

ANALYZE THIS: USING TAXONOMIES TO ‘SCAFFOLD’ STUDENTS’ LEGAL THINKING AND WRITING SKILLS*

As lawyers we pride ourselves on our analytical skills, structured thought process, and insights that derive from close reading of texts. Yet, how much actual class time do legal writing faculty, and faculty teaching doctrinal subjects, spend deliberately and constructively imparting these same skills to our students? Our initial reaction to such a question might be to dismiss it, as many of us are convinced that we spend at least an adequate amount of time talking about, and/or fostering the analytical process. A closer examination of our actual classroom practice might reveal a different story. For example, a professor at a large public Midwestern university, who taught a writing intensive class, and who claimed to talk to her students about analysis and writing “all the time,” actually spent very little time (less than 10% of each class) explicitly teaching her students the thinking and writing skills necessary to the discipline.¹ Moreover, in another writing study conducted at a private university, some teachers had difficulty responding to questions about what kinds of thinking and analytical skills their writing assignments and courses in general, were designed to inculcate in their students.² Why this disconnect?

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¹ The study was conducted by Stuart Greene as part of a study about how students learn to write in specific disciplines. Greene tape recorded and sat in on all of the lectures in a writing intensive class. The author transcribed the tapes of the subject’s lectures and assisted Greene in the development of an article. The tapes and transcripts are on file with Stuart Greene, Associate Dean, College of Arts and Letters, University of Notre Dame.

² This study was a separate study conducted by Stuart Greene with the assistance of the author and others. The researchers read students’ papers and tried to identify the types of thinking that they saw being manifested in the papers, based on a coding system structured in part on Bloom’s taxonomy. The researchers then interviewed the professors who assigned the papers to determine the assignment’s goals. The researchers also interviewed the student authors to determine if they were clear on the assignment’s goals and the types of thinking that the assignment was designed to inculcate. In many cases both the professor assigning the paper and the student completing the assignment were unclear about the goals of the assignment. Generally the most successful papers were those in which the student and the professor were clear about the goals and parameters of the assignments, and the student responded to those goals appropriately.

Many of us speak glibly about training our students to think like lawyers, but we have not necessarily tailored our pedagogy to meet that goal. If we are not clear and explicit in how we go about teaching students analytical skills, we cannot necessarily expect them to become experts in analysis. While it is true that over the course of their law school careers, most students will develop legal analytical skills through exposure to the law and by means of the Socratic method, we can do better. Lawyers pride themselves on precision. This article argues that we should take a more direct approach to thinking, by fostering students' metacognition skills. We need to develop precise and overt strategies, based on taxonomies, to teach students analytical skills and enable them to master the skills of thinking and writing like lawyers.

The Current Paradigm and Legal Writing "Like A Lawyer"

Since the findings of the McCrate Report, the prevailing wisdom has been that analysis is a primary skill that students must acquire, and law schools must teach.³ As Christopher Rideout and Jill Ramsfield have noted, "a critical function of law school is to teach legal analysis and argument ..."⁴ Yet, precisely how we are to teach analysis, and precisely how students learn to "do" analysis remains somewhat mysterious, both to faculty and, more importantly, to students themselves.

Legal Writing seems to provide a prime opportunity to develop the skill of analysis - of thinking and writing like a lawyer. The opportunity to read and write in the

³ The McCrate Report identified fourteen "fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter." – "developing analytical skills" was one of these. See AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM at 7 (Robert McCrate, ed. 1992).

⁴ Christopher Rideout, Jill Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994)

discipline, to be specific about methodology, to craft goal oriented assignments,⁵ to practice new pedagogies,⁶ to reach all students because of smaller class sizes and conferencing, to allow students to work through the “process” rather than focusing on the product⁷ – in short, to put into practice the new legal rhetoric⁸ - all these possibilities are open in legal writing. Moreover, we can share our findings with others in the field by publishing in the journals dedicated to legal writing issues.⁹ Yet, legal writing faculty have struggled to reach a consensus on how we best teach analysis, or even if we teach it explicitly at all.¹⁰

If questioned about how they teach analysis, many legal writing faculty might respond that they teach it by teaching CREAC, CRAC, IRAC, or any one of the acronyms used to describe the organizational formula that we teach students to follow when writing office memoranda. This process involves extrapolating rules from cases, and applying them to the facts of the case at hand. While these approaches have proven

⁵ Laurel Currie Oates suggests that not all types of writing promote learning. The situation where learning is most likely to occur is “(1) when the process of meaning is subject to the pressure of converging constraints and options, or to conflict among goals, and (2) when the writer turns his or her attention to managing or negotiating problematic cognitive and rhetorical situations.” Legal writing assignments should be drafted with these goals in mind. Laurel Currie Oates, 6 J. LEGAL WRITING INST. 1, 21 (2000).

⁶ Rideout and Ramsfield, Note 4 *supra* at 69-70.

⁷ Terry Phelps compared the paradigm shift in legal writing to that which took place in composition studies in the 1970s. The shift signified a sea change – shifting the focus from the product of writing to the process of writing. See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 S.W. L.J. 1089.

⁸ Jo Anne Durako et al report that the New Legal Rhetoric is the prevailing pedagogy in many if not most legal writing classrooms. See Jo Ann Durako, *From Product to Process: Evolution of a Legal Writing Program* 58 U PITT. L. REV 719 (1997). The New Legal Rhetoric focuses on the process of how students learn to write, rather than the product; it involves an emphasis on drafting and revising, responding in a “formative” rather than a “summative” manner, seeing writing as a process, and other techniques. The New Legal Rhetoric has borrowed techniques from composition theorists and cognitivists, all of which has led to a paradigm shift in the teaching of writing. See generally Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 S.W. L.J. 1089.

⁹ See for example the Journal of the Legal Writing Institute, the Journal of Legal Education. Also law reviews on occasion dedicate an issue to legal writing..

¹⁰ Mary Kate Kearney and Mary Beth Beazley have suggested that we can integrate the Socratic method with the instruction of writing by having students create legal documents in response to the teacher’s questions, allowing each student to receive personal feedback from the teacher, and holding conferences in which students get feedback which they then use to revise their work. See Mary Kate Kearney, Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”*: *Integrating Socratic Method with the Writing Process*. 64 TEMPLE L. REV. 885, 887 (1991).

to be extremely helpful in providing students with a way in which to structure their writing and analytical process, they become too formulaic and limited to allow for the full development of analysis. CREAC does not explain to students how to do analysis, it merely provides an organizational formula for writing up that analysis.

Formula like CREAC, while useful, often ultimately prove to be too reductionist to be entirely useful in teaching students the skill or art of analysis. CREAC tends to encourage formalism, rather than creative thinking. This evidenced by the fact that many students who struggle to enculturate themselves into legal writing, bemoan the fact that legal writing does not allow for creativity. They fail to see that CREAC is merely a tool for writing up their analysis and response to problems, and that they can be creative in their responses to those problems, and in the arguments that they make.¹¹

As Kevin Smith has noted, “Most students . . . do not participate in a systemic and in-depth study of each method’s operation, potential uses, and conceptual bases.”¹² Because most students then see CREAC and its ilk as a formula that they can plug in, in order to write a memo, they do not see the big picture of what is required by lawyerly analysis. Students then fail to understand that “legal reasoning is a dynamic iterative process which must be adapted to the needs of a particular legal problem.”¹³ They also fail to understand that “legal reasoning involves the structured manipulation and utilization of information, not the information itself.”¹⁴

¹¹ Jill Ramsfield has noted that students complain that their creative impulses are stifled by the constricts of legal writing. See generally Jill Ramsfield and Chris Rideout, Note 4 *supra*.

¹² Kevin H. Smith, *Practical Jurisprudence: Deconstructing the Art and Science of Thinking Like a Lawyer* 29 U. MEM. L.REV. 1, 2 (1998).

¹³ *Id.*

¹⁴ *Id.* This problem is not unique to legal writing. Darcy Haag Granello encountered similar problems in teaching psychology students how to write a literature review in that discipline. See Darcy Haag Granello, *Promoting Cognitive Complexity in Graduate Written Work: Using Bloom’s Taxonomy as a Pedagogical Tool to Improve Literature Reviews* 40 COUNSELOR EDUCATION & SUPERVISION 292 (2001).

In our rush to professionalize the discipline of legal writing, and show skeptics that there is a “content” to the subject, and that writing can be taught, perhaps the pendulum has swung too far in favor of “content driven learning.”¹⁵ Perhaps in focusing on content like CREAC, and Bluebook citations, we have neglected legal analysis and thinking. We may have inadvertently become “content-centered teachers [who] believe that merely providing exposure to the ideas of the discipline will cause students’ thinking to evolve naturally over time.”¹⁶ Some of us may even believe that “the capacity to think is innate and that, therefore, spending valuable class time promoting changes in thinking seems unnecessary or even misguided.”¹⁷ We need to turn away from this “banking” approach to education,¹⁸ and return to a more instrumental view of teaching thinking and writing. We need to explicitly teach students thinking strategies, and make them conscious of their cognitive processes. We also need to continue to explore how our students’ thought processes shape their writing and vice versa.¹⁹

Legal Writing teachers need to move to a more explicit methodology when teaching analysis; a methodology that goes beyond providing students with models of effective analysis, and that goes beyond CREAC. Providing samples of “effective” or

¹⁵ WILBERT J. MCKEACHIE, BARABARA K. HOFER, MCKEACHIE’S TEACHING TIPS: STRATEGIES, RESEARCH AND THEORY FOR COLLEGE AND UNIVERSITY TEACHERS, (D.C. Heath & Co., 11th ed., 2002).

¹⁶ *Id.* at 284

¹⁷ *Id.*

¹⁸ Paulo Freire critiqued what he termed the “banking” approach to education where students passively take in information given to them by the teacher and do not actively participate in, or take responsibility for their own learning. See PAOLO FREIRE, PEDGOGY OF THE OPPRESSED (New York: Continuum, 1989)

¹⁹ Phillip Kissam explores this idea of epistemic as opposed to instrumental writing in *Thinking (by Writing) about Legal Writing*, 40 VAND. L. REV. 135 (1987). Kissam suggests that when using the epistemic method, the writer contributes to the development of the subject matter – writing is an act of constructing knowledge. In instrumental writing, by contrast, the writer is concerned only with the product, and not at all with how the act of writing and thought might influence the development of thje subject matter.

“good analysis,”²⁰ while useful in some instances, does not necessarily encourage students to see the big picture – that analysis is a particular way of thinking about problems, and of drawing information from various sources, analogizing fact patterns, extrapolating rules, synthesizing and strategizing, and making predictions, no matter what the circumstances. Providing students with samples encourages them to see problems as discrete and content or information specific. We need to do more than this.

Further, we need to continue to think about the relationship between the way our students think and the way that they write, and the relationship between the two. The assumption is that if we teach writing effectively, using all the new and developing pedagogies, we must be teaching analysis effectively.²¹ In making this assumption, we have apparently neglected to fully probe the relationship between writing and thinking. We know that writing and thinking are interrelated, and that “when our students write memos and briefs, they are doing more than just telling us what they know, they are learning to think like lawyers.”²² It would behoove us to probe the relationship between writing and thinking (analysis) so that we can more effectively teach our students the analytical skills required for the effective practice of law. As things stand, we have not resolved the issue of how we best teach our students – and have them manifest in their writing - the skill of “thinking like a lawyer.”

²⁰ Even if we provide samples or models, students may not necessarily understand what makes them good. They might also have trouble emulating the documents, or come to think that there is only one correct way to respond to an assignment.

²¹ This assumption is quite ironic, given that many of us weight analysis very heavily in our grading process. By doing so, we are in effect grading students on something that we are not explicitly teaching them, although we do model it for them to some degree.

²² Laurel Currie Oates, *Beyond Communication: Writing As A Means of Learning.*” 6 J. LEGAL WRITING INST. 1, (2000).

What Do We Mean By “Thinking Like a Lawyer?”

Thinking like a lawyer is one of those axioms, so readily tossed around, the precise meaning of which is not always clear. Whatever its content, it is clearly an art that students come to law school with the expectation of learning. “[Students]... go to a great school not so much for knowledge as for arts and habits.”²³ The art of thinking in a peculiarly legal way is a skill essential to successfully entering the discourse of the law. Robert Keeton described the art of thinking like a lawyer as “a general skill of understanding - one that is essential to develop in some minimum degree before any bridges can be crossed between knowing law and using it in addressing a problem.”²⁴

To determine what we mean by “thinking like a lawyer” we have to first examine what it is that lawyers do. In other words, to provide the phrase with content, we must look at the context. Students must understand the conventions and practices of the law, and how these are used by lawyers in a variety of contexts, before they can claim to be able to think like lawyers. While true expertise in thinking like a lawyer can come only through exposure to the multi facets of practice, as it would be impossible to reproduce what lawyers do in its entirety during the classroom experience, students must be socialized into the discourse and practices of law through as much exposure as possible to the process of the law.

While lawyers’ roles are often multifaceted, one important role is that of problem solver. Kurt M. Saunders and Linda Levine suggest that “thinking like a lawyer means to a large extent, thinking rhetorically within a problem solving context.”²⁵ To be able to

²³ James J. Brown, *Honing the Legal Mind: The Classroom Experience*, 12 STETSON L. REV. 653, 668 (1983).

²⁴ Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD L. REV. 203, 211 (1981).

²⁵ Kurt M. Saunders, Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F.L. REV. 121, 125 (1994).

think rhetorically, students must understand that they need to select an appropriate mode of response from those available, depending on the context, audience, relations, limits, constraints, and values of the parties to whom the lawyer is beholden. Thinking rhetorically is thus a conscious act that does not depend on impulse, but at its core represents a well thought through strategy.²⁶ Lawyers must often choose whether to appeal to logos, pathos or ethos. They must present “[l]ogical arguments that rely on deductive applications of rules to facts and the analogizing of precedents.”²⁷

Lawyers are not only problem solvers, however. Depending on the context, they “report” the rules established by case law to senior partners in the form of memos, they act as analysts in trying to predict how the court will rule, they are strategists, advocates, mediators, evaluators. This suggests that our students will be able to take the skills that we give them and apply them to any situation or problem that they are confronted with in practice. In order for students to be able to do this, they must have developed analytical skills that they can employ appropriately in response to various and changing demands imposed upon them by clients, other counsel, and judges.

What Are Our Goals for our Students?

The McCrate report envisioned the law student entering the profession of law as “a well trained generalist.”²⁸ For many of us, we would interpret this as having our students enter the profession as competent, skilled, and thoughtful lawyers, capable of formulating and communicating complex ideas in an effective way to the appropriate audience. Insofar as it is possible, we want them to be experts, not novices. The

²⁶ James Boyd White discusses the role of rhetorical thinking in law in James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life* in THE RHETORIC OF THE HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS, JOHN S. NELSON ET AL; (eds;) (1987) at 200.

²⁷ Linda Levine. Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 112 (1993).

²⁸ The McCrate Report, Note 3 *supra*

difference between an expert and a novice is that experts are efficient and precise about problem solving, and experts have developed domain specific patterns of thought.²⁹ Experts are able to function in this way because they are able to classify problems appropriately, and because they have internalized the conventions of their discourse,³⁰ or, as Gary Blasi suggests, they have acquired a “large repertoire of knowledge in schematic form.”³¹ Once information has been sorted into schema, it can be stored in long term memory. Experts classify problems efficiently because they process them through a series of schemata, which allows them to see connections between ideas, while novices are often unable to distinguish or identify the category within which a specific piece of information falls. An example of novice writing is that novices often summarize the applicable law, without analyzing it, or they analyze it in a superficial way, because they don’t know how to process the information, they only know that they have to report it in some way.³² Novices also struggle to accord priority to information. Paula Lustbader notes that “without a schemata, a novice will be unable to use her knowledge effectively because she will not know the structure of the discourse, the order in which to present ideas, when to emphasize different concepts, and what information she needs to make explicit versus what information is understood implicitly.”³³ Novices need to learn the more global application and thinking strategies of experts, and emulate their higher order thinking.

²⁹ Paula Lustbader, *Themes in Academic Support for Law Schools: Construction Sites, Building Types and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 326 (1997).

³⁰ *Id.* at 326

³¹ Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 342 – 43 (1995).

³² Joseph Williams noted that this was a common problem – See Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING 1 (1991).

³³ Lustbader, Note 29 *supra* at 327.

Teachers of Legal Writing want their students to master the conventions and genres of our discourse, and to enter the legal community confident of their skills. We want them, in short, not just to be people who have managed to pass a Legal Writing course, but to demonstrate, as Linda Berger puts it, that they are “capable of construction of thought, not just construction of a document.”³⁴ Seeing connections between ideas, and taking ownership of concepts is a critical step in construction of thought.

In fact, we want our students to be legal authors, not just writers. Stuart Greene defines authorship as “the critical thinking skills that students use in their efforts to contribute knowledge... knowledge that is not necessarily found in source texts but is nonetheless carefully linked to those texts.”³⁵ This act of authorship is akin to “constructing” or synthesizing and applying the law to the myriad facts they will encounter everyday as lawyers. Our goal is for our students to learn how to construct the law for themselves. To become an author thus requires “learning that involves the creation of entirely new knowledge structures or the restructuring of old ones.”³⁶ – In constructing the law, students must describe and synthesize the law, apply legal rules, analogize and distinguish, create arguments, use authority appropriately, and persuade their audience.³⁷ They must enter and engage in the ongoing conversation of the law, but, as Terry Phelps reminds us, they can only do so when they have found their “professional and personal voices.”³⁸ To be able to find their voices, students must be made aware that they need to do this; they must be given strategies to enable them to process, analyze and

³⁴ Linda Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING, 57, 61 (2000).

³⁵ Stuart Greene, *Making Sense of My Own Ideas: The Problems of Authorship in a Beginning Writing Classroom*, 12 WRITTEN COMMUNICATION 186, 187 (1995).

³⁶ Oates, Note 5, *supra* at 18.

³⁷ Rideout and Ramsfield Note 4, *supra* at 55.

³⁸ Teresa Godwin Phelps, Note 7 *supra* at 1102.

synthesize information. Once their thinking process has been structured or scaffolded appropriately, they will more easily be able to enter the discourse of law.

The Case and Socratic Methods and Thinking Like a Lawyer

Lustbader suggests that the transition from novice to expert is an evolutionary one, which occurs when students have acquired sufficient content knowledge, judgment in problem solving, experience, and have built schemata to help them respond appropriately to different problems.³⁹ The Socratic method is the generally accepted method in law schools that is used to teach analysis. By asking a series of probing questions to ostensibly break things down, teachers of the law hope to foster students' critical and analytical thinking.⁴⁰

The Socratic method is a corollary to the case method, pioneered by Christopher Langdell in 1870. The latter is predicated on using cases to ascertain the principles and strictures of the law, and in combination with the Socratic method, involves quizzing students about these rulings, reasoning, policies and principles in order to explicate them to the class as a whole. The case method is widely recognized as the prevailing pedagogy in American law schools.⁴¹ Although Langdell originally perceived it as helping to teach students analytical skills as well as the rules of law,⁴² it has been criticized as failing to meet that objective.⁴³ Students tend to memorize portions of the cases so that they can respond when called upon. They do not necessarily see the relationship between parts of

³⁹ Paula Lustbader, Note 29 *supra*. at 326.

⁴⁰ For an overview of the Socratic method, see Richard K. Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 728-39 (1989).

⁴¹ *Id.*

⁴² Supporters of the Socratic and case methods claim that students obtain a better understanding of legal issues and the process of analysis when they are forced to think through answers themselves. See, Mary Kate Kearney, Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMPLE L. REV. 885, 887 (1991). See also, Irvin C. Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 9, 26 (1968).

⁴³ Frank R. Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226, 235 -36 (1973).

the law, or how the elements or rules of a given case interrelate with the law as a whole. Moreover, they fail to see the purpose of the methodology. Kurt Saunders and Linda Levine have pointed out that one of the major criticisms of the case method “centers on its failure to teach analytical skills explicitly”⁴⁴ Students tend to focus on black letter rules, and rely on memorization, rather than trying to see connections and the legal framework as a whole. In part this failure of students to understand, appreciate and respond to the methodology, can be attributed to legal professors’ failure to be explicit about the goals and purpose of their methodology, and their failure to make the connections and interrelatedness clear. As a result, “students are often well into their legal education before they understand the operation of the legal method,”⁴⁵ and even more disturbing, their analytical skills have not been sharpened in the way that will prepare them to enter the practice of law thinking like lawyers.

Exposure to the Discipline – Reading Like a Lawyer

As part of the case method, law students are required to read thousands of cases. Thus, by the time they graduate from law school, most law students could be said to have “read the law” – to borrow the Oxbridge phrase. Not only have they read extensively, they have written several legal writing assignments, briefs, exam answers, and in the course of reading and writing, have acquired some comprehension about how lawyers reason, analyze, think and write. The preliminary findings of Greene’s as yet unfinished longitudinal study of how students learn to write in their discipline, suggests that some, but not all, students may acquire the art of writing and thinking in their discipline by dint of exposure to discipline specific articles, and by writing appropriate assignments

⁴⁴ Kurt Saunders, Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F.L. REV. 121 (1994)

⁴⁵ *Id.* at 130

designed to develop the skills valued by the discipline.⁴⁶ Most first year law classes, with the exception of legal writing and research, require few or no written assignments, but do require students to read voluminous numbers of cases, and textbooks. Reading in the discipline, thus should ostensibly develop at least some students' knowledge and skills by exposing them to the analysis of the law found in cases and textbooks. However, to assume that requiring students to read the law will develop their analytical skills, ignores the fact that not all readers read and process information in appropriate ways, that not all students are equally insightful, and not all are able to glean the discipline's methodology from merely reading.

Researchers have determined differences between proficient legal readers and non proficient, (experts and novices) in the way that the proficient readers process and store the information.⁴⁷ They have also noted that proficient readers in all disciplines "decode" text, make predictions, ask questions in their minds as they read, are thoughtful about their reading, and most importantly, think about ways to organize what they are learning and apply it to new situations.⁴⁸ This last skill is one of the most important in law.

As Ruth Ann McKinney has noted, reading is a way of constructing knowledge, proficient readers actually *make* meaning by and through their interactions with the text.⁴⁹

According to the New Rhetoric, what a reader understands and retains from the text and

⁴⁶ Stuart Greene, see Note 2 *supra*. However, it is only the more talented students who are capable of this – many students become discouraged because they don't know what it means to write in their discipline, or what their professor wants, and why, when she or he assigns written work to students.

⁴⁷ Dorothy H. Deegan, *Exploring Specific Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154 (1995). Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407 (1987).

⁴⁸ JEFFREY D. WILHELM, IMPROVING COMPREHENSION WITH THINK-ALoud STRATEGIES, (2001) at 29.

⁴⁹ RUTH ANN MCKINNEY, READING LIKE A LWYER, (2005) Carolina Press at 52.

context, depends upon the reader's prior knowledge of similar texts and contexts.⁵⁰ The reader must be able to understand how what she is reading relates and connects to what she has read previously. McKinney points out that "merely adequate reading – reading for flat information – just won't do."⁵¹ Yet, this is precisely the type of reading practiced by many law students, who confront huge volumes of reading each day, and who live in terror of being called on in class and being required to provide detailed information about cases for the class. It is no wonder then that these students come to see reading as all about "flat information." McKinney calls on law students to challenge assumptions, find patterns and generate new ideas as they are reading.⁵² While her point is well taken, students need to be taught and specifically instructed to do this. The patterns inherent in the law are not automatically clear to them. Connections often need to be laid out and made explicit before students begin to acknowledge them.

Moreover this methodology, and the need to develop schemata to process the information, needs to be taught to many students. While exposure to reading the law might ultimately develop students' analytical skills over a period of time, it is not a very efficient way to accomplish this goal. It also risks leaving behind those less proficient readers who do not grasp the "exposure to the discipline" methodology, and who continue to read for information only.

Novices and Experts- The Thinking/Writing Relationship

In fact, the process of writing is usually the process whereby lawyers' reasoning becomes apparent to students. This process is not unique to law. In response to a writing

⁵⁰ JANET EMIG, *THE WEB OF MEANING: ESSAYS ON WRITING TEACHING, LEARNING AND THINKING* (Upper Montclair, 1983).

⁵¹ *Id.* at 53

⁵² *Id.*

study conducted at the University of Hawaii, Manoa,⁵³ about the relationship between writing and thinking, one student responded “as you write you have these epiphanies.” The student was referring to seeing connections, linking ideas, and making sense of concepts while in the process of writing – connections that the student had been unable to make until the actual writing process. This is known as the epistemic view of writing where “writing comes to be no longer a product of thought but becomes an integral part of thought.”⁵⁴ While many of us have experienced the same phenomenon, it would be useful to establish when, how and why we have these epiphanies, and even more useful if we could teach our students how to consciously stimulate, recognize, and control them. By focusing on the thinking process, how information is retained, stored, linked, how connections are formed, we can best teach our students how to think like lawyers, and then perhaps write like lawyers.

How then do students become capable of this kind of learning, and this kind of thinking and authorship? They can only do so if they become autonomous learners, or what McKeachie describes as strategic or self regulated learners.⁵⁵ To become this type of learner, research has shown that they need an organized knowledge base and a set of strategies for acquiring, integrating, and even creating new knowledge.⁵⁶ They need, as McKeachie puts it, “goal directed approaches and methods of thought that help students

⁵³ Thomas Hilger, Edna Lardizabal Hussey and Monica Stitt-Bergh, *As You're Writing You have These Epiphanies: What College Students say about Writing and Learning in their Majors*, WRITTEN COMMUNICATION (1999).

⁵⁴ See Kissam. Note 19 *supra*, see also Jill Ramsfield and Christopher Rideout who note that the process perspective takes one step toward healing this enforced separation of language from the writer, by incorporating thinking into the writing process – legal analysis and argumentation become integral parts of the act of writing, viewed as a whole. See Rideout and Ramsfield, Note 4 *supra* at 55.

⁵⁵ McKeachie Note 15, *supra* at 275

⁵⁶ *Id.* at 277.

build bridges between what they already know and have experienced, and what they are trying to learn.”⁵⁷ They need to be able to “take ownership of their own learning.”⁵⁸

I am suggesting that we need to refocus attention on specifically teaching analysis by providing students with schemata or scaffolds to enable students to structure and process their thoughts effectively. One way in which we might do this is by making students more explicitly conscious of their thought process in the act of writing. While much of the focus of this article is directed towards Legal Writing faculty, doctrinal faculty might also rethink their techniques for teaching analysis. By using Bloom’s taxonomy, which identifies the levels of cognitive thinking, and teaching the taxonomy explicitly to students, we can foster deep and thorough analysis in students’ writing. We need not restrict ourselves to Bloom’s taxonomy, however. Bloom’s taxonomy is a starting place – albeit a useful one. Faculty can decide for themselves which precise skills we are trying to inculcate in our students, and then craft a taxonomy or heuristic based on our students’ needs. We can add to, and expand upon Bloom’s taxonomy as the need arises – the critical elements are being absolutely clear in our own mind, and explicit with our students about what it is that we want them to learn, how the skills interrelate, and how we want them to classify and process information.

Why Taxonomies?

It would be foolhardy to embark on a project to teach thinking “without adopting a systematic approach to the task.”⁵⁹ Taxonomies help us provide this kind of approach. A taxonomy is merely is system of classification, which lays things out in an orderly fashion. Bloom’s taxonomy is particularly useful because it has been successfully

⁵⁷ *Id.* at 277

⁵⁸ Oates, Note 5 *supra* at 3.

⁵⁹ McKeachie, Note 15 *supra* at 285

applied and adapted in various educational settings.⁶⁰ It forces teachers to lay out their goals for their students, defines and classifies educational objectives, and relates assignments and classroom activities to these objectives. It also provides a mechanism for teachers to assess whether students are meeting the objectives, and if not, where they are falling short.

Another crucial and attractive feature of Bloom's taxonomy is that it identifies in a hierarchical manner, the various developmental stages of cognitive development, and thus allows teachers to "scaffold" student's thinking by building on each level in an increasingly complex way.

Cognitive and educational psychologists, suggest that "scaffolding" is an appropriate method to support cognitive development, particularly cognitive development of a skill that students will need to incorporate and use over the course of their professional lives. Scaffolding has been described as "an instruction device that provides individual students with intellectual support so they can function at the cutting edge of their cognitive development."⁶¹ Scaffolding, as Athanassiou explains, is "teaching that provides support to allow the learner to learn for him or herself."⁶² It is the kind of teaching that is instructive, rather than prescriptive. While there may be several appropriate devices to provide such scaffolding, this article suggests that Bloom's taxonomy or any taxonomy that has been carefully thought through and designed to develop appropriate analytical skills which enable students to see connections between

⁶⁰ See for example Darcy Haag Granello, Note 14 *supra*, who applied it to teach students how to write literature reviews, and Nicholas Athanassiou who used it to teach management skills to business students. Nicholas Athanassiou, Jeanne M. McNett, Carol Harvey, *Critical Thinking in the Management Classroom: Bloom's Taxonomy as a Learning Tool*, 27 J. MANAGEMENT EDUCATION 533, 539 (2003).

⁶¹ Hogan and Pressley in Athanassiou, Note 60, *supra* at 534.

⁶² Athanassiou, Note 60 *supra* at 539.

ideas, may be particularly appropriate for the teaching of legal analysis/writing skills. Any taxonomy used should lay out a hierarchy of thinking goals and skills that students must develop, master and build on before reaching more sophisticated complex higher order skills.

Cognition, Metacognition and Bloom's taxonomy

i). Cognition

Cognitivists subscribe to the theory that learning best takes place when data is selected, processed, transformed into meaningful information, and stored in memory.⁶³ For this to take place, the information must be stored in the long term memory, as opposed to the short term memory. To process and store information efficiently, the brain attempts to place the information within an existing knowledge structure. This is done in an attempt to make meaning from the information, and is known as the “information-processing approach.”⁶⁴ According to Piaget, the brain functions efficiently by placing or “assimilating” information into an existing coherent system or “schema.” If this is not possible, because the information is new and does not fit comfortably into an established schema, we are forced to “accommodate” the new information by modifying the existing schema, or creating a new one.

In creating new schemata, Lustbader⁶⁵ notes that students begin to recognize the relationships among concepts, and begin to develop domain specific patterns of thought. “Mastery of these thought patterns distinguishes a novice from an expert in a particular

⁶³ Much of our knowledge about schemata and cognition comes from Piaget's theories of intellectual development. See David Moshman & Bridget A. Franks, *Intellectual Development: Formal Operations and Reflective Judgment* in ELAINE P. MAIMON ET AL; THINKING, READING AND WRITING (New York , 1989) at 9, 13.

⁶⁴ *Id.*

⁶⁵ Lustbader, Note 29 *supra* at 326

domain.” The advantage of this is that as experts, they can process, store and utilize information in a more thorough and efficient way, as well as see connections and distinctions between various forms of information. Leamson and others have suggested that underlying brain structures change to support enduring learning when students think about the course material in more meaningful ways.”⁶⁶ The seminal work of composition theorists Linda Flower and John Hayes has also verified that significant learning takes place when a writer places the “topic within a network of knowledge or schema, which allows him or her to cluster and organize his or her ideas and to see interrelationships among various aspects of the represented ideas with other knowledge that the writer may have.”⁶⁷

i). Metacognition

Metacognition involves the conscious art of thinking about one’s own thinking strategies. As Pamela Lysaght and Cristina Lockwood have noted, “the premise is that if students understand how they learn, they will. By doing so, students will become more actively involved in the learning process, and the manner in which the information they receive is stored, and becomes part of a schema.”⁶⁸ Particularly when what they learn is contextual, students can be made aware of what schema the information fits within, what its interrelationships with existing schema are, and the purpose, role and function of the information. Students can thus become more active and autonomous learners by being made consciously aware of their own thought processes.

⁶⁶ Leamson cited in McKeachie Note 15, *supra* at 285

⁶⁷ Oates, Note 5 *supra* at 13.

⁶⁸ Pamela Lysaght, Cristina D. Lockwood, *Writing Across the Law School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS’N LEGAL WRITING DIRECTORS 73, 94 (2004).

iii). Bloom's taxonomy

Bloom's taxonomy is a model originally designed by Benjamin Bloom and his colleagues to improve an instructor's ability to teach thinking.⁶⁹ Bloom's general approach to education theory has been described as "mastery learning," which, involves the student taking responsibility for what he or she learns, and which presupposes that each student is capable of learning the same material, provided that they are given appropriate instruction and sufficient time to learn.⁷⁰

The taxonomy has been widely documented as supporting student mastery of learning, and as an assessment tool to measure student competency and knowledge acquisition.⁷¹

The taxonomy has been utilized successfully across disciplines.⁷²

The taxonomy outlines six hierarchical positions of cognitive complexity, ordered from the least to the most complex: Knowledge, Comprehension, Application, Analysis, Synthesis and Evaluation.⁷³ Bloom anticipated that each level of the system would build on the successful completion of the previous levels.⁷⁴ At the bottom of the spectrum, Bloom considered Knowledge and Comprehension to be lower level thinking skills. At the other end of the spectrum, where a student can demonstrate mastery of Analysis, Synthesis and Evaluation, students are considered to be performing at the highest levels of the cognitive function. All of these skills, but particularly the higher level ones, are

⁶⁹ McKeachie, Note 15 *supra* at 285.

⁷⁰ THOMAS R. GUSKEY, IMPLEMENTING MASTERY LEARNING, (2nd ed., Wadsworth Publ. Co. 1997).

⁷¹ Darcy Haag Granello, Note 14 *supra*.

⁷² See McKeachie Note 15, *supra*, Haag Granello, Athanassiou Note 14 *supra*.

⁷³ Haag Granello, Note 14, *supra*.

⁷⁴ McKeachie, Note 15, *supra* at 285

integral to successful legal writing. All of them, too, are recursive and not merely hierarchical.

Using Taxonomies to Teach Effective Thinking and Writing

Susannah Brietz Monta and her colleagues in the English Department at the University of Wisconsin have found it crucial for students to understand precisely the requirements and parameters of an assignment, in order for those students to become successful writers.⁷⁵ In other words, before beginning to write, students must know exactly what types of skills they are being called upon to exhibit in response to the assignment – analysis, argument/persuasion, comparing and contrasting, etc. Brietz Monta also identified other crucial factors related to the rhetorical situation, that once students were compelled to consciously take into account, positively influenced their writing skills. Combining these factors into a hierarchical pyramid, loosely based on the USDA’s food pyramid, Brietz Monta created the composition pyramid – a visual depiction of how students should approach a writing project. The fundamental block of the pyramid that must be considered before any of the other factors, is the assignment, and its requirements, nature and scope – what it is that the person responding is being called upon to do.

The reason that the assignment is so crucial, is that the assignment acts as a visual cue to students for what type of thinking is required. If the assignment seems only to demand “knowledge telling”, i.e. reporting the facts of the case, or the ruling, without the student being required to contribute any of his or her ideas, then it is unlikely to facilitate

⁷⁵ Brietz Monta details this information at a University of Wisconsin website. *A User’s Guide to the Composition Pyramid*. See <http://mendota.english.wisc.edu/WAC>

learning.⁷⁶ For an assignment to facilitate learning, it must demand of students more than just the retelling or documenting of specific information. It must require students to take existing knowledge and transform it in some way by adding their own insights, analysis, seeing connections and relationships between ideas, and drawing analogies and distinctions. Additionally, students must also view the task that they are called on to perform as a knowledge transforming task.⁷⁷

In Legal Writing, the act of writing an office memo should be viewed as a knowledge transforming task, but all too often it is not, because students are unclear precisely what is being required of them. Because parts of the memo, such as describing the facts of the case, and describing the fact patterns and holdings of similar cases seem to be “knowledge telling” tasks, rather than knowledge transforming tasks, students mistakenly think that memo writing is formulaic – you merely plug in the facts, CREAC/IRAC, and you are done. Students need to be taught more precise thinking strategies for each part of the memo so that they come to see it as knowledge transforming, and so that they come to see themselves as legal authors who contribute to the ongoing development of the law.

Breaking down the requirements of the memo into specific schemata, and being more precise about the requirements of each part would be useful in fostering more precise thinking and writing on the part of our students. We often tend to use “genre based” teaching, teaching the format of the memo, how to write the facts objectively, how to CREAC etc, instead of focusing on the thinking skills required. Being explicit

⁷⁶ See Laural Currie Oates, Note 5 *supra* at 21. See also a study conducted by Ann M. Penrose reported in *To Write or Not to Write: Effect of Task and Task Interpretation on Learning through Writing*. 9 WRITTEN COMM. 465 (1992).

⁷⁷ Oates uses this phrase to describe the types of assignments that facilitate learning. See Oates, Note 5 *supra* at 21.

about the cognitive skills required in memo writing and providing students with schemata in the form of Bloom's taxonomy (or an appropriate taxonomy specifically and thoughtfully designed by a particular teacher) to "scaffold" those cognitive skills, may assist students in coming to think like lawyers. Also, as teachers, if we have taught students the various cognitive steps required, and are aware of them ourselves, it will be easier to identify where our students' thought processes are incomplete or erroneous. Our responses to their writing can thus be tailored and targeted to specific errors, and will help to form and shape our students' development as legal thinkers.

Cognitive Objectives

In order for students to master the higher levels of cognitive development, they must first establish the lower levels. Below I illustrate how Bloom's taxonomy may be applied to teaching students how to write an office memo.

Knowledge, Comprehension and Application in Bloom's Taxonomy

Knowledge - As a logical progression, students start off with the facts presented by the client or assignment in a predictive memo assignment. Students must know the facts – in other words, they must be able to bring to mind the appropriate information. Even if they do not yet know which facts are legally significant, they must know the client's basic story. While this part of the memo may at first seem like knowledge telling – requiring students merely to report the facts, as opposed to requiring them to process the facts and overlay them with any of their own interpretation - choosing which facts to include does require more than knowledge telling. Students should only include facts which are legally significant, and which are required for the reader to make contextual

and chronological sense of the client's story. To do this successfully, students must not only demonstrate knowledge, but also, the next level of the taxonomy, comprehension.

Comprehension- requires a student to demonstrate an awareness of what the material means, by correctly identifying the legally significant facts for example. The student must show understanding that the client's particular problems fall into a recognizable area of law – torts or contracts for example. The student must then take appropriate measures to find the applicable law pertaining to the client's situation, and must come up with the relevant statute(s) and case law. The student must be able to read and comprehend the law. She must extrapolate the "rule" from the statute, and the holdings and rationales of the cases. These types of tasks do not rise to the level of knowledge transformation, but are necessary as a background and context to explain to the reader what is at issue. They are also necessary for the student, who can then progress to the more cognitively complex tasks.

Application - Once the student has completed these tasks, s/he may then progress to application. This has been defined by Nicholas Atthanassiou as "the use of data, theories and principles to answer a question."⁷⁸ In Legal Writing, the data and principles are the rules, holdings and principles established by the statutes and case law. Applying these rules and holdings from the law to the client's facts shows whether the students can determine which facts are legally significant, which cases are relevant, which principles, rules, holdings and rationales should be applied. Atthanassiou suggest that at this level the student should be able to demonstrate classification, development, modification and organization.⁷⁹ In the Legal Writing universe, this means that the student should be on

⁷⁸ Athanassiou Note 60 *supra*, at 536

⁷⁹ *Id.*

her way to analogizing and distinguishing cases, applying the law to the facts, etc. It is at this point that students' thinking may begin to break down, as it is here, and in the next few steps of the taxonomy that students are required to make connections and see the interrelatedness between the various schemata.

Analysis and Synthesis

According to Bloom,⁸⁰ analysis is properly understood as breaking down the material into its constituent parts so that the organizational structure may be understood. In order to perform this task, a student must demonstrate understanding of the material, its content and structure. For the typical formalistic Legal Writing student, this is where CREAC and IRAC would come into play. Analysis, however, requires not only a formal mastery of the genre, but as Bloom noted,⁸¹ understanding on the part of the student as to how all of the pieces fit together. The student must, therefore, show mastery over hierarchy of authority, how cases interrelate and fit together. The student must be able to see connections. It is here that the writing of the memo becomes a truly knowledge transforming task. In synthesis, the students recombine the parts to form a new entity – at this level of thinking, students should be able to create new patterns and structures, based on a scheme for classifying information.

The final and highest level of cognitive development is evaluation which “shows the ability to judge the value of material for a given purpose, based on definite criteria and rationale.”⁸² This level includes “decision making and selection” and contains elements of all the other categories – for example, synthesis is critical to evaluation. For

⁸⁰ BENJAMIN BLOOM, M.D. ENGELHART, F.J. FURST, W.H. HILL, & D.R. KRATHWOHL, *TAXONOMY OF EDUCATIONAL OBJECTIVES: COGNITIVE DOMAIN* (New York, McKay, 1956)

⁸¹ *Id.*

⁸² Athanassiou, Note 60, *supra*.

the legal writer, this type of thinking would be exemplified in the Brief Answer and the Conclusion and Recommendation. Here the student would demonstrate a mastery of the subject matter, the objectives and purpose of the memo, and the complex interrelationship of law and particular facts that enable a lawyer to make a prediction about whether a client has a claim. Here the student shows definitively whether he or she has mastered the skill of thinking like a lawyer. Having outlined the facts and law, applied the relevant parts of the law to the particular context, analyzed the implications, and synthesized all of the information into a manageable form for the reader that is “genre appropriate,” the student would then make a recommendation to the supervising attorney about whether and how to proceed with the case. Connecting all of these elements, requires the creation of new knowledge structures, and the modification of old ones. All of these skills are skills routinely used by lawyers, who, as Oates reminds us, act as reporters, analysts, evaluators and strategists.⁸³ By requiring them, we are requiring our students to think like lawyers, and become fledgling experts as opposed to novices.

We must therefore give our students these skills, and we can best teach them by using “goal directed approaches and methods of thought that help students build bridges between what they already know and have experienced and what they are trying to learn.”⁸⁴ These strategies, McKeachie suggests, can be used to “help build meaning in such a way that new information becomes part of an organized knowledge base that can be accessed in the future for recall, application or problem solving.”⁸⁵ If we want our students to enter the profession prepared to exercise lawyer-like skills, we must help our students establish a cognitive schema for the development of these skills.

⁸³ Oates Note 5, *supra* at 22.

⁸⁴ McKeachie Note 15, *supra* at 277.

⁸⁵ *Id.*

Conclusion

Getting our students to acknowledge legal writing as a “knowledge transforming task”⁸⁶ will not be easy. To accomplish this, we must make it a manageable task. We cannot assign them such a task, however, without giving them strategies to assist them with the process. We need to better understand the behaviors that constitute critical thinking, as well as the types of thinking required by various lawyerly tasks, in order to make explicit and teach these behaviors to our students.

Joseph Williams has pointed out that learning to write and think is not just a matter of cognitive growth, but also of socialization into a discourse.⁸⁷ Law students have to move from their former discourses into a new one, a transition that is not always smooth. The transition also takes time. To expect students to become “experts” in the space of one year, given the limited number of knowledge transforming assignments that one can reasonably expect them to undertake in that time period, is unrealistic. “Students need continued and repeated guidance from experts so that they can acculturate slowly and steadily.”⁸⁸ If law schools do not provide enough time and opportunity for students to become accustomed to this new discourse through a preliminary legal writing course , and later master it through advanced legal writing courses, we risk relying on the profession to teach students what they should have learned in law school. By giving students the opportunity to practice being members of the legal community in law school, they are much more likely to enter the profession as competent professionals; a goal identified by the McCrate report, and surely the goal of every caring law teacher.

⁸⁶ Oates Note 5, *supra* uses this phrase at 22.

⁸⁷ Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING 1, 24 – 30 (1991).

⁸⁸ Jill Ramsfield, Chris Rideout, Note 4 *supra* at 77.

Refocusing attention on thinking as opposed to writing has a number of meaningful implications. It requires us to develop specific strategies to teach students to pay attention to their own thinking, and identify where that might be breaking down. It requires us to develop thoughtful, realistic assignments, with specific learning goals in mind. It also requires us to respond differently to our students' papers. Instead of writing summative comments, we need to try and identify where our students' thought process has broken down, and respond to that in a formative way. Teaching thinking effectively requires us, as well as our students, to do some serious thinking about what it is we are doing when we write. We need to prove equal to the task if we want to effectively teach our students to write like lawyers.