: Essays on Law and Legal Education 73, 77 (1999) (describing "the activity of being a lawyer" as inextricably intertwined with struggles with the constraints and enablements of language).

[FN24]. Michael J. Madison, The Narratives of Cyberspace Law (or, Learning from Casablanca), 27 Colum. J.L. & Arts 249 (2004).

[FN25]. I am hardly the first person to discover this, nor the first to put it into practice. See Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 77 (2001) (conceiving of legal systems as social practices based on the structure and content of their core concepts, viewed from the point of view of participants in those practices). For examples of writing-to-learn applied in particular law school settings, see Elizabeth Fajans & Mary R. Falk, Comments Worth Making: Supervising Scholarly Writing in Law School, 46 J. Legal Educ. 342 (1996); Kissam, supra note 9, at 2012-13; Parker, supra note 11, at 141-42.

[FN26]. This meta-discussion of cognition and constructivism is itself consistent with a writing-in-the-disciplines path to knowledge. Until I began writing this Essay, I hadn't focused specifically on this parallel in my work.

[FN27]. In my law practice, I was a litigator, at least most of the time. I rely on research memos in part because I wrote a lot of memos and a lot of briefs as a practitioner, and in part because other kinds of legal writing with which I'm familiar--litigation documents; letters to clients, courts, and opposing counsel; and licenses--are form-based to a significant degree. In my opinion, teaching law via that kind of writing either is less likely to lead to the problem-solving kind of writing-to-learn experience that the literature recommends, or requires an investment of teaching resources that significantly exceeds what I have available as a teacher working solo in my classroom.

[FN28]. Before joining the faculty at the University of Pittsburgh, I taught at Harvard Law School as what is now known as a Climenko Fellow. I team-taught a course on lawyering skills that blended instruction in substantive law with exposure to "real" legal skills, including memo writing, drafting transactional documents, and interviewing and client counseling.

[FN29]. I have found that students don't complain much about the absence of notice in the syllabus, because each assignment allows ten days or so for completion. At times I specify the dates in advance, however, because

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doing so helps me plan my own schedule more effectively.

[FN30]. I typically post each assignment in both HTML and PDF formats. I sometimes include hyperlinks to websites with relevant information, such as images, video, or audio of relevant products. In one instance I based a copyright problem on a series of stuffed tigers, and I uploaded and made available images of the tigers that I produced myself.

[FN31]. The “to,” “from,” “date,” and “subject” header may be single-spaced. I also specify margins (one inch all around); I forbid footnotes; and I specify the font (twelve-point Times New Roman, or its equivalent).

[FN32]. In other words, sometimes the memos are designed as “objective” memos that call for impartial analysis of law, fact, and policy; more frequently, they are designed as “subjective” memos that call for analysis from the point of view of a particular client. I have occasionally asked students to serve as staff to a legislative committee and write memos, addressed to a staff director, that analyze proposed legislation.

[FN33]. I do not require strict adherence to Bluebook formats for citations, but I do tell the students that I expect that any citation standard they adopt should be clear to the reader and applied consistently throughout their work.

[FN34]. The “no e-mail” restriction is at odds with the realities of contemporary practice. I use the rule to enforce a level of formality and professional discipline that might otherwise erode.

[FN35]. In practice, student questions and my answers have never occupied a full hour of class.

[FN36]. I have used this teaching method with classes of as many as eighty-five students and with as few at thirty-five students. For the time being, I now cap enrollment at fifty students per class in order to keep my grading burden at a manageable level.

[FN37]. The score is a composite of my assessment of writing and substantive analysis. As a rule, I do not score each separately before assigning an overall score.

[FN38]. Usually I begin with the letter A, but I occasionally begin at the end of the alphabet. Doing so turns out to be a cheap and easy way to validate long-suffering students with last names that begin with Z or Y.

[FN39]. I do this privately, of course.

[FN40]. I ask the students to send me text-based electronic versions of their work. For each memo, I delete the student's name from the body of the document. I also delete identifying information from the meta-data fields of the document. Then I convert the file to PDF format and post that version on the course website.

[FN41]. Amadeus (Warner Bros. 1984).

[FN42]. Students with a first law degree from a civil law country may also have difficulty with the precedent-driven style of legal analysis expected in the American legal system.

[FN43]. It is also conceivable that one student will simply copy a colleague's work. With a sufficiently small class, detection is so easy that the probability of this occurring seems extremely remote.

[FN44]. Through well over 1,000 memos, I have identified one case of unambiguous plagiarism. A student

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copied material from a law firm's website.

[FN45]. This Essay hasn't focused on how my practice responds to a distinct but related deficiency in traditional legal education, which one author describes as excessive reliance on a “Vicarious Learning/Self-Teaching Model.” See Schwartz, supra note 6, at 349-58. There is self-teaching at work in my method, too, but it is self-teaching that is monitored more closely than usual and guided by more feedback than is common.

My efforts to promote self-initiated collaboration among students tend to be unsuccessful. According to the self-reports of collaborative activity that I request, there is a modest uptick in collaboration over the course of the semester. I suspect that law students either don't know how to work collaboratively or expect that they won't need to know in law practice. For now, teaching in a way that addresses this problem would add one task too many to my agenda.

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