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# Enigma: A Variation on the Theme of Legal Writing's Place in Contemporary Legal Education

**Cover Page Footnote**

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# ENIGMA: A VARIATION ON THE THEME OF LEGAL WRITING'S PLACE IN CONTEMPORARY LEGAL EDUCATION

IAN GALLACHER\*

Edward Elgar's *Variations on an Original Theme (Enigma)* was first performed in June 1899.<sup>1</sup> The work was an instant success, no doubt in part because it presented a puzzle for the early listeners to work out. The work was dedicated "to my friends pictured within,"<sup>2</sup> and before each variation Elgar included a series of initials, nicknames, or, in one case, three asterisks, that hinted at the person being pictured in each variation. In time, the identities of almost all of these dedicatees have been uncovered<sup>3</sup> and audiences can now listen for the sound of Isabel Fitton ("Ysabel" of the sixth variation) tentatively working on a string crossing exercise on her viola,<sup>4</sup> Arthur Troyte Griffiths ("Troyte" of the seventh variation) slamming down the piano lid in frustration after failing to play a piano piece well,<sup>5</sup> and Dan, a bulldog owned by Dr. G.R. Sinclair ("G.R.S. of the eleventh variation), barking to celebrate his return to dry land after falling into the River Wye.<sup>6</sup>

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\* Ian Gallacher is a Professor of Law and Director of the Legal Communication and Research Program at Syracuse University College of Law. This article expands on the topic of a presentation I gave in 2013, in collaboration with Professor David Thomson of the University of Denver, at the 2013 ALWD conference. Thanks to Dean Hannah Arterian for her continued support, and to my fellow Legal Communication and Research Professors at Syracuse: Elizabeth August, Elton Fukumoto, Andrew Greenberg, Lynn Levey, Aliza Milner, Kathleen O'Connor, Deborah O'Malley, Lucille Rignanese, Richard Risman, and Shannon Ryan, and to the too-numerous-to-name group of student assistants who have worked with all of us through the years. As always, this is for Julie McKinstry.

<sup>1</sup> MICHAEL KENNEDY, *PORTRAIT OF ELGAR* 83 (2d ed. 1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 95. The exception is the variation preceded by asterisks. It is generally supposed that the dedicatee was Lady Mary Lygon, a friend of Elgar. A musical quotation from Mendelssohn's "Calm Sea and Prosperous Voyage" overture, and a curious timpani effect thought to simulate the throbbing of ocean liners' engines, is often suggested as support for the association of this variation with Lady Lygon because she was believed to have been on an ocean trip to Australia at the time of the work's composition. In fact, though, the *Variations* were completed before Lady Lygon began her voyage. Recent speculation has focused on Helen Weaver, a woman with whom Elgar had a romantic relationship before marrying his wife and who had sailed to New Zealand in 1885, 14 years before the *Variations* were composed.

<sup>4</sup> *Id.* at 92.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 94.

The “Enigma” of the work’s subtitle, though, was not the identities of the various subjects of Elgar’s music portraits. Elgar alerted the audience to the presence of this more complicated puzzle in his program notes for the work’s first performance: “The enigma I will not explain — its ‘dark saying’ must be left unguessed, and I warn you that the apparent connection between the Variations and the theme is often of the slightest texture; further, through and over the whole set another and larger theme ‘goes,’ but is not played.”<sup>7</sup>

The identity of this “larger theme” has led to over a century of speculation and analysis by amateur and professional musicologists. Themes from “God Save the King” “Auld Lang Syne,” and “Rule Britannia,” among others, have been suggested,<sup>8</sup> as have less tangible themes like “Friendship” or Elgar himself.<sup>9</sup> There is ultimately no solution to the enigma; during his life, Elgar left only hints that lead in several different directions and he died without leaving a definitive answer. The unsolved problem, though, has not diminished the work’s popularity and it remains, as it was from the time of its first performance, one of the most popular pieces Elgar wrote<sup>10</sup> and one of the most popular pieces of English classical music ever written.

This structure of a known theme inspiring multiple variations, with an overarching unknown and unheard theme, can also serve as helpful metaphor for the role of legal writing in contemporary legal education. Just as in the musical work, legal writing has a theme — the teaching of lawyering skills through an experiential model during the first year of law school — that can be realized in many varied ways. And just as in the Enigma Variations, it is possible to imagine a broader, less tangible “theme” that can inform the various different parts of a legal writing program and draw them together as part of a larger whole.

This article will suggest one possible larger theme for legal writing, while recognizing that — as with the “Enigma Variations” — many different themes could be equally valid and could serve the same function. After reviewing the current state of legal writing in the legal academy, and the status battles that continue to be fought by

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<sup>7</sup> KENNEDY, *supra* note 1, at 84.

<sup>8</sup> *Id.* at 85.

<sup>9</sup> *Id.* at 98. The suggestion that Elgar himself might be the larger theme that goes “over” the entire piece but is never played is made more difficult by the fact that the final variation — E.D.U. — is intended as a representation of Elgar. “Edoo” was his wife’s pet name for Elgar.

<sup>10</sup> The honor of most popular Elgar composition must go to the first of his “Pomp and Circumstances” marches, with a trio beloved in the United States for its evocation of numerous convocation and graduation ceremonies and in England for its role as the melody of the patriotic song “Land of Hope and Glory.”

those who teach it, the article will suggest that it is time for at least a temporary lull in hostilities and that legal writing and doctrinal<sup>11</sup> faculty members should work together at a time of crisis for law schools. The article reviews the benefits to be gained by a law school when it has a strong, well-functioning legal writing program, and concludes with a discussion of Syracuse University's identification of the larger theme that runs over the day-to-day variations of its legal writing program. While each institution can, and perhaps should, find its own theme, Syracuse's experience can serve as an example of how this approach can add value and depth to the program and can, without substantial additional effort or any additional cost, provide a significant and previously unrealized benefit to the students.

### 1. *Legal Writing in Law Schools*

There is no debate that legal writing is a crucial part of every first year law school curriculum. The American Bar Association has made clear that accredited law schools must provide "substantial instruction in . . . writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous experience after the first year."<sup>12</sup> While there are many possible ways to interpret this requirement,<sup>13</sup> most law schools satisfy it by requiring their students to take a first year course in legal writing and research.<sup>14</sup>

Legal writing programs typically introduce students to the practice of written legal analysis by requiring them to write practice-

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<sup>11</sup> I use the term "doctrinal" here as a convenient and familiar shorthand to denote subjects that study a definable body of developed and still-developing law like torts, contracts, civil procedure, and property, as opposed to skills courses, like legal research and writing, clinical programs, and externship programs, that focus on skills training. As with all such shorthand labels, the "doctrine/skills" dichotomy is inaccurate and potentially misleading, but it saves time and space.

<sup>12</sup> ABA, 2014-2015 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(3), *available at* [http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf).

<sup>13</sup> There are so many possible ways of interpreting the ABA's requirement that the ABA has published an invaluable Sourcebook on Legal Writing Programs that, among other things, describes the many ways law schools have conformed to it. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS (2d ed. 2006)[hereinafter "Sourcebook"].

<sup>14</sup> ABA-APPROVED LAW SCHOOLS, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited Sept. 16, 2014) (noting that, at the time of this writing, there are 204 ABA approved law schools). *See also*, LEGAL WRITING INSTITUTE & ASSOCIATION OF LEGAL WRITING DIRECTORS, REPORT OF THE ANNUAL LEGAL WRITING SURVEY, *available at* <http://lwionline.org/uploads/FileUpload/2012Survey.pdf> (last visited Sept 16, 2014) (noting that all 183 responding law schools offer legal writing and research courses in the first year).

related documents like legal memoranda,<sup>15</sup> appellate briefs,<sup>16</sup> pre-trial briefs,<sup>17</sup> client letters,<sup>18</sup> trial briefs,<sup>19</sup> or other documents. The LWI/ALWD survey<sup>20</sup> does not record topics for these assignments, so it is impossible to tell from it, or from any other source,<sup>21</sup> to what degree legal writing programs across the country coordinate the topics of their assignments for a semester or for an entire year according to any organizing principle.

## 2. Status Issues for Legal Writing Faculty

Despite the important role for legal writing programs mandated by the ABA, their faculties continue to face status challenges within the legal academy. Certainly the ubiquity of legal writing programs has not translated into institutional status for many of those who teach in them. The LWI/ALWD Survey indicates that out of the 183 American schools (and one Canadian law school), 13 used tenured or tenure-track teachers specifically hired to teach legal writing and 6 hired tenured or tenure-track teachers as part of their first-year doctrinal load, while 82 schools hired full-time non-tenured or tenure-track teachers with short or long-term contracts, 19 schools used adjuncts, 2 used part-time faculty, and 62 used a complex hybrid staffing model to teach their legal writing courses.<sup>22</sup> Any way one looks at those numbers, they do not suggest that legal writing has obtained status parity with doctrinal subjects in the law school hierarchical model.

As one might expect, legal writing faculty have been vocal in their dismay about this institutional disparity. And a review of the literature on this topic certainly makes for dismal reading.<sup>23</sup> In an era

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<sup>15</sup> LWI/ALWD Survey, *supra* note 14 (stating that 172 schools require their students to write legal memoranda).

<sup>16</sup> *Id.* (138 schools).

<sup>17</sup> *Id.* (95 schools).

<sup>18</sup> *Id.* (93 schools).

<sup>19</sup> *Id.* (52 schools).

<sup>20</sup> *Id.*

<sup>21</sup> The LWI maintains an Idea Bank where attendees of the LWI's biennial conferences can both deposit and withdraw assignments. While this is a valuable indicator of what some schools are doing in their legal writing programs, and while it serves its principal function as a resource to help legal writing programs both efficiently and well, it is too small a sample, and too haphazardly organized, to use as a resource to make any broad claims about whether legal writing programs across the country organize their assignments according to any overarching scheme for the entire year. The idea bank is available at [http://www.lwionline.org/idea\\_bank.html](http://www.lwionline.org/idea_bank.html) (last visited Sept. 16, 2014).

<sup>22</sup> *Id.* at 5. In the interests of full disclosure, I am one of the fortunate legal writing faculty members to have tenure and full Professor status.

<sup>23</sup> There are too many articles written about the status disparities between legal writing and doctrinal faculties to list them all here and, in any case, my goal in this article is in part

when the importance of writing skills for graduating law students is well-appreciated, there seem few pedagogical or theoretical justifications for maintaining the inequitable treatment of legal writing faculties.

Law school administrations, however, would doubtless raise a practical reason for the agonizingly slow march towards equal status for legal writing faculties in the American legal academy. Put simply, placing all legal writing positions, in every law school in the country, on the tenure-track would be a significantly inflationary step at a time when law school enrollments are being dramatically reduced.<sup>24</sup> It might be desirable to give legal writing faculties the same status as their doctrinal colleagues, but for the foreseeable future, except for incremental change at some institutions, it probably isn't going to happen.

In this time of falling enrollment<sup>25</sup> and general challenges for law schools,<sup>26</sup> it seems there are more productive ways for law school faculties to be spending their time than continuing an unhelpful and ulti-

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to suggest that we declare a moratorium on such discussions. But in keeping with the genre requirement that an author provide at least some documentary support for claims made in the text, *see, e.g.*, Mitchell Nathanson, *Dismantling the "Other": Understanding the Nature and Malleability of Groups in the Legal Writing Professorate's Quest for Equality*, 13 *LEGAL WRITING* 79 (2007); David T. Ritchie, *Who Is on the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 *MERCER L. REV.* 991 (2007); Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 *UMKC L. REV.* 253 (2004); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 *U. KAN. L. REV.* 105 (2003); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 *Berkley Woman's L.J.* 1 (2001); Jo Anne Durako, *Second Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. LEGAL EDUC.* 562 (2000).

<sup>24</sup> *See, e.g.*, Mark Nuckols, *Legal Education Crisis: Law Schools Need to Cut the Fluff*, *HUFFINGTON POST* (March 12, 2013), [http://www.huffingtonpost.com/mark-nuckols/legal-education-crisis-sc\\_b\\_2863170.html](http://www.huffingtonpost.com/mark-nuckols/legal-education-crisis-sc_b_2863170.html). I could have picked any one of an innumerable number of articles that sound the same basic message: legal education is in crisis and needs to change. For some perspective, it is worth noting the same klaxon-call of warning being sounded in 1948. *See* Julius Cohen, *Crisis in Legal Education*, 15 *U. CHI. L. REV.* 588 (1948). Interestingly, some of the solutions to the two legal education crises are diametrically opposed, with contemporary sympathies running towards two year law degrees with an optional third year. *See, e.g.*, Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 *LEG. & PUB. POL'Y.* 599 (2012). One potential 1948 solution, however, was "experimentation with four-year law schools (instead of the conventional three)" (*see* Cohen, 15 *U. CHI. L. REV.* at 588).

<sup>25</sup> *See, e.g.*, Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs are Cut*, *NEW YORK TIMES* (Jan. 30, 2013) *available at* <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?pagewanted=all&r=0> (discussing the 20 percent decrease in law school applications from the previous year and a 38 percent decline from 2010).

<sup>26</sup> The titles of two recent books by law school professors suggest the depth of these challenges: Brian Z. Tamanaha, *FAILING LAW SCHOOLS* (2012), and Paul Campos, *DON'T*

mately sterile conflict over internal status issues. Our institutions are in trouble, and everyone — faculty, administrations, employers, and, most of all, students — would be better served by at least a temporary truce in the status wars as we all pull together to find a way to improve law schools. By doing so we would be heeding the oft-repeated words of Rahm Emanuel that one should “[n]ever let a crisis go to waste. They are opportunities to do big things.”<sup>27</sup> And as it turns out, legal writing faculty are the perfect people to help their law schools put the current crisis to productive use.

### 3. *Putting The Law School Crisis to Good Use*

Law schools have been attacked on multiple fronts recently, with two positions being asserted with particular vigor. Critics argue first that law schools are too expensive and some — including President Obama — have gone so far as to suggest that law schools should change from a three to a two year model in order to save their students a year’s worth of tuition.<sup>28</sup>

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GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR’S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK (2012).

<sup>27</sup> Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, NEW YORK TIMES (Nov. 9, 2008), available at [http://www.nytimes.com/2008/11/10/us/politics/10obama.html?\\_r=1&ref=politics](http://www.nytimes.com/2008/11/10/us/politics/10obama.html?_r=1&ref=politics). Whether or not Mr. Emanuel actually coined this catchy phrase, his is the name most often associated with it. A crisis, it is worth remembering, can result in positive as well as negative change; the word is defined, in part, as “[a] vitally important or decisive stage in the progress of anything; a turning-point; also, a state of affairs in which a decisive change for better or worse is imminent.” OXFORD ENGLISH DICTIONARY, available at <http://dictionary.oed.com>.

<sup>28</sup> In an August, 2013 speech at Binghamton University, President Obama said “This is probably controversial to say, but what the heck, I’m in my second term so I can say it. (Laughter.) I believe, for example, that law schools would probably be wise to think about being two years instead of three years — because by the third year — in the first two years young people are learning in the classroom. The third year they’d be better off clerking or practicing in a firm, even if they weren’t getting paid that much. But that step alone would reduce the cost for the student. . . . Now, the question is can law schools maintain quality and keep good professors and sustain themselves without that third year. My suspicion is, is that if they thought creatively about it, they probably could. Now, if that’s true at a graduate level, there are probably some things that we could do at the undergraduate level as well.” Dylan Matthews, *Wonkblog*, WASHINGTON POST (August 27, 2013) <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/27/obama-thinks-law-school-should-be-two-years-the-british-think-it-should-be-one/>. New York’s Chief Judge, Jonathan Lippman, has recently decided to allow law students to sit for the New York bar in the February of their third year of law school, if the students commit to spending their last semester performing pro bono legal service. James C. McKinley, Jr., *New York State’s Top Judge Permits Early Bar Exam In Exchange For Pro Bono Work*, NEW YORK TIMES (Feb. 11, 2014), available at [http://www.nytimes.com/2014/02/12/nyregion/top-judge-allows-for-early-bar-exam-in-return-for-pro-bono-work.html?hpw&rref=nyregion&\\_r=0](http://www.nytimes.com/2014/02/12/nyregion/top-judge-allows-for-early-bar-exam-in-return-for-pro-bono-work.html?hpw&rref=nyregion&_r=0). The effect such a decision will have on law students’ ability to graduate from law schools “practice ready” is unclear. The students will, apparently, have a semester’s worth of pro bono experience, but whether the students will be supervised in their work or whether, as



Others are more critical of law school curricula, with one of the persistent themes being that recent graduates are not “practice ready,” a term as ubiquitous as it is opaque. Margaret Barry notes that the phrase

could mean that graduates, equipped with a basic array of substantive knowledge, are able to learn what they need through apprenticeship in their first job. In the comforting embrace of an office prepared to introduce the necessary professional competencies, graduates would learn the essentials for participation in the profession. But law schools do promise more — that graduates who pass the bar exam are capable of representing clients, no further lessons required. . . . As it happens, however, law schools overlook or tacitly reject that promise.<sup>29</sup>

There are alternatives to the notion of “practice ready” that are more readily intelligible and, perhaps, more achievable: “justice ready,” proposed by Professor Jane Aiken<sup>30</sup> and “client ready,”<sup>31</sup> proposed by Professor Ruth Anne Robbins, are two of the more valuable reformulations of the “practice ready” concept into something tangible that law schools can aspire to rather than the amorphousness of whichever “practice” might be intended at any given time.

It is significant that Professors Barry, Aiken and Robbins are clinicians (although Professor Robbins also has a foot firmly planted in the legal writing world<sup>32</sup>) because clinical education clearly has a vital role to play in preparing our students to be ready for life after law school, whatever that “ready” might mean.<sup>33</sup> But while clinics, and other opportunities like internships and externships, offer a valuable opportunity for students to gain practice experience, they have signifi-

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putative members of the bar (“putative” since the results of the bar will not be known until the end of, or close to the end of, their time as pro bono lawyers), they will be assumed to have the knowledge necessary to represent pro bono clients without help is unknown until the details of Judge Lippman’s plans are made known.

<sup>29</sup> Margaret Martin Barry, *Practice Ready: Are We There Yet?* 32 B.C.J.L. & SOC. JUST. 247, 249 (2010).

<sup>30</sup> Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C.J.L. & SOC. JUST. 231 (2012).

<sup>31</sup> Ruth Anne Robbins, *Law School Grads Should Be ‘Client Ready’*, NATIONAL LAW JOURNAL (Feb. 18, 2013), available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202588420895&Law\\_school\\_grads\\_should\\_be\\_client\\_ready&slreturn=20130222102931](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202588420895&Law_school_grads_should_be_client_ready&slreturn=20130222102931).

<sup>32</sup> In addition to being the past president of the LWI, and a current board member of that body, Professor Robbins also serves as co editor-in-chief of *Legal Communication & Rhetoric: the Journal of the Association of Legal Writing Directors*. See *Rutgers School of Law, Ruth Anne Robbins Biography*, <http://camlaw.rutgers.edu/directory/ruthanne/>.

<sup>33</sup> To be clear, though, Professor Robbins is not writing just from a clinical perspective when she argues that law schools should help students to be “client ready.” Her vision is much broader as she makes clear when she writes that “[t]he time has come for entire law school faculties to move the focus of nonclinical experiential courses toward the notion of client” (see Robbins *supra* note 11).

cant drawbacks as well. In addition to the costs of clinical programs<sup>34</sup>, and their inability to reach all law students because of their understandably limited enrollments, clinical programs are located in the upper-level curriculum because of their need to adhere to the restrictions placed on them regarding student practice.<sup>35</sup> Accordingly, they cannot offer any practical balance to the doctrinal emphasis of most first year law school courses. Professor Aiken acknowledges as much when she criticizes the traditional law school case method for removing the students' "sense of justice through the classroom dynamic."<sup>36</sup> She notes that "[a] clinician's job [to teach students to be justice ready] is made harder because of what students have already endured in law school."<sup>37</sup>

What advocates of clinical education, and its benefits in preparing law students to leave law school ready to begin a life in law practice, often overlook is the existence of an experiential – under any reasonable definition of that term — pre-clinical program sitting in the heart of the first year law school curriculum.<sup>38</sup> Legal writing and research

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<sup>34</sup> In a recent article, Professor Robert R. Kuehn proposes that "providing a clinical education experience for every student or providing more opportunities for students to participate in law clinics has not and need not cost students more through higher tuition charges." Robert R. Kuehn, *Pricing Clinical Education*, 92 DENV. U. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042). Without engaging in a detailed discussion of Professor Kuehn's work on this subject, it is nonetheless possible to say that reasonable minds might differ as to his conclusions.

<sup>35</sup> The ABA has revised Standard 303(a)(3) to require law schools to offer six experiential credits in the upper-level curriculum. See Andy Thomason, *Bar Association Approves Package of Reforms for Law Schools*, *The Chronicle of Higher Education* (August 13, 2014), available at [http://chronicle.com/blogs/ticker/jp/bar-association-approves-package-of-reforms-for-law-schools?cid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/blogs/ticker/jp/bar-association-approves-package-of-reforms-for-law-schools?cid=at&utm_source=at&utm_medium=en). While this would, to an extent, address the criticisms that current law students are insufficiently "practice ready," it is unclear how much this proposal would cost or how that money would be raised without increasing tuition, thereby fuelling the fire of criticism about the cost of a legal education. How such a proposal would be reconciled with the proposals that law schools cut a year from their degree programs is also unclear at present.

<sup>36</sup> Aiken, *supra* note 30 at 235.

<sup>37</sup> *Id.* at 234. Professor Aiken's use of "endured" to describe the first year of law school is a powerful sign of the way she feels about the well-understood and traditional goal of first year law school courses to "lop off [students'] common sense, to knock [their] ethics into temporary anesthesia. [Their] view of social policy — [their] sense of justice — to knock these out of [them] along with woozy thinking, along with ideas all fuzzed along their edges." Karl Llewellyn, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY*, 101 (1960). The Carnegie Report noted that this is still the apparent goal of first-year legal education. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW*, 141 (2007)(hereinafter, the "Carnegie Report")("students are told repeatedly to focus on the procedural and formal aspects of legal reasoning, its "hard" edge, with the "soft" sides of law, especially moral concerns or compassion for clients and concerns for substantive justice, either tacitly or explicitly pushed to the sidelines.").

<sup>38</sup> Professor Barry highlights this blind spot in her discussion of Boston College Law School's first year curriculum and the changes that school has made to include a public law

programs — situated in the first year curriculum by ABA requirement and plying their trade by teaching students how to improve their writing and analytical skills by requiring the students to write practice-based documents like memoranda and court briefs — are perfectly located to begin the process of helping first year law students take their first steps as legal professionals. Indeed, they are already accomplishing this goal without any significant changes in the first year curriculum, because for almost all law schools they have been in place for some time.

#### 4. *First-Year Legal Writing Programs in American Law Schools*

The legal writing and research programs in most American law schools are based on an experiential model, although this might not be at first apparent. These programs tend to require their students to produce lawyer writing based on a hypothetical set of facts. Presented with these facts, the students must either take the law as provided to them as part of the assignment, or must research the relevant law themselves, and then must extract the rules that will apply to the case, illustrate and then apply those rules to the given facts, and then either predict the likely outcome of the issue or seek to persuade a court to reach a particular outcome.

In this simulated environment, the law student is being asked to behave as a lawyer and is learning important lessons in lawyering culture, either implicitly or explicitly, as a result of classroom instruction. Students must learn how to construct documents that are appropriate to their purpose and to consider how best to achieve that purpose, and they learn how to synthesize facts and law to predict, or advocate for, a particular outcome. Students also learn crucial lessons about professional empathy – the need to consider how the reader of a document is thinking in order to provide the reader with the information necessary to consider an issue at the moment the reader needs that information – and professional behavior, most notably drafting genre-appropriate documents that are submitted according to strict dead-

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perspective and to give its students the chance to take a practice course in their first year, (Barry, *supra* note 29 at 256-257). While praising the motivation behind these changes, Professor Barry notes that they “essentially affirm[ ] the traditional first year content and approach.” Yet nowhere in her discussion of the Boston College first year curriculum does Professor Barry note the law school’s Legal Reasoning, Research, and Writing program, which forms an essential part of the law school’s first year curriculum and which, according to the school’s website, “provides students with a problem-based curriculum that equips them with the analytical, research, and written communication skills essential to the practice of law.” Boston College, *Curriculum Guide*, available at <http://www.bc.edu/content/bc/schools/law/services/academic/programs/curriculum/guide.html> (last visited Sept. 18, 2014).

lines. In short, legal research and writing programs help students begin the process of discovering their professional identities as lawyers.

Some aspects of the lawyer's job, of course, are missing in this model. Law students, especially in their first year, might not be asked to interview or counsel a client, and typically the law student is given a discrete task to accomplish rather than being immersed in many different aspects of multiple cases. And the legal writing and research model tends to be litigation-driven, ignoring — for the sake of convenience and in order to get its foundational messages about writing style and structure across to students in as clear and direct a manner as possible — the many other areas in which lawyers practice. Nonetheless, this model is at its most effective when a law student is asked to think and respond as would a lawyer in the same situation and is therefore based, in a very direct way, on an experiential approach to legal education.

This experiential approach, even though based on simulation and hypothetical rather than actual clients, can yield some important benefits to a law school. Because of the location of legal writing within the first year of the law school curriculum, legal writing programs reach all first year law students and do so without adding cost to the budget or credits to the curriculum because they, and the faculty necessary to teach them, are already there. In fact, legal writing programs typically do their work unnoticed, hidden in plain sight by the spotlight placed on the doctrinal classes that most believe are the sole emphasis of the first year of law school. And while the idea of incorporating writing-across-the-curriculum principles in the first year of law school has been discussed in the legal writing literature for years,<sup>39</sup> the idea appears not to have met with much interest: while the LWI/ALWD Survey reflects some degree of coordination between legal writing and doctrinal programs in 46 schools,<sup>40</sup> the overwhelming majority of schools — 138 — reported no relationship between first year skills and doctrinal courses.<sup>41</sup>

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<sup>39</sup> See, e.g., Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 LEGAL WRITING 325 (2011); Celeste M. Hammond, *Integrating Doctrine and Skills in First Year Courses: A Transactional Attorney's Perspective*, 17 LEGAL WRITING 409 (2011); Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School-Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73 (2004).

<sup>40</sup> Five schools coordinate both assignment topics and teaching of subjects between legal writing and doctrinal faculty, and forty-one schools coordinate assignment topics but not teaching. LWI/ALWD Survey, *supra* note 14, at 16.

<sup>41</sup> *Id.*

This might have something to do with the status issues surrounding legal writing faculties and the subject they teach: some doctrinal faculty members might feel that it would be beneath them to work with lower-statused teachers in their institutions and some legal writing teachers might be unwilling to act as what might be perceived as glorified teaching assistants for the doctrinal faculty. And there is also the concern that having multiple voices talking about the same topic might prove confusing for the students: if the cases the students find to help them in a torts-based legal writing assignment offer a slightly different doctrinal perspective on a topic from that of the torts textbook, or from their torts professor, to which voice should the students listen?

But a more benign, and substantially more likely, impediment to such integration is the sheer logistical complexity of accomplishing it. In order for both the doctrinal and the legal writing courses to be given their full due, both sets of teachers would have to work closely to develop a coordinated set of syllabi that accommodate the relatively inflexible schedule of a legal writing course — which requires time to be built-in for the students to work on assignments out of class and for the faculty to grade and return those assignments in order to work up to the drafting of more complex documents as the semester continues — and the relatively flexible schedule of a doctrinal class, in which class discussion of an important point might take longer than anticipated, causing a domino effect that can change the days in the semester on which a particular issue is discussed. Coordination among doctrinal faculty members teaching different sections of the same subject can also sometimes be tricky, potentially dooming any attempts at integration to failure.

Moreover, even when all these logistical problems can be overcome, it is difficult to imagine a writing-across-the-curriculum approach working with more than one doctrinal course during a semester. Even if the legal writing program is able to coordinate with, say, the torts faculty, then the chance to work with the contracts or civil procedure faculty is likely lost. Students will get some advantage in seeing a different side of doctrine in one area, but not in others. And if the logistical problems cannot be overcome, or if the time and energy necessary to overcome them is not to be found, then the natural tendency would be for both skills and doctrinal faculty to retreat to their own discrete areas and teach what they teach, sensitive to the importance of what each group teaches but unable to find more than ad-hoc points of congruence between the two.

But there is an alternative approach, one legal writing programs can follow on their own but which will still bring their students the

benefits of putting their writing and research assignments into a broader pedagogical context. This approach is logistically simple, requiring no coordination outside the boundaries of the legal writing program, and emphasizes the pre-clinical nature of legal writing programs, making it a useful preparation for the experiential courses the students will take as part of the upper-class curriculum. Best of all, this approach requires little additional work on the part of faculty and no additional work — beyond the usual assignment load for the legal writing course — for the students, but has the potential to provide greater benefits to them than the individual assignments would deliver. And it can do so at no additional cost to the institution.

### 5. *Listening To The Larger Theme*

This alternative approach involves structuring all legal writing assignments around a larger theme, so that the entire semester or even year involves assignments that all explore different variations of that theme. In this way, the students have the opportunity to work developing their lawyering skills while, at the same time, contemplating and reflecting on the issues surrounding the larger topic. At Syracuse, we use the development of professional identity as the larger topic, designing each writing assignment the students work on to reflect a different aspect of this overarching theme. In this way, the students are able to get an added benefit from their work on their various assignments and will be, we hope, better prepared to confront the issues flowing from client representation when they encounter them in doctrinal, clinical, other upper-level courses, and, ultimately, in real-life situations, after first thinking about such issues in a simulated, pre-clinical setting.

#### A. *Professional Identity and Contemporary Law Students*

The theme of professional identity was selected in response to the Carnegie Report's discussion of a law school's role in helping students develop a sense of professional identity. The Report notes that "[p]rofessional schools are not only where expert knowledge and judgment are communicated from advanced practitioner to beginner; they are also the place where the profession puts its defining values and exemplars on display, where future practitioners can begin both to assume and critically examine their future identities."<sup>42</sup> The Report continues by observing that "in a time when many raise questions about the legitimacy of the legal profession in both general and

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<sup>42</sup> Carnegie Report, *supra* note 37 at 4.

specific terms, professionalism needs to become more explicit and better diffused throughout the legal profession.”<sup>43</sup>

The problem faced by law schools is how, exactly, such training should be “diffused.”<sup>44</sup> In particular, the first year law school curriculum, with its characteristic emphasis on doctrine and “thinking like a lawyer,”<sup>45</sup> offers few obvious opportunities to introduce the notion of professional identity to the students. But because legal writing courses are less rigidly bound to doctrinal learning and typically have the freedom to select the topics of their assignments from a wide range of areas, they offer one useful place to begin the professional identity conversation in the first year.

And there seems little doubt that our students need to hear this discussion as early as possible, ideally earlier than its traditional location in practice-based and clinical courses found in the second and third years of law school. A recent study suggests that the state of “professionalism” among undergraduate students — the ones who will soon be coming to law schools — has been in decline recently.<sup>46</sup> The study, which reflects the views of a nationwide sample of faculty members teaching at undergraduate institutions, found that, among other results, 38.3% of respondents felt that less than 50% of students exhibit “professionalism,” 37.5% reported a decrease in the percentage of students who demonstrated “professionalism” over the past five years, and 43.3% reported a worsening of work ethic over the past five years.<sup>47</sup>

The study sought “a more structured definition of professionalism” by having its respondents rate the importance of 19 “qualities associated with being professional in the workplace” on a scale of 1-5.<sup>48</sup> Of these, the study concluded that the most important “profes-

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<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 31. The Carnegie Report acknowledges this difficulty, noting that “because identity is a comprehensive and integrative achievement, it is difficult to address in a specialized way, as one might address the study of calculus or Chinese language. The moral development of professionals requires a holistic approach to the educational experience that can grasp its formative effects as a whole.”

<sup>45</sup> A phrase that comes not direct from the mouth of Professor Kingsfield but, rather, from Karl Llewellyn. See, Llewellyn, *supra* note 37 at 101. And while thinking like a lawyer is an important skill for future lawyers to develop, I have previously argued that the process by which law schools seek to instill it by driving out empathetic response in their students is a failing that should be remedied. Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance*, 8 LEG. COMM. & RHETORIC 109 (2011).

<sup>46</sup> Center for Professional Excellence at York College of Pennsylvania, 2012 Professionalism on Campus, (2013) available at <http://www.ycp.edu/media/yorkwebsite/cpe/York-College-Professionalism-on-Campus-Study.pdf>.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> *Id.* at 18.

sionalism” qualities were “[a]ccepts personal responsibility for decisions and actions (4.73), [d]isplays a sense of ethics (4.65), [i]s thoroughly prepared for classes and assignments 94.63), [c]ompetent verbal and written communication (4.59).”<sup>49</sup>

In conclusion, the study’s researcher observed that

[t]he findings from this study closely parallel those in the study of professionalism in the workplace. It is apparent that students do not change their behaviors when they transition from college to their place of employment. Students can benefit by knowing how their professionalism is perceived by professors. A clear opportunity exists for students to differentiate themselves from the mass of other students by simply learning to think and act professionally. This will not only be to the student’s advantage while a student but also when they enter the workplace.<sup>50</sup>

Well, maybe. The survey is not convincing in its attempt to define “professionalism” in terms of what college professors think is professional behavior, and what that group perceives as unprofessional behavior — 82.5% reported “[t]ext messaging at inappropriate times, such as during classes”<sup>51</sup> as a problem, for example — might be a more complex response to the situation in which the students find themselves than is contemplated by the survey’s respondents. It is also difficult to know if things truly are getting worse, since faculty members are unlikely to remember their own misdeeds when they were college students.<sup>52</sup>

The study does, though, appear to strike a responsive chord in many older faculty members who hear of its result, suggesting that what the survey outlines in stark relief is the way the students’ behavior is likely perceived by others, despite the reasons for such behavior. And if law students do not learn what it means to behave like a lawyer, then no amount of thinking like a lawyer will help them survive in the legal workplace. And it is by the standards of a generation different from theirs that the students will likely be judged, so the students are well-served by learning what will be required of them as early as possible.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 22.

<sup>51</sup> *Id.* at 17.

<sup>52</sup> For the record, I do recall some crossword puzzles being completed during law school classes when I was a student. And the use of passive voice in this footnote is intentional.



### B. *The Syracuse Approach*

At Syracuse,<sup>53</sup> we ask the students to complete three principle writing assignments in both the first and second semesters. Because we teach research at the start of the second semester, all first semester assignments are closed-universe. The assignments become incrementally more complicated as each semester continues as the students' writing and analytical skills grow more sophisticated.<sup>54</sup>

The students are asked to analyze a variety of different factual and legal issues over the course of the first year. For example: a lawyer disbarred in one state wondering if he would be automatically disbarred in another; a recently-graduated law student concerned about allegations about her past made to the character and fitness committee of the bar by a disgruntled ex-boyfriend and revealing, during the course of her interview, some substantially worse actions as yet unknown to the committee and about which she intended to lie under oath at a hearing on her past actions; a lawyer accused of commingling client funds and spending them to feed a gambling habit; and so on. The first two assignments of the year involved the students watching two "attorney-client" interviews<sup>55</sup>, the first conducted in a good, professional manner, the second in a caricature of inattention.<sup>56</sup> Subsequent assignments used a small file of relevant documents —

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<sup>53</sup> The legal writing program at Syracuse is known as Legal Communication and Research ("LCR"). In addition to the LCR I and II courses being discussed here, Syracuse devotes one or two sections in the first year (depending on perceived demand and anticipated enrollment) to an international law-based writing program that covers some aspects of documents filed in international courts as well as domestic research and writing. This international course operates on a separate curriculum and is not a part of this discussion. In addition, the students are required to take an additional semester of legal writing in either the fall or spring of their second year. These LCR III courses are structured differently and do not consciously structure their assignments to conform with the principles discussed in this article.

<sup>54</sup> All details regarding the Syracuse LCR program as on file with the author and are available on request.

<sup>55</sup> The process of creating these videos was discussed in more detail in Ian Gallacher, *Lights! Camera! Law School?: Using Video Interviews to Enhance First Semester Writing Assignments*, PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING (forthcoming).

<sup>56</sup> The "clients" in the first year of this new approach were played by Domenic D'Imperio and Kate Reid, while the "attorneys" were played by Jennifer Scordo and Emily Brown, all four recent alumni of the College of Law. All acted their parts wonderfully, although it was extraordinarily difficult for Mr. D'Imperio and Ms. Reid to play unethical attorneys in trouble and for Ms. Brown to play a less-than-effective attorney during the interview. We chose alumni to play these four roles in an attempt to heighten the verisimilitude for the students, who find it difficult to suspend disbelief when they find themselves next to a "client" or "attorney" in the lunch line. In the Syracuse area, however, the one general rule of life is that everyone finds themselves, at some time or another, in the DeWitt Wegman's, the largest food market in the area. And so it was that Ms. Reid found herself speaking to a group of students, all using her character's name and apparently believing she had done the bad things she narrates in the video interview. She

letters, client retention agreements, court pleadings, transcripts, newspaper cuttings, and so on — to give the students the necessary facts for their analysis and to lend verisimilitude to the simulation.

Every aspect of these first problems — from the way in which the factual information was gathered and presented to the students to the subject matter of the problems themselves — was designed to provide talking points for in-class discussion about how lawyers should conduct themselves and how, if the students had been presented with the various situations presented by the assignments, they would, or should, have reacted. While the volume of assignments was no different than in past years, we were able to encourage the students into discussions about some aspects of what it means to be a lawyer, and what kind of lawyer the students might want to be, by the simple step of structuring the assignments around the central theme of professional identity.

Subsequent assignments were given to the students in more traditional, paper, form, in order to give the students experience in deriving relevant facts from a variety of documents. The students were given an assignment memo, outlining the parameters of the assignment (due date, length, and so on) and an outcomes memo, outlining why the students were being asked to complete this particular assignment and what they should be expected to learn from the process of completing it, as well as any other documents giving them the facts of the case. The program continued to use video, but in the form of video tutorials — short videos that discuss certain technical aspects of lawyer writing and research and intended to serve as out-of-class reminders of in-class discussions.<sup>57</sup>

Because the larger theme of professional behavior and identity was being explored in the background, and because the program's primary mission of teaching legal research and writing was unchanged, we did not develop any assessment measures to determine the extent to which students' sense of professional identity had been affected by this approach. One informal and anecdotal measure, though, seemed significant; in a discussion with the College of Law's Associate Dean for Student Life, I discovered that the number of students seeking to amend and add to the information in their application forms — information that therefore become known to the character and fitness committee when the students applied for membership in the bar —

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had the good grace to see the funny side of the experience and to be persuaded that the student reaction was a testament to her excellent acting skills.

<sup>57</sup> A more detailed discussion of these video tutorials can be found at Ian Gallacher, *Talking in the Dark: Using Technology for Basic Academic Support*, THE LEARNING CURVE (2012).

had risen substantially over previous years, and that this increase had occurred at precisely the time the students were working on the assignment involving a student who had omitted certain information from her bar application. The students certainly had been drawing some lessons from the assignment in addition to the lessons of writing and structuring analysis for which the assignment was primarily designed.

The professional identity theme was designed to be one that sat on top of the program's principal mission of writing and research instruction, so we did not reserve specific class time in the course of the year to discuss it, although legal writing professors were encouraged to have discussions about the issues raised by the assignments as those issues came up in the course of class discussion. It was important that the legal writing program not try to pre-empt the role of the professional responsibility or clinical faculty, or the other faculty who might deal more explicitly with professional identity issues in the upper-level curriculum. But by presenting these issues as part of a simulation-based experiential program in the first year, we sought to enrich the conversations those faculty members would have with these students next year. Having considered issues of personal integrity and responsibility to clients during their first year, these students should come to the second year of law school in a better position to have deeper and more engaged conversations about these and other professional identity issues, and should, we hope, be prepared to begin practicing law not only with a sense of what they are allowed to do but also what they should do when confronted by the ambiguities and complexities of practice.

#### CONCLUSION

The particular large theme we chose at Syracuse is only one of countless possible ones that legal writing programs can use to enhance their students' first year of law school. Whether these themes are based on integration with first-year doctrinal programs or, like the program at Syracuse, use thematic elements from upper-level courses, the crucial point is that with a little planning and preparation, the first year legal writing course can impart important lessons about practical lawyering in addition to the crucial lawyering skills it already teaches. And that, in turn, should allow the students to be more "practice ready," whatever that term might mean, than they otherwise might have been. And this result can be accomplished without any additional cost or additional tuition charge to the students, because it is an extension of work already being done by the experiential program sit-

ting at the heart of the first year curriculum in most American law schools.

It might seem strange to consider the notion that legal writing is an experiential course tucked into what is typically thought of as the purely doctrinal first year of law school. But writing and research education can only adequately be achieved through the completion of assignments that require a lawyering context in order to test a student's ability to select facts and apply rules to the material facts of a case and that in turn means that the assignments — consciously or unconsciously — take on the characteristics of experiential simulations. And the benefits of simulation in a legal context are well-recognized.<sup>58</sup>

Indeed, an argument can be made that this type of simulated experiential learning is more effective than the more traditional experiential learning offered by clinics, externships, and internships. While those experiences offer students the chance to work with and for real clients, rather than their simulated counterparts in legal writing courses, and therefore provide the last measure of reality that is helpful in rounding out a law students' education and helping them make the transition from school to practice, such programs also present challenges to law schools. Clinics are expensive,<sup>59</sup> are typically limited in size, and are able to accommodate fewer than all a law school's upper-level students before they graduate. Externships and internships can make up that gap, but are, by their nature, offered outside of the law school which must closely monitor each externship experience to make sure that an appropriate level of education is being delivered to each student. And both clinics and externships/internships are hostage to the vagaries of client intake and cannot guarantee an equal experience for all students.

By contrast, legal writing programs offer simulated experiential learning for all students, and do so early in the students' law school careers. When carefully prepared, with assignments that are as rich, nuanced, and realistic as possible, legal writing programs can offer all students a consistent and valuable experience that helps them to begin the process of developing a professional identity along with the development of the core lawyering skills they will need as practicing lawyers. Such programs are not, nor never should be, the end of students' experiential learning in law school. But they should be recognized

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<sup>58</sup> Paul Maharg has written extensively on this subject. For a bibliography, see <http://paulmaharg.com/>.

<sup>59</sup> *But see*, Kuehn, *supra* note 34.

and supported as the first experiential learning experience most lawyers will have.

Structuring a legal writing program around a larger theme than just the lawyering skills to which the program traditionally exposes students can involve variations as simple or as complex as the school chooses, and each variation can be as individualized as those in Elgar's "Enigma" Variations. The simple recontextualization of legal writing as an experiential course, and the drafting of traditional legal writing assignments around a larger theme – heard or unheard – can result in an enriched experience for students, achieved with little effort and at no additional cost to the law school. And such a move can help to answer those critics who argue on the one hand that law schools aren't sufficiently responsive to the needs of practice, and on the other hand that law schools efforts to add experiential learning to the curriculum will be expensive additional costs that should not be borne by students who are already paying too much in tuition. In fact, law schools have been playing experiential music in their first year curricula for a long time. It's just that no one knew what the tune was.