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Experiential Legal Writing before Law School: Undergraduate Judicial Opinions

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EXPERIENTIAL LEGAL WRITING *BEFORE* LAW SCHOOL: UNDERGRADUATE JUDICIAL OPINIONS

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First year doctrinal courses at American law schools typically require students to read large numbers of judicial opinions. However, very few first-year legal writing courses teach students how to write opinions.[1] The assignments in first-year legal writing courses focus on documents that junior lawyers typically write, such as legal memoranda, briefs, and client letters.[2] As a result, first-year students are unlikely to gain experience in learning how to write the most common form of legal document they see during their first year, the judicial opinion.

This anomaly reflects the long-standing divergence in legal education between doctrinal and experiential education. Throughout most of their history, American law schools have taught doctrinal law separately from legal writing. While law schools have expanded the teaching of lawyering skills, most have been hesitant to integrate the teaching of legal writing into their doctrinal curriculum. At 72% of law schools, first-year legal writing courses are "not connected" with what students learn in doctrinal courses.[3] This means that in almost three-quarters of law schools, the cases students read in their doctrinal courses are not related to their legal writing assignments. There is "some coordination" of topics between first-year legal writing courses and doctrinal courses at 23% of law schools, and "substantial coordination" at only nine schools, or 5%.[4]

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[1] The annual survey of the Legal Writing Institute, an organization of law school writing professors, does not even list opinion writing as a category of assignments for first-year legal writing courses. Association of Legal Writing Directors, *Report of the Annual Legal Writing Survey 2014*, (hereinafter ALWD Survey 2014) at 13, *http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf*.

[2] *See, e.g.,* Ian Gallagher, *Enigma: A Variation on the Theme of Legal Writing's Place in Contemporary Legal Education*, 1 J. Experiential Learning 60, 62-63 (2013), *quoting* ALWD Survey 2014.

[3] ALWD Survey 2014 at 16.

[4] *Id.*

To my knowledge, no other area of graduate education separates writing instruction from substantive instruction. In Political Science, for example, writing is taught within doctrinal courses, not in a separate writing course. Nevertheless, the division between first-year substantive and practical teaching has persisted in law schools since they replaced the apprenticeship system in the late nineteenth century.[5]

In this article, I first explore why law schools discouraged the teaching of legal doctrine when they were incorporated into American universities in the late nineteenth century. I then examine why the resurrection of practical legal training in law schools led to a separate and distinct class of legal writing professors. I contrast this history with undergraduate constitutional law classes that integrate the teaching of doctrine with legal writing, and identify potential benefits to prelaw students who take such courses. Finally, I discuss why teaching opinion writing is an ideal assignment for future law students, and suggest that legal writing professors collaborate with undergraduate instructors to improve the training of future lawyers.

I.
Practical legal training before the Civil War

In the early decades of the United States, most lawyers did not attend law school. Instead, they paid a fee to apprentice to a practicing attorney, who would assign them various tasks in their offices.[6] Much apprentice work involved copying writs and pleadings, which provided limited practical experience in legal writing. Most lawyers had little time to actually teach apprentices about legal writing, and "apprentices often felt their writing was more drudgery than education."[7]

The first school for lawyers was established by Tapping Reeve in Litchfield, Connecticut, in 1784.[8] Anyone could enroll; there were no educational prerequisites.[9] The Litchfield curriculum consisted of a 14-month long series of lectures, during which students took verbatim notes. Later, they recopied and bound these notes to form a personal

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[5] *See, e.g.* Robert Stevens, *Law School: Legal Education in America from the 1850s through the 1980s* (1983); David S. Romantz, *The Truth about Cats and Dogs: Legal Writing and the Law School Curriculum,* 52 Kan. L. Rev. 105, 109 (2003).

[6] *See* Louise Harmon, *The Lawyer Scribe: The Litchfield Law School, Laptops, and the Metaphysics of Soul Searching*, 32 Legal Stud. F. 837 (2008).

[7] Jeffrey D. Jackson & David R. Cleveland, *Legal Writing: A History from the Colonial Era to the End of the Civil War,* 19 J. Legal Writ. Inst. 191, 199 (2014).

[8] Gail Hupper, *The Rise of an American Doctorate in Law: Origins through World War II,* 49 Am. J. Legal Hist. 1, 6 (2007).

[9] *Id.*

legal reference book they could use in their practice.[10] Reeve also offered optional moot court exercises that included the preparation of writs and pleadings as well as oral argument.[11] There were no written examinations; students received a letter of attendance that they could use as proof of having engaged in legal study.[12] Litchfield became the model for other proprietary law schools that were run by practicing lawyers, many of which collapsed when the lawyer retired.[13]

The curriculum of these law schools contrasted sharply with how law was studied at American colleges in the early nineteenth century. Colleges "viewed their mission as training students for moral citizenship rather than imparting particular knowledge,"[14] so legal theory was an acceptable subject, but not the development of practical legal skills. While several colleges hired professors of law shortly after the ratification of the Constitution, they rarely established a degree program in law. Instead, most hired a successful lawyer or judge to lecture on legal subjects.[15] Aspiring lawyers favored apprenticeship training because it provided experiential learning that was essential if they wanted to practice law.[16]

II.
How university status discouraged practical training in law schools

As the United States became more industrialized, demand arose for more rigorous postsecondary education. The collegiate focus on classics and philosophy was no longer "sufficient to support either the pursuit of abstract research or the roles citizens would be filling in a changing society. In addition, scientific discovery meant that there was more and more knowledge to communicate, and more and more fields came to be viewed as within the purview of academic study."[17] Educational leaders looked to European universities for ways to improve American higher education. They found that most European universities included a separate law faculty staffed by full-time professors who "viewed themselves as scholars first and teachers second."[18] These professors examined law theoretically, often applying ideas from polit-

[10] *Id.*
[11] Jackson & Cleveland, *supra* note 7, at 201.
[12] Harmon, *supra* note 6, at 872.
[13] Romantz, *supra* note 5, at 109-10.
[14] Hupper, *supra* note 8, at 8.
[15] Jackson & Cleveland, *supra* note 7, at 202-04. The one exception was Transylvania College in Lexington, Kentucky, which no longer has a law school. *Id.*
[16] Hupper, *supra* note 8, at 7.
[17] *Id.* at 8.
[18] *Id.* at 9.

ical science, economics, and sociology. Their lectures were addressed not only to future lawyers, but also to students planning careers in government or business. European law faculties did not offer experiential training in law, and students who planned to practice law had to obtain practical training through internships at law firms and government agencies.[19]

The privileged place of legal study in European universities also appealed to American law teachers, most of whom were employed on a part-time basis.[20] To gain professor status, these instructors had to overcome the objection that American legal study—unlike its continental counterpart—was still seen as a trade.[21] Transforming American legal education into a suitable subject for university education required a radical change in pedagogy. This began at Harvard Law School in 1870, when Dean Christopher Columbus Langdell introduced the case method of instruction.[22] Langdell purported to study law as a science, using judicial decisions as evidence of what the law was.[23] He used the Socratic method to direct the students' examination of judicial opinions. Langdell's method taught students "to discover and to classify doctrine buried in an appellate court opinion and to discern implicitly how the court reached its holding."[24] Cases became the essential building blocks of legal education, and collections of edited cases became the new legal texts.[25]

Langdell's scientific approach to teaching law[26] initially faced resistance from other Harvard professors. However, when his students began impressing law firms with their analytical ability, the Harvard faculty switched from lectures to the case method.[27] Other law schools soon followed, and by 1902 half of American law schools had adopted the case method.[28] The widespread adoption of Langdell's approach convinced university administrators that the study of law had become sufficiently scientific to merit inclusion among other

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[19] *Id.*

[20] *Id.* at 12.

[21] Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117, 124 (1997).

[22] Stevens, *supra* note 5, at 52.

[23] Romantz, *supra* note 5, at 114-15.

[24] *Id.* at 138.

[25] Russell L. Weaver, *Langdell's Legacy: Living with the Case Method,* 36 Vill. L. Rev. 519 (1991).

[26] Langdell did not eliminate practical instruction from his classes, as he required students to prepare pleadings and argue motions in his civil procedure class. Burlette Carter, *Reconstructing Langdell,* 32 Ga. L. Rev. 1, 65-66 (1997-98).

[27] Hupper, *supra* note 8*,* at 12.

[28] Romantz, *supra* note 5*,* at 120.

university subjects.[29] By the 1920s legal education had achieved a highly prestigious place in American academia, which was further enhanced when universities began conferring a doctoral (J.D.) degree on their graduates.[30]

The incorporation of law schools into American universities did not immediately transform law teachers of law into tenured professors. In order to focus on teaching, writing, and legislative consultation, most legal instructors discontinued the experiential training they had previously provided.[31] According to a 1912 article in the *Harvard Law Review,* "[T]he recent law school graduate with a brilliant record is more and more called upon to become a professional law teacher at the time of leaving law school, or a short time thereafter. The rule is being more and more rigidly enforced that these men shall devote all their time to the teaching of law and shall not practice in any degree."[32] Since the law schools had become part of universities at which research and publication was most highly prized, scholarship became far more important to faculty promotion than training students to practice law.[33] Law schools devoted few resources to providing experiential education because this might make them "resemble a trade school."[34]

The effects of substituting legal scholars for practicing lawyers were recognized by the first Carnegie Report on Legal Education in 1921. The Report's author criticized university-based law schools for abandoning the training of lawyers in practical skills: "[T]here was no provision for practical training in advising clients or in conducting litigation, but only for the acquisition of theoretical knowledge."[35] The law school curriculum included no instruction in legal writing or oral argument, although some law schools did utilize librarians to teach research skills.[36] To obtain experiential training, students had to join extracurricular mooting clubs.[37] Because many law school graduates never received the skills training necessary to effectively practice

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[29] Hupper, *supra* note 8, at 13.

[30] Stevens, *supra* note 5, at 11.

[31] Hupper, *supra* note 8, at 12.

[32] Albert M. Kales, *Should the law teacher practice law?,* 25 Harv. L. Rev. 253, 253 (1912).

[33] Stevens, *supra* note 5, at 43.

[34] Arrigo, *supra* note 21, at 128.

[35] Alfred Z. Reed, *Training for the Public Profession of Law* 379-80. Stanford: Carnegie Foundation (1921).

[36] Romantz, *supra* note 5, at 128.

[37] *Id.* at 127.

law,[38] the law firms that hired them had to provide additional experiential training before they could effectively practice law.[39]

III.
PRACTICAL TRAINING RETURNS TO LAW SCHOOLS

In 1938, the University of Chicago became the first law school to establish a program to teach legal writing. In the 1940s, other law schools followed suit, although without the rigor of Chicago's 8-credit program.[40] Most legal writing courses in the 1940s were directed at providing remedial instruction for weaker students,[41] which meant they were considered peripheral to the focus of legal education. Chris Rideout and Jill Ramsfeld suggest this was because most law professors saw "legal writing as quite simple if one knows how to write. They never had a course in legal writing and they did just fine."[42] It was not until 1947 that the American Association of Law Schools recognized legal writing as a category of law school instruction.[43]

Instruction in this first generation of legal writing courses was premised on the assumption that writers knew what they meant to convey and only needed to determine the best way of communicating that meaning.[44] As a result, the goal was to develop writing skills rather than using the writing process to improve students' understanding of law.[45] According to Chris Rideout and Jill Ramsfeld, this "formalist perspective"[46] meant that "[w]riting courses should be kept in their place, away from so-called substantive courses."[47] Consequently, legal writing courses were developed outside of the traditional first-year curriculum, and taught by a separate cohort of faculty.

The newly-hired legal writing instructors posed a threat to the scholarly status of doctrinal professors. Law faculties did not accept legal writing as a subject of serious scholarship, and legal writing

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[38] Leonard D. Pertnoy, *Skills is not a Dirty Word*, 59 Mo. L. Rev. 161, 177 (1994).

[39] Arrigo, *supra* note 21, at 138-39.

[40] Marjorie Dick Rombauer, *First Year Legal Research and Writing: Then and Now*, 25 J. Leg. Ed. 538, 541 (1973).

[41] *Id.* at 540.

[42] J. Christopher Rideout & Jill J. Ramsfeld, *Legal Writing: A Revised View,* 69 U. Wash. L. Rev. 35, 40 (1994).

[43] Rombauer, *supra* note 40, at 540.

[44] *See, e.g.* Arrigo, *supra* note 21, at 138, quoting Professor William Pedrick: "Writing is writing. The ability to write an organized, persuasive argument is in no way peculiar or special to the legal profession. It follows that law teachers are no better and indeed perhaps less equipped to teach writing skills than would be those persons in the university who approach that task as their specialty. . ."

[45] *See* Rideout & Ramsfeld, *supra* note 42, at 40-47.

[46] *Id.* at 49.

[47] *Id.* at 45.

instructors were usually denied professorial rank.[48] Law faculties reflected this hierarchy in several ways. Legal writing teachers were placed on a separate employment path (often for short, non-renewable terms) that did not lead to teaching doctrinal courses.[49] Relegated "to the lowest rungs on the academic ladder,"[50] writing instructors were often denied faculty voting rights and given offices inferior to those of doctrinal professors.[51] Some law schools publicly boasted about how cheaply they could teach legal writing. The *Journal of Legal Education* published articles such as "A Low Cost Writing Program: The Wisconsin Experience" (1959)[52] and "Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience" (1973).[53]

The second-class status of legal writing professors did not prevent them from publishing about their pedagogical methods. Linda Flower and John Hayes used cognitive psychology to reexamine the way in which writers write.[54] Using empirical studies, they constructed a model of the writing process that reflected the dynamic interaction between learning and writing.[55] In 1982, Maxine Hairston challenged the formalist perspective by claiming that how people write is far different than how they have been taught:

> [W]riting is an act of discovery for both skilled and unskilled writers; most writers have only a partial notion of what they want to say when they begin to write, and their ideas develop in the process of writing. They develop their topics intuitively, not methodologically. Another truth is that the writing process is not linear, moving smoothly in one direction from start to finish. It is messy, recursive, convoluted, and uneven. . ..[56]

The recognition that writing involves far more than accurately conveying known ideas led legal writing scholars to develop two new approaches to their craft.

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48 Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy,* 11 Legal Writing 3 (2005).

49 Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 Cardozo Women's L.J. 75, 77 (1997).

50 Romantz, *supra* note 5, at 132.

51 Edwards, *supra* note 49, at 88.

52 Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program: The Wisconsin Experience,* 11 J. Leg. Educ. 387 (1959).

53 Kenneth B. Germain, *Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience 1971-72,* 25 J. Leg. Educ. 595 (1973).

54 Linda S. Flower & John R. Hayes, *The Dynamics of Composing: Making Plans and Juggling Constraints,* in *Cognitive Processes in Writing* (Lee W. Gregg & Erwin R. Steinberg eds., 1980).

55 *Id.* at 31.

56 Maxine Hairston, "The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing," 33 *College Composition and Communication* 76, 85 (Feb. 1982).

The process approach recognizes that legal writing generates knowledge as writing takes place.[57] According to Phillip C. Kissam, "A continuous and reciprocal feedback can occur between a writer's partially completed text or texts and her thoughts, memories, and instincts about a chosen subject. This feedback can enrich the writer's vision and stimulate her perception of connections . . . ."[58] Through a dialectical process, writers continuously engage in creation, using language to generate or revise ideas and then attempting to embody those ideas in specific words.[59] This process is analogous to a conversation with oneself about a subject that becomes progressively better-defined with each successive draft.[60]

The constructivist approach to legal writing is based on post-modernist literary theory. Constructivism posits that textual meaning is inherently contextual, as it is created by the members of the interpretive community in which the text is situated.[61] Since legal writing is directed at communicating within a legal community defined by certain roles, purposes, and ideologies,[62] students need to learn the special meaning and usage rules the legal community gives to certain words and phrases. According to James Boyd White, "The lawyer is a user of words; but . . . must use them in a world of unexpressed and inexpressible experience."[63] The constructivist approach to legal writing teaches this experience to law students by immersing them within the community of legal readers.[64] As students work toward becoming attorneys, they learn to conform their writing to the expectations of the legal profession.

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[57] Rideout & Ramsfeld, *supra* note 42, at 52-53.

[58] Phillip C. Kissam, *Thinking (by Writing) about Legal Writing*," 40 Vand. L. Rev. 135, 140 (1987).

[59] Rideout & Ramsfeld, *supra* note 42, at 54.

[60] *See* Theresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986); Kissam, *supra* note 58.

[61] Adam Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing,* 58 Baylor L. Rev. 893, 924 (Fall 2006).

[62] Rideout & Ramsfeld, *supra* note 42, at 57.

[63] James Boyd White, *The Legal Imagination* 3 (2d ed. 1985).

[64] Todd, *supra* note 61, at 924-25.

IV.
LEGAL WRITING PROFESSORS DEVELOPED NEW INSTITUTIONS AND INSTRUCTIONAL FOCUS

Relegated to a "lower caste"[65] in legal academia, legal writing instructors spent their time "Building a Room of Our Own."[66] This meant developing practices and institutions that were distinct from those of doctrinal professors. Whereas doctrinal faculty worked independently on their courses, legal writing instructors worked together, often using a common curriculum or at least shared assignments.[67] Whereas doctrinal faculty made no comments on student exams, legal writing instructors gave extensive marginal comments and even allowed students to revise their work.[68] Whereas doctrinal faculty intimidated large first-year classes students with the Socratic method,[69] legal writing instructors used more collegial methods in smaller classes.[70] At most law schools, no one could confuse a doctrinal course with a legal writing course.

In addition to establishing different pedagogic methods, legal writing instructors created new conferences, organizations, and publications that were not shared with their doctrinal colleagues. To combat what Marjorie Dick Rombauer called a "depressing sense of isolation,"[71] legal writing instructors established the Legal Writing Institute (LWI) to promote sharing of pedagogic techniques.[72] LWI subsequently created a journal to publish scholarship about legal writing.[73] In 1984, legal writing faculty initiated a biennial conference on legal writing[74] that drew attendees from throughout the United States and Canada. In 1995, the directors of law school writing pro-

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65 Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 Leg. Comm. & Rhet. 12, 14 (2002).

66 Linda L. Berger, Linda H. Edwards, & Terrill Pollman, *The Past, Presence and Future of Legal Writing Scholarship: Rhetoric, Voice and Community,* 16 Legal Writing 521, 528 (2010).

67 Jan M. Levine, "*You Can't Please Everyone So You Better Please Yourself": Directing or Teaching in a FirstYear Legal Writing Program,* 29 Val. U. L. Rev. 611, 618 (1995).

68 Romantz, *supra* note 5, at 144; Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 Or. L. Rev. 1007, 1016 (2001).

69 Steven R. Sedberry, *Law School Labyrinth* 81 (2d ed. 2001).

70 "[A] significant portion of a LRW [legal research and writing] teacher's *work* involved caring, flexible, creative, enthusiastic interaction with students. . .." Arrigo, *supra* note 21, at 160.

71 *See* Mary S. Lawrence, *The Beginning: Extraordinary Vision, Extraordinary Accomplishment*, 11 Legal Writing 213, 221 (2005).

72 *Id.* at 224.

73 *See www.lwionline.org/journal_of_the_lwi.html*.

74 Lawrence, *supra* note 71.

grams formed the Association of Legal Writing Directors,[75] which established the *Journal of the Association of Legal Writing Directors.*[76] These new journals specialized in articles about legal writing, which had been slighted by student-run law reviews.[77]

Having marked their territory in legal academia, legal writing faculty focused their efforts on providing the experiential training that doctrinal professors had slighted since the nineteenth century. Their contribution to legal education gained increasing recognition after the release of the American Bar Association's McCrate Report in 1992. This report chastised law schools for the poor quality of their graduates' writing skills: "The lament of the practicing bar is a steady refrain: 'They can't draft a contract, they can't write, they've never seen a summons. . . .'"[78] Law schools adapted by increasing the extent and quality of practical legal training. When the ABA revised its accreditation standards in 1996 to require the teaching of legal writing,[79] legal writing faculty could celebrate having secured their place in legal academia. While they still lacked the pay and prestige of doctrinal faculty, the ABA's mandate recognized them as providing an essential part of legal training.

However, this recognition did not merge the separate paths followed by doctrinal and legal writing faculty. Instead, most law schools continued to separate legal writing instruction and first-year doctrinal classes.[80] This division of responsibilities appears to have provided benefits to both types of faculty. Doctrinal professors can praise their lower-paid, lower-status legal writing colleagues for their contribution to legal education while continuing to focus on scholarship instead of practical training. Legal writing professors can enjoy the enhanced pay and improved working conditions they have earned over the past decade,[81] while teaching their courses with minimal interference from doctrinal faculty. Given the history of legal education, the disjunction between doctrinal teaching and legal writing instruction is quite

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[75] Arrigo, *supra* note 21*, at* 179.

[76] *See www.alwd.org*.

[77] *See* Berger et al., *supra* note 66, at 543.

[78] Robert McCrate et al., *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 4 (1992).

[79] American Bar Association Section of Legal Education and Admissions to the Bar, "Standards for Approval of Law Schools and Interpretations." *ABA Journal* (August 1997) 113.

[80] *See* 2014 AWLD Study, *supra* note 1.

[81] This does not mean that legal writing professors have approached parity with doctrinal professors. *See, e.g.,* Kristen K, Tiscione and Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty,* 31 Colum. J. Gender & L. 47 (2015); Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies,* 31 Colum. J. Gender & L. 111 (2015).

understandable. But it is not the only model for teaching law in American universities.

V.
Another model for teaching legal writing: undergraduate constitutional law courses

My undergraduate constitutional law courses do not follow the law school paradigm of separating writing assignments from the study of case law. At Touro College, where I teach, students can take two courses on American constitutional law: The Supreme Court and the Constitution, and Civil Rights and Civil Liberties. In these classes, my students write (and rewrite) a Supreme Court opinion. In teaching my students how to write an opinion, and identifying the choices that judges must make as they write, my goal is to better prepare them for understanding and analyzing the hundreds of cases they will read in law school. My intent is to help bridge the first-year law school gap between learning law and writing about law.

During most semesters, I choose a case that is before the Supreme Court, and limit the issues for discussion to two or three. Occasionally, no appropriate Supreme Court case is pending, and I construct a hypothetical case. I allow the students to choose their side,[82] and they practice before the class and then present oral argument to a panel of three lawyers. All students listen to all arguments, which gives them ample opportunity to think about how they would decide the issues. The students then switch perspective from advocate to justice, and draft an 8-10 page opinion based on a case-specific outline I provide. I work with the students to revise and refine their analysis, and provide comments on multiple drafts of their opinions. There is no requirement that they write their opinion on the side they previously argued.

For the spring 2014 semester I chose *Hobby Lobby, Inc. v. Sebelius,*[83] which examined whether the Religious Freedom Restoration Act allowed individuals to claim exemption from regulations implementing the Patient Protection and Affordable Care Act. The constitutional issues in *Hobby Lobby* involved the application of several Free Exercise cases we had studied. The statutory interpretation issues were not complicated, and the students actually found them

[82] Most of the time the students are evenly divided, but occasionally I ask a student to switch sides to even out the numbers for oral argument.

[83] The Supreme Court decision is *Burwell v. Hobby Lobby, Inc.,* 573 U.S. ___, 134 S.Ct. 2751 (2014).

interesting. I scheduled student arguments after the Supreme Court heard argument so that I could pose some of the same questions asked by the justices. When it came time to write opinions, two chose the opposite side from the one they argued. The students took the arguments seriously and focused their analysis on governing principles of law rather than their personal political beliefs.

For the spring 2015 semester, my students focused on the cluster of cases that the Supreme Court grouped under the name *Obergefell v. Hodges.*[84] Since the Court did not hear argument until late April, I could not use their questions for the oral arguments. Instead, I had the students read some of the parties' briefs as preparation. The students (conveniently) split evenly when choosing sides for argument, but several of those who argued against a right to same-sex marriage switched sides when they wrote their opinions. Once again, I saw a noticeable change take place in class discussions about the case. Before the arguments, the students were most concerned about strategy and tactics; after, they were most interested in the proper application of precedent interpreting the Due Process and Equal Protection Clauses. Writing this opinion turned out to be more difficult for the students than I expected, but the students' final opinions reflected significant improvement in their ability to explain and apply legal concepts.

Opinion writing achieves the goals of the process-based approach to legal writing. Phillip Kissam illustrates this approach in discussing "the need to interpret or synthesize some related judicial opinions in order to establish one or more standards that will function to organize, explain, and justify these decisions."[85] This is what students do repeatedly when they write opinions, and what many of them will do when they enter law school. The process of writing opinions has helped my undergraduate students understand how to formulate legal principles, a skill that aids them in class discussions about legal doctrine. As one of my 2014 students wrote in an email, "the assignment gave me a deeper understanding of Supreme Court opinions, and of constitutional law in general. It helped strengthen my ability to clearly analyze constitutional law cases."[86] Another student email similarly validated the process approach: "writing the opinion was helpful because it helped me approach the issues at hand in a clear and logical fashion."[87]

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[84] 135 S. Ct. 2071 (2015).

[85] Kissam, *supra* note 58, at 140.

[86] *See* comments on file with author.

[87] *Id.*

Opinion writing also fits into the constructivist approach to legal writing. Judges write according to norms and conventions that are usually unrecognized by those who lack legal training. As students read and discuss opinions, they learn to recognize those standards and understand how they affect the structure of opinions and the linguistic choices judges make. An opinion-writing assignment allows students to incorporate judicial norms and conventions into their own writing, which gives them an impression of what it would be like to be a lawyer. According to Ruth Vance, learning to write opinions "can cause students to look at the legal process from a different perspective and to become better critical readers and users of opinions."[88] When my 2015 students were writing their opinions, they voluntarily met before our late-afternoon classes to share ideas and critique each other's work. Although each student was required to submit a separate opinion, the opinion writing assignment provided an opportunity for intellectual collaboration that they will hopefully repeat in law school.

V.
Opinion writing in law school—but also before law school

Teaching opinion writing in law school is not a novel idea. Law schools have offered upper-class electives in opinion writing for over two decades, and the number of law schools offering such classes has grown.[89] In 2007, 18 law schools offered courses on opinion writing;[90] by 2014, that number had increased to 44.[91] The principal goal of these courses is to improve the skills of students who would be interning or clerking with judges.[92] This goal is reflected in content of these courses, most of which is adapted from judicial training materials produced by the ABA Appellate Judges Conference or the Federal Judicial Center.[93]

While improving student performance in judicial clerkships is an important goal, I believe that opinion writing has independent value in helping students learn about law and the legal community. Opinion writing can best meet this goal with first-year students, but they are

[88] Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography,* 17 Legal Writing 197, 198 (2005).

[89] *Id.*

[90] *See* Association of Legal Writing Directors, *Report of the Annual Legal Writing Survey 2010*, at iii, *http://www.awld.org/survey/survey_results/2010_Survey_Results.pdf*.

[91] ALWD Survey 2014, *supra* note 1, at 25.

[92] Vance, *supra* note 88, at 198.

[93] *Id.*

not the target audience of pre-clerkship opinion writing classes.[94] When I first presented my ideas to a faculty colloquium at Touro Law Center, I recommended that opinion writing assignments be incorporated into the first-year legal writing program, but was told by some legal writing professors that their first-year syllabi were already full. According to Associate Professor of Legal Process Sharon Pocock, "Given all there is to learn for beginning students, many of whom don't bring to law school the level of writing skills that would be desirable, judicial opinion writing simply doesn't fit into the time available in a first-year writing class. . . ."[95] The absence of this assignment from first-year legal writing programs[96] supports this conclusion. But this does not mean opinion writing belongs only among upper-level electives in law school. I believe that it can help prelaw students to develop skills they will refine when they go to law school.

The 2007 Carnegie Report criticized law schools for failing to adequately prepare law students to be lawyers, and concluded that law schools should make significant changes in their curriculum: "Students need a dynamic curriculum that moves them back and forth between understanding and enactment, experience and analysis. . . . Legal education needs to be responsive to both the needs of our time and recent knowledge about how learning takes place. . .."[97] The first of the Report's five recommendations was "Offer an Integrated Curriculum."[98] While the Report referred to courses that were offered in law school, I believe that law schools should recognize the benefits that undergraduate courses can provide in helping to improve students' understanding of legal doctrine. By working with professors who teach law to undergraduates, law school faculty can reap the benefits that come from having better prepared students in their first-year classes.

Until now, there has been minimal collaboration between undergraduate constitutional law teachers and law school writing professors in developing legal writing assignments. Law school writing professors have largely devoted their efforts on making students practice-ready, which means teaching writing skills students will use *after* law school. Legal writing professors have not devoted their efforts to improving the way legal writing is taught *before* law school. The website of the leading association of law school writing teachers, the Legal Writing

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[94] *Id.*

[95] *See* comments on file with the author.

[96] *See* note 2.

[97] William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (1983), at 8, archive.carnegiefoundation.org/elibrary/elibrary_pdf-632.pdf.

[98] *Id.* at 8-9.

Institute (LWI), appears to exclude undergraduate legal writing from its purview.[99] A review of articles published in recent editions of *Legal Writing: the Journal of the Legal Writing Institute*[100] finds none on topics relating to teaching legal writing outside of law school. The *Journal of the Association of Legal Writing Directors* is similarly devoid of articles about teaching legal writing to undergraduates.[101] The *Journal of Legal Education*[102] publishes articles about many subjects taught in law school, but again not about undergraduate teaching of legal writing. The absence of published articles about collaboration between law school writing professors and undergraduate law teachers vividly demonstrates the existence of this void.

Perhaps this is to be expected since law schools view themselves as *sui generis* among educational institutions. Unlike health science graduate programs that mandate completion of certain courses, law schools do not require specific courses for admission. NYU advises law school applicants:

> Admissions committees presume that you will spend sufficient time studying "law" while in law school, and they prefer that the undergraduate years be used to acquire a broad field of general knowledge upon which legal studies can be based. Similarly, most law schools actively discourage students from taking too many law-related classes as undergraduates."[103]

Given that the Carnegie Reports have long documented complaints about poor writing by law school graduates[104], it is time for law schools—and legal writing professors—to recognize the opportunity to help undergraduates who engage in legal writing.

Experiential legal education need not wait until law school. Assignments such as opinion writing can provide valuable experience for future law students while they are taking undergraduate classes.

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99 *www.lwionline.org*.

100 *www.lwionline.org/journal_of_the_lwi.html*.

101 *www.alwd.org/lcr*.

102 *jle.aals.org*.

103 The Barbara & Evan Chesler Prelaw Program, "The Prelaw Curriculum," at *www.prelaw.cas.nyu.edu/page/prelaw.handbook.curriculum*.

104 *See, e.g.,* Reed, *supra* note 35, at 378-80.