TEACHING LEGAL WRITING IN THE UNITED STATES

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In the United States, as in Australia, the place of skills training in legal education is debated. The contending caricatures of plumber and dilettante are familiar in both countries. Here, as there, educators try to strike a balance between imparting legal skills and raising law and society issues. Here, as there, the schools have recently introduced clinical and perspective courses to appease both factions. In the United States, however, recent years have brought a fresh emphasis on the teaching of fundamental writing skills.

Courses in "legal writing", often coupled with training in "research" or "bibliography", are nothing new. For many years they have been taught, or at least offered, typically as required courses during the student's first year. Long an ugly duckling in the eyes of students and faculty alike, legal writing is changing its appearance these days: many schools are adopting, however, a less expository and more skills-oriented approach to the subject. They are doing so for two reasons. First, the legal profession, alarmed about a deterioration in the writing competence of new associates, has been urging the law schools to develop student facility in simple English usage.[1] The schools have responded, for although they ought not to cater to the interests of "places like Sue, Grabitt & Runne",[2] they are of course distressed if their graduates cannot spell or punctuate the firm's name.

A second reason that U.S. law schools turned, or returned,[3] to fundamental writing skills is that they have come to share the lay frustration with excessive legalese. "[C]riticism of lawyers' writing has taken on a new intensity. The popular press castigates lawyers for the 'frustration,

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1 See, e.g. E. Thomas, "Shearman & Sterling's Hired Gun Shoots Down Legalese", (1978) *Juris Doctor* (June/July) 28; Goldfarb, "Lawyers and Their Language Loopholes", *Washington Post*, 28 October 1976, §A, 25, Col. 1. Cf. Pinsker, "Why business execs hire English profs", *The Christian Science Monitor*, 23 February 1979, 22, Col. 1.

2 R. Cranston, "Law and Society: A Different Approach to Legal Education" (1978) 5 *Mon.L.R.* 54, 61. This article, which inspired my own, summarizes the "dominant strands" in legal education, discusses the "skills argument", and proposes a fuller orientation to "law and society" in the curriculum.

3 To some extent, the new curriculum has precedent. For example, the best textbook in practical writing skills was somewhat of an anomaly, for having been first published in 1961, it is one of the oldest: H. Weihofen, *Legal Writing Style* (2nd ed. 1980).

outrage, or despair' a consumer feels when trying to puzzle through an insurance policy or instalment loan agreement."[4] Even (or especially) high courts are vulnerable.[5] In sum, it is said that "[w]e lawyers cannot write plain English".[6] Prompted by consumer associations, "plain language legislation"[7] and private efforts to simplify standard documents[8] have alerted law schools to the greater need for training in clear English usage.

That some law firms now require all incoming associates to attend seminars on company time taught by English instructors[9] evidences rather pervasive deficiencies somewhere in the associate's formal education. The

[4] R. Wydick, *Plain English for Lawyers* (1979) 4. This excellent primer is an expanded and revised version of an article which originally appeared in (1978) 66 *Cal. L.R.* 727.

[5] See Johnson, *The High Court Gets a Mother Tongue Lashing* (1978) *Student Lawyer* (October) 6.

[6] This sentence begins the book by Wydick, op. cit. fn. 4. The author points out that:

> "Criticism of lawyers' writing is nothing new. In 1596 an English chancellor decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the document, all 120 pages of it. Then he ordered that the person who wrote it should have his head stuffed through the hole, and the unfortunate fellow was led around to be exhibited to all those attending court at Westminster Hall. [*Mylward* v. *Welden* (Ch. 1596).]
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> When the common law was transplanted to America, the writing style of the old English lawyers came with it. In 1817 Thomas Jefferson lamented that in drafting statutes his fellow lawyers were accustomed to 'making every other word a "said" or "aforesaid", and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means. . . .' [Letter to Joseph C. Cabell (9 September 1817) reprinted in 17 *Writings of Thomas Jefferson* 417-18 (A. Bergh ed. 1907).]"

[7] See e.g. *New York General Obligation Law* §§5-701b (McKinney 1978) (requiring consumer contracts to be written "in a clear and cogent manner using words with common and everyday meanings"). Wydick reports, op. cit. fn. 4, that

> "President Carter has ordered that new regulations of the federal executive agencies must be 'written in plain English' that is 'understandable to those who must comply' with them." Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).

See also Semegen, *Plain Language Legislation* 85 Case and Comment, January-February 1980, at 42.

[8] These private efforts respond generally to public concern about the deteriorating quality of English usage in the United States. "Will America be the death of English" is the opening salvo in a bestseller by E. Newman, *Strictly Speaking* (1974). Two examples of reforming standard legal expressions within the private sector are these:

> Surrender of Lease
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> Old: Tenant "has not at any time heretofore made, done, committed, executed, permitted or suffered any act, deed, matter or thing whatsoever, whereby or wherewith, or by reason or means whereof the said lands and premises hereby assigned or surrendered, or any part or parcel thereof are, or is, or may, can, or shall be in any wise impeached, charged, effected or incumbered".
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> New: "Tenant has done nothing which would give anyone a claim against the leased premises."
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> Promissory Note
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> Old: "No extension of time for payment, or delay in enforcement hereof, nor any renewal of this note, with or without notice, shall operate as a waiver of any rights hereunder or release the obligation of any maker, guarantor, endorser or any other accommodation party."
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> New: "We can delay enforcing any of our rights without losing them." 'Translations from the Legalese", *U.S. News and World Rep.*, 7 November 1977, 46.

[9] See Thomas, op. cit., fn. 1.

explanation may lie in the diminishing role of English composition at all levels of education, the increasingly rare mastery of it by pre-law students, relaxed standards in those programs of English composition which have survived, and that old bugbear, society's increasing devotion to the broadcast media. Writing skills are too often ignored at all stages of education. Perhaps most seriously, "[o]ur universities are almost uniformly neglecting expository writing".[10]

The law schools themselves may have been partly to blame. Until recently, courses and course materials[11] in legal writing emphasized special techniques of legal expression and analysis. More and more, however, courses have become remedial efforts to return to the fundamentals. Thus, a more clinical emphasis on basic English usage, taught by close faculty supervision and critiquing, is replacing the traditional focus on analytic techniques, taught in an expository fashion by remote control.[12] As the core subject matter, "plain English" usage is gaining favour over the reliance upon jargon, model opinions, form books, and "thinking like a lawyer". Language in the newer curriculum is seen as not simply a product of thought and analysis, but as their determinant.[13] An exciting dimension of the new skills curriculum is the growing interest in word processing.[14] Where minicomputers and cathode-ray tube terminals are available, training in modern processing techniques gives students, particularly those attracted to careers in litigation, substantial advantages.

Despite the common objectives and large number of courses in legal

[10] R. Dickerson, "Legal Drafting: Writing as Thinking, or, Talk-Back From Your Draft and How to Exploit It" (1978) 29 *Journal of Legal Education* 373.

[11] See e.g. W. Statsky and R. Wernet Jr., *Case Analysis and Fundamentals of Legal Writing* (1977); W. Gilmer, *Legal Research, Writing and Advocacy: A Sourcebook* (1978).

[12] See Johnson, "Teaching Legal Writing: An Idea Whose Time Has Come. Or Has It?" (1979) *Student Lawyer* (November) 10.

[13] "Language is a guide to 'social reality'. Though language is not ordinarily thought of as of essential interest to the students of social science, it powerfully conditions all our thinking about social problems and processes. Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society. . . . The fact of the matter is that the 'real world' is to a large extent unconsciously built up on the language habits of the group", Sapir, *The Status of Linguistics as a Science* in D. Mandelbaum (ed.) *Selected Writings of Edward Sapir in Language, Culture and Personality* (1951) 160, 162.
Sapir was one of the first to recognize that although environment and social experience strongly influence language, language likewise influences experience . . . it exerts a powerful influence on cognitive behaviour and social structuring and shapes the way people think about and perceive the world. Benjamin Lee Whorf, Sapir's student, posited that language not only influences perceptions of reality, but actually determines those perceptions. Whorf believed that no individual is free to describe nature with impartiality; rather, every person is "constrained to certain modes of interpretation even while he thinks himself most free." (B. Whorf, *Language, Thought and Reality* 214 (J. Carroll ed. 1970); R. K. L. Collins, "Language, History and the Legal Process: A profile of the Reasonable Man" (1977) 8 *Rut.-Cam. L.J.* 311, 320, 321.

[14] See Harbison, "Word Processing for Lawyers" (1980) 85 *Case and Comment* (January-February) 20.

writing at U.S. law schools, teachers seldom compare notes. Ironically, communication among American law teachers of communication is minimal, and because legal writing is an unpopular subject among faculty, the teaching turnover is great. Typically each new teacher must reinvent the wheel, for published descriptions or syllabi of courses are unavailable. Unfortunately, too, the American experience is isolated. The comparative study of training in writing skills, as opposed to the flashier substantive curriculum, is virtually unknown. To stimulate a useful exchange of viewpoints, this brief article will describe one U.S. program of training in legal writing. This program, at Willamette University, is typical in its objectives, general content, and controversiality, but somewhat atypical in its organization and intensity. This program is typical, most importantly, in attempting to respond to rather widespread disenchantment with the English language proficiency of law students and graduates.

PHILOSOPHY

> "When Phaedrus taught English composition he was faced with the problem of how to teach people to write well. He and his students recognized good writing when they saw it. Part of what he taught his students was that they could and did make qualitative judgments of writing, and that they agreed with Phaedrus and one another in those judgments. But what was it that made good the writing they all recognized to be good? To know the answer to this question seemed a necessary condition of learning to write well themselves. Yet while rules might provide some basis for criticism after one had written something, there was no set of rules which, if followed precisely, produced quality writing. Words like unity, vividness, authority, economy, sensitivity, clarity, emphasis, flow, precision, while useful to characterize good writing, were of no help in learning to write prose which had those qualities.
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> It became clear that Phaedrus was trying to teach something which could not be defined. It could be known in the sense that one could know how to do it; but it could not be known in the sense that one could give a verbal description of it to someone else. A purely classic analysis somehow missed the point. A classic understanding of quality writing did not enable one to write well. On the other hand, that a piece of writing was good was more than a subjective reaction to it by the reader. Quality was an objective feature of the writing. Why then could it not be defined?"[15]

Teachers of legal research and writing share Phaedrus's dilemma, but we all must make choices. Three notions inspire our adoption of a skills approach to legal writing. First, many students, if not most, need closely supervised, remedial exercises. Secondly, it has been frequently said that there is no such thing as good writing: there is only good rewriting.[16]

[15] R. B. Parker, "A Review of Zen and the Art of Motorcycle Maintenance With Some Remarks on the Teaching of Law" (1976) 29 *Rutgers L.R.* 318.

[16] For practical advice to allow ample time for the writing process, see G. J. Solomon, "A Concise Guide to Courtroom Craft" (1976) *Juris Doctor* (June) 37.

Thirdly, language conditions our thinking.[17] A more or less "objective" analytic approach to legal communication is insufficient; the idiosyncratic, subjective features of writing that a clinical or skills-oriented approach affords must be explained, critiqued, and supervised.[18]

In pondering the wheel metaphor that each new teacher must reinvent the wheel, I am reminded of the observation that pre-Columbian cultures, for example, got along rather well without the wheel as a tool. Instead, those cultures rather puzzlingly used the wheel only in toys. We, however, have learned from experience that wheels can convey big loads. Thus, once legal writing is invented or reinvented to become an indispensable part of the curriculum, we who teach it ought to use it as a tool rather than a toy or game. Bibliographic treasure hunts in the law library and elaborate steeplechases in problem-solving, long emphasized in the American curriculum, have at most a limited place. To paraphrase Professor Nash's metaphor, the hobby horse of the expository approach now seems inferior to the plough of disciplined writing exercises.[19] Well supervised practice, not elaborate methodology, makes perfect.

The horse (but not hobby horse) of plain English, regularly regroomed, belongs before the wheeled cart of effective problem-solving, and not vice versa. It is a matter of efficiency; the horse could, after all, push the cart. In the limited class time available, it makes little sense to devote attention to theories and rules of legal analysis when so many students have so many highly individual problems in writing organized, plain English. Ideally, a course should allow ample time for bibliography and legal analysis, but developing the horsepower of effective English ought to be paramount. Generally, students seem to need only a brief introduction to legal bibliography, and their substantive courses, willy nilly or systematically, develop those skills of legal analysis to which a course in legal research and writing might devote more explicit attention. So much for general philosophy and, the reader will be pleased to know, of the wheel metaphor. Here is a summary of the program at Willamette University.

DIVISION OF LABOUR AND FACILITIES

All of the 140 first-year students are required to take two semesters, that is, a full year of legal research and writing. Students are organized into

[17] "In law, the proper use of words is always a matter of paramount importance. In fact, verbal precision is a hallmark of the legal trade. Those in the profession know well that because what is said often has a pronounced effect on what is eventually done, mastering language is essential to effective lawyering." Collins, op. cit. fn. 13.

[18] "The conclusion that Phaedrus reached was that the problem of whether Quality was subjective or objective was itself a misconception resulting from the classic-romantic split. Instead of seeing the world as made up of what is out there, objective and definable, plus our subjective reactions to it, one needed to realize that the subjective and the objective were simply aspects of reality." Parker, op. cit. fn. 15.

[19] Quoted in Cranston, op. cit. fn. 2.

four classroom sections, of which one professor is responsible for two and a visiting instructor, newly appointed each year, is responsible for the other two. The instructor is typically a junior faculty member with a substantial writing and editorial background. The program seems to be invigorated each year by the fresh ideas a visiting instructor brings. The two faculty members frequently collaborate. Of the four sections we share, each is broken down into groups of about a dozen students. Each group is led by a student teaching assistant, chosen the previous spring on the basis of past performance in legal research and writing, overall law school performance, special writing or teaching capacities, and responses to a detailed application form. Each teaching assistant receives token compensation—really an honorarium—but more importantly, enjoys a prestige which both the law school and the outside legal community accord. Until the 1979-1980 school year the assistants had taught only the first semester and were replaced in the second semester by adjunct instructors. The latter were typically young practitioners with high credentials. Our experience, however, with even the most carefully selected adjunct instructors has too frequently been negative—perhaps because of their busy practices—so that beginning 1980 the student teaching assistants work both semesters. Our experience with the new format is very favourable.

The functions of both faculty members are to develop course materials and assignments; to introduce themes and techniques in the classroom; to read, comment upon and evaluate assignments; to consult individually with students, both on their initiative and during required sessions; and to supervise the teaching assistants. The latter conduct weekly workshops with their groups on current assignments; make themselves available, more or less on call, to individual students; conduct supplementary bibliographic sessions; and otherwise serve as valuable interpreters of classroom requirements. They are also responsible for reading and commenting upon the first (ungraded) assignment, a case briefing. Finally, each teaching assistant takes the students from start (research of two or three issues) to finish (an office memorandum of ten pages or so) of an original problem he or she has prepared over the summer, reviewed with the faculty members, and revised during the opening weeks of the first semester. The educational value of this assignment has been very high, thanks to the enthusiasm and expertise of the teaching assistants.

Library facilities include the school's own collection and, within a few blocks, a county law library, the State of Oregon Library, and the Oregon Supreme Court Library. The outside facilities cooperate with the law school to make their materials readily available. Within the school's own library the first of four floors is devoted entirely to the legal research and writing program. This area includes a collection of all the basic research

materials, including an additional set of court reports, carrels and study tables for first-year students, and a large conference room, embellished with Daumier prints, for scheduled and informal consultation. Message boards assist in facilitating communication between students and instructors.

CONTENT AND CHRONOLOGY OF WRITTEN ASSIGNMENTS

The first semester typically includes nine writing assignments, the first two ungraded and the last seven graded. In chronological order and with an indication of the approximate period for completion, these assignments are: a case briefing (overnight); a short essay on an assigned topic, which requires no research but enables the faculty supervisors during the second week to appraise individual writing skills (two days); an office memorandum on several issues of law, which rather quickly puts the students in deep water for the first time (ten days); a related opinion letter (two or three days); the memorandum written by the teaching assistants (ten days); drafting or redrafting and annotating a statute (one week); negotiating, drafting and redrafting a contract between subgroups of two or three students (ten days); a bibliographic assignment in international legal research (two months, in the course of other assignments); and a final lengthy office memorandum (three weeks).

The most stressful of these assignments seems to be the contract training. Although the negotiating and group drafting processes generally engender a spirit of involvement and cooperation, the learning experience for some is bruised by the reported failure of some group members to carry their full load. We believe, however, that the educational value of small group dynamics of the exercise outweighs its frustrations for the students.

By and large, the program does not try to develop skills of persuasive writing until the second semester. It seems enough in the first semester to emphasize objective exposition (reporting, one might say) in good, clear, well-organized English. During the second semester, however, the program emphasizes advocacy: a complaint (ten days); a motion, affidavit, and memorandum of points and authorities in support of the motion (two weeks); an appellate brief (six weeks); and oral arguments from the brief (the duration of whose preparation after classroom and workshop introductions to oral advocacy may vary from two to five weeks, depending on whether the student wishes to be included in a concluding moot court competition). We have developed sequences of problems that simulate court records to give the students an experience that is as practical as possible.

To paraphrase the American poet Robert Frost, education in legal research and writing involves a good deal of hanging around until you catch on. Faculty supervisors emphasize this frequently to the students,

so as to help dispel anxieties and to convey the expectation that they will spend considerable time in trial and error. Although the program encourages students to do their own work, it also encourages them to seek the help of supervisors and teaching assistants. We strive to read papers and return them with comments two or three days after they are submitted, and we apply red ink very freely. Just after the first graded assignment we require the students to sign up for intensive individual consultation with their faculty supervisors. These consultations are very time-consuming, but do individualize the learning process, help to relieve student anxieties, and permit us to take account of subjective, idiosyncratic problems in writing style.

Particularly during the first week of the course, we must force feed the students a great deal of new material in preparing them for the initial office memorandum, which they begin the third week. By that time, we will have discussed the elements of effective writing; legal bibliography, including library tours; the elements of an office memorandum; and citation form. Despite the risk of resulting confusion, we are convinced that students learn more by plunging rather soon into the memorandum, without a more gradual buildup.

In drafting assignments, faculty supervisors try to select subject matter that amplifies the core curriculum of the first year, which is oriented to the common law of the several states in the federal union.[20] From the start, however, students are exposed to statutes as well as common law, and some amount of international law. We always place problems in an actual jurisdiction; hypothetical jurisdictions are best left to final exams. Although for a single assignment it is difficult to draft alternative problems of approximately the same degree of difficulty and at approximately the same stage of substantive learning, we do so in order to minimize competition for materials during the inevitable library scramble for key materials. The final, first semester memorandum typically centres on a rather extended application of the core curriculum; for example, a final first semester problem centred on the international movement of cultural property, with issues relevant to their classroom discussions on personal property.

READINGS

Because we are convinced that the intertwined skills of research and writing are best learned by doing, rather than by reading, the course requires little formal reading. Required readings include *The Elements of*

[20] That is, Property, Contracts, Torts, Introduction to Jurisprudence, and Civil Procedure.

Style,[21] the *Harvard Citator*[22] (for classroom, workshop and individual reference), several readings from books on reserve,[23] and my own introductory materials, which number about 80 pages.[24]

At the very least, legal research and writing ought to look as if it were fun, and I think its appeal can be more than cosmetic. Too many published materials read like military field manuals. We do, however, encourage students to consult our reserve collection of published materials on specific points, and include a list of these sources on the course syllabus. We have also used films, but based on student apathy, have not found them to be worth the trouble of arranging for them.

SUMMARY OF STRENGTHS AND WEAKNESSES

" 'When I use a word', Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'.

'The question is', said Alice, 'whether you can make words mean so many different things'.

'The question is', said Humpty Dumpty 'which is to be the master—that's all'."

Lewis Carroll, *Through the Looking Glass*

Our program, an example of the new approach to legal writing in United States legal education, seeks to make students masters of language. In sum, what are the program's strengths and weaknesses? The student newspaper of the law school provides an "insider's" view:

"Legal research and writing is the most traumatic and demanding of the first year courses. It puts students in direct personal contact with the criticism of professors. It strains the student ethics as many are forced to use a limited number of library resources in a very short time period in the preparation of a brief or memorandum. In fact, while the College of Law is remarkable for the absence of cutthroat competition, most of what does exist is traceable to first year research and writing. It is a rare student who does not bear some scars from the experience.

[21] W. Strunk, Jr. and E. W. White, *The Elements of Style* (3rd ed. 1979). My students refer to the program's reliance upon this source as "Strunking and Whiting".

[22] *A Uniform System of Citation* (12th ed. 1978).

[23] See especially F. Cooper, *Writing in Law Practice* (1963); M. Rombauer, *Legal Problem Solving* (3rd ed. 1978); R. Dickerson, *The Interpretation and Application of Statutes* (1975). Materials on library reserve include M. Cohen, *How to Find the Law* (7th ed. 1976); M. Cohen, *Legal Research in a Nutshell* (3rd ed. 1978); J. Jacobstein and R. Mersky, *Fundamentals of Legal Research* (1977); M. Price and H. Bitner, *Effective Legal Research* (3rd ed. 1969) (or M. Price, H. Bitner and S. R. Byslewicz, *Effective Legal Research* (4th ed. 1979)).

[24] These materials include comments on the role of language; examples of different forms of legal communication; several generally humorous sets of writing errors, some fanciful, others actual; a set of "do's" and "don'ts"; primers on such themes as citation form, office memoranda, statutory research in Oregon, state court structure, and effective negotiation of contracts. Quips and quotes are sprinkled throughout the materials to instill an appreciation of the subject matter in an intellectually stimulating and entertaining way without delving very deeply into the subject.

> No one can deny that the present research and writing course is strong. Quality performance is demanded and the professors devote themselves to the task of careful evaluation of such work. This is as it should be, for the course has pervasive career implications."

The legal writing program at Willamette is rigorous; no wheel is completely round. The workload is demanding for both students and faculty. In cost-benefit terms, our program is expensive because it is intensive. For us teachers, there can be, in Professor Dickerson's somewhat exaggerated words, "the stupefying tedium of scrutinizing each student's written work".[25] Also, the program may impose too much responsibility on individual students to budget their time in such a way as to work efficiently and keep up in other courses. The program may also generate too much competition among students. On the other hand, we encourage students to collaborate to an ethically responsible extent with each other, so long as each end product essentially reflects individual effort. A possible disadvantage of my specific emphasis on good English usage is that it leaves only limited time for identifying the presumed, or sometimes prescribed, steps of legal analysis. Faculty supervisors of the writing program defer for that instruction to colleagues who teach first-year substantive courses. Fortunately, the latter are keenly aware of the underlying philosophy and methodology of the writing course. Because faculty and students concur that the wheel of legal research and writing helps move the learning process, the Willamette program enjoys the luxury of encouragement and support. Consequently, the course has become intensive, with nearly unlimited opportunity for cycles of practice, individual consultation, reworking, feedback and close supervision otherwise of student assignments.

[25] Dickerson, op. cit. fn. 10 at 374.