

WHAT WILL I DO ON MONDAY, AND WHY AREN'T WE DOING IT ALREADY?:

REFLECTING ON THE VALUE OF EXPRESSIVE WRITING IN THE LAW SCHOOL CURRICULUM*

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I. INTRODUCTION

A central task for law students is learning to think as lawyers think. To accomplish this task, students must create their own understanding of the law as they interpret authoritative texts and observe life through the lens of the law. This process of creative discovery requires both imagination and discipline.

Writing assignments in law school usually emphasize the process of creating formal professional documents, such as memoranda, briefs, and more recently contracts. The iterative process focuses on producing a document that will serve a particular purpose and audience most effectively. In shaping documents that conform to their intended readers' expectations as to content, organization, and language, students develop critical-thinking skills that will serve them throughout their professional careers.

Writing-to-communicate to a distant and impersonal professional audience, however, is not the only kind of writing that is valuable to legal education. Also essential to the development of critical understanding is writing to express the writer's thoughts to the writer herself and perhaps an audience of trusted others,¹

* This Essay is based on presentations given at the Association of American Law Schools (AALS) Annual Meeting, Section on Legal Writing, Reasoning, and Research, New York City, NY, January 4, 2008.

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1. Art Young, *Teaching Writing Across the Curriculum* 5 (3d ed., Prentice Hall 1999). This monograph offers a wealth of suggestions for using writing in and out of the classroom to improve the quality of students' thought and expression.

writing to reflect and to make sense of texts, writing to explore the realm of knowledge and experience, and writing to exercise authority over texts and give voice to the writer's experience.² Expressive writing provides a means for students to reflect on texts and practice, experience, and bridge gaps created by linguistic distance embodied in legal texts—"to give voice to experiences that might otherwise be lost or denied."³ Writing to express thoughts serves to form those thoughts: through expression, thoughts are revealed and shaped.

Although writing to create meaning is an essential step in the process of writing to communicate to a particular audience to serve a particular purpose, attempting to do both at the same time may stifle creative thinking and yield superficial analysis and stilted prose;⁴ without independent thought, writing to communicate becomes writing to conform. By rarely assigning exploratory writing—writing that may be subversive because it is personal—in law school, we miss opportunities to bring the discipline of writing to the process of creating meaning.⁵

Providing such opportunities in law school, however, may provide an important foundation for professional growth. Research in the acquisition of expertise consistently finds the key to be deliberate practice, i.e., to perform an authentic task of appropriate difficulty, and after feedback, to do it again—better this time.⁶ Assigning expressive writing in law school offers students a vehicle for sustained, deliberate practice of the legal imagination, a means of surfacing and developing students' perceptions, thoughts, and judgment as they enter the profession. Deliberate practice of reflective and exploratory expressive writing fosters development of authentic professional identity and voice.

2. *Id.* at 9.

3. Nancy Lester, Panel Remarks, *Writing to Learn How to Think In and On Actions: The Role of Writing in Becoming a Professional* (New York City, N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference).

4. Peter Elbow, *Teaching Thinking by Teaching Writing*, *Change* 37 (Sept. 1983).

5. *Id.*

6. See K. Anders Ericsson, *The Acquisition of Expert Performance: An Introduction to Some of the Issues*, in *The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports and Games* 20–21 (Lawrence Erlbaum Assocs. 1996).

II. HOW EXPRESSIVE WRITING CAN SERVE EDUCATIONAL GOALS

The preceding essays⁷ illustrate the power of writing to construct meaning and generate understanding and suggest the variety of forms expressive writing assignments may take. These assignments interrupt automatic thinking to awaken awareness and encourage reflection and original thought.

A. Reflecting on Texts

Throughout her professional career, a lawyer learns from legal texts and through her written expression contributes to the development of the law. Learning to read and interpret legal authorities is a fundamental lawyering skill and central to case-method instruction in law school. Immediately upon arriving at law school, beginning law students learn to identify and summarize the component parts of judicial opinions through preparing case briefs. Although students are encouraged to reflect on the implications of the opinions and raise question in class discussions, they may discount their own observations (and those of their classmates) as they seek the “right answer.”⁸ Reflective writing may promote deeper reading of texts by asking students to articulate their responses to texts and to reframe texts in relation to other texts, thereby building a foundation for synthesizing authorities.

For example, Nancy Lester, a professor of literacy education, “promotes expressive, critically reflective writing” by assigning “learning logs.”⁹ Her instructions are simple: “As you are reading, note down any excerpt from the text that causes you to stop and think. Place this excerpt in the left hand column. In the right-hand column, note down your reaction/response to the excerpt.”¹⁰ Using this informal format, students explore their thoughts about

7. The authors discussed their ideas as members of a panel entitled *Writing Across the Curriculum: Professional Communication and the Writing that Supports It*, presented by the Section on Legal Writing, Reasoning, and Research at the 2008 Annual Meeting of the Association of American Law Schools (New York, N.Y., Jan 4, 2008).

8. See Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163, 164 (1993).

9. Lester, *supra* n. 3

10. *Id.*

texts as they read; they notice the surprises and work through their questions to create their own understanding of the texts.¹¹

The goal of the assignment is for students to “acquire knowledge in a way that ensures they will be able to use that knowledge, not only to practice, but to describe and explain why they practice as they do.”¹² Such critically reflective writing helps students develop “authoritative voices that reflect mastery of the subject matter,”¹³ and make “meaningful connections from the known to new understandings.”¹⁴ Professor Lester notes,

When students use writing as a way of thinking in their learning logs, opportunities for taking risks or making cognitive leaps are expanded, since producing polished ideas and correct answers without having opportunities to mess around with or tinker with their sketchy shaping of those ideas leads to shallow exercises in regurgitation.¹⁵

B. Discovering the Stories behind the Texts

Beginning law students often hope that their professors possess and will someday share law’s equivalent of the decoder ring—something that sets out the Law for every situation. Because they have entered law school—not fact school, they may resist thinking carefully about the factual complexity underlying the heavily edited cases they read for class—assuming that an opinion’s recounting of “the facts” is the singularly correct representation of the underlying human circumstances. Later, in reaction to the alarming discovery that multiple representations are possible, some students may conclude that law—at least case law—amounts to little more than the measure of the “chancellor’s foot.”¹⁶ Legal education can offer students a path toward finding

11. For a discussion of the value of this sort of “problematizing” reading strategy, see Dorothy Deegan, *Exploring Individual Differences Among Novices in a Specific Domain: The Case of Law*, 30 *Reading Res. Q.* 154 (1995).

12. Lester, *supra* n. 3.

13. *Id.*

14. *Id.* For an extended discussion of transfer of learning from one context to new contexts and its importance in learning, see *How People Learn: Brain, Mind Experience, and School* 51–78 (John D. Bransford et al. eds., expanded ed., Natl. Academy of Sci. 2001).

15. Lester, *supra* n. 3.

16. See e.g. H. Jefferson Powell, “Cardozo’s Foot”: *The Chancellor’s Conscience and Constructive Trusts*, 56 *L. & Contemp. Probs.* 7, 7 (Summer 1993) (stating that “[t]is all

meaning within indeterminacy by providing experiences in reading and recounting stories embodying the human dimension that may be lost in the highly abbreviated representations of facts found in law students' casebooks.¹⁷

Medical students may face a similar challenge reconciling scientific principles with human complexity, a challenge that may be addressed by exploring the imaginative possibilities suggested in literary texts. For example, Danielle Ofri, professor of medicine, has incorporated five minutes of "something literary" into morning rounds, reading an essay or poem aloud and asking for discussion, because she believes that "medicine—like law—can streamline the thought process into a very cramped indurate style."¹⁸ Reading literature and composing narratives, on the other hand, require "neurologic loop-de-loops involving keen observation, description, action, emotion, language, and esthetics,"¹⁹ and nuanced interpretation of metaphor. Dr. Ofri observes, "These are the skills of creative thinkers . . . [who can] approach problems from diverse perspectives."²⁰

In addition to reading literary writing to explore the human experience and to reject the conventional boundaries, Dr. Ofri assigns "narrative write-ups" that challenge and illuminate the genre of the "patient write-up," which is a standard medical history with formalized sections, usually written in a "carefully honed argot of passive voice and specialized vocabulary designed to keep the doctor and the patient at a healthy linguistic distance."²¹ The patient's voice is absent from the write-ups, which are tedious to read; Dr. Ofri likens them to "the interrogation of a corpse."²²

one as if they should make the Standard for the measure we call A foot, to be the Chancellor's foot; what an uncertain measure would this be; One Chancellor has a long foot another a short foot a third an indifferent foot; tis the same in the Chancellors Conscience." (quoting Edward Fry, *Life of John Seldon*, in *Table Talk of John Seldon* 177 (Frederick Pollock ed., 1927)).

17. See generally Ruth Anne Robbins, *An Introduction to Applied Storytelling and this Symposium*, 14 *Leg. Writing* 4 (2008)

18. Danielle Ofri, Panel Remarks, *Injecting Homer into Hippocrates: Using Literature to Teach Medical Students* (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

In a narrative write-up, by contrast, students must tell the patient's story as a story in plain language (e.g., a forearm is a forearm, not a "distal upper extremity"). After overcoming their resistance to this departure from all they had worked so hard to learn, students discovered that they uncovered critical clinical facts that would not have come to light in the standard write-up."²³ Rejecting the conventions of a standard genre in medical education thus served to interrupt students' habitual practice and routinized thinking and writing, so that they may notice more, understand more, and better respond to the unique circumstances surrounding their patients.

Nancy Levit, professor of law, likewise argues that discovering and telling stories in legal education promotes development of professional identity and that narrative is a powerful mode of learning,²⁴ noting that research in cognitive neuroscience indicates that narratives trigger both hemispheres, leading to holistic learning.²⁵ The role of metaphor in legal thought has been described as "our most pervasive means of ordering our experience into conceptual systems."²⁶ Accordingly, creative writing in law school "sharpens analytical skills—it insists that its authors have the ability to shift perceptual frameworks."²⁷ Many of Professor Levit's examples take the form of poetry, but other assignments, such as asking a criminal law student to give the closing argument in a case read for class, may provide experience in reframing facts, while additionally drawing attention to modes of persuasion.²⁸

C. Giving Voice to the Writer's Experience

In addition to supporting professional communication, expressive writing may itself be that communication. Although writing courses in law schools necessarily emphasize writing for law practice and the expectations of readers of legal documents,

23. *Id.*

24. Nancy Levit, *Expository Writing Across the Curriculum—Legal Storytelling: The Theory and the Practice*, 15 *Leg. Writing* 259, 265–276.

25. *Id.* at 277.

26. *Id.* at 266 (quoting Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 *U. Chi. L. Rev.* 361, 383–384 (1996)).

27. *Id.* at 273.

28. *Id.* at 273–274.

an education in law should also include experience in formulating and expressing original thought on issues of importance to the student and to society.

Ruthann Robson discussed her use of scholarly writing projects in her seminar on law and sexuality, in which students gave voice to their own moral reasoning on highly controversial issues.²⁹ The assignments challenge students to take risks as they create within a limited realm of legal doctrine and to communicate their own position in a voice that is both professional and authentic.

D. Providing Alternatives to Conventional Modes of Assessing Learning

Finally, expressive writing assignments are valuable tools for assessment of law students' learning. Derrick Bell has offered a variety of creative alternatives to final exams for assessing what students have learned—and for facilitating their learning more in the process.³⁰ While these methods may involve more work for teachers and students, they promise benefits of greater depth of understanding and fuller development of an authentic professional voice.³¹ How we assess law students' performance sends a clear message to students about what skills are valued. If the three-hour examination is our only means of evaluation, we miss opportunities to encourage reflection and creative exploration of ideas.³² Why is it the favored form?

29. Ruthann Robson, Panel Remarks, *Sexual Justice, Student Scholarship and Some Thoughts on the So-Called Seven Sins* (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).

30. Derrick A. Bell, Jr., Panel Remarks, *Writing Across the Curriculum: Professional Communication and the Writing that Supports It* (N.Y.C., N.Y., Jan 4, 2008) (panelist at the Section of Legal Writing, Reasoning, and Research panel at the AALS Conference) (notes on file with Author).

31. *Id.*

32. See Philip Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433, 455 (1989). For a thoughtful discussion of law school examinations and alternative modes of assessment, see William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 162–184 (Jossey-Bass 2007).

III. *WHAT WILL I DO MONDAY—AND WHY AREN'T WE
DOING IT ALREADY?*

These panelists persuasively demonstrate the potential of expressive writing assignments to encourage students to think about the law and to become reflective practitioners. They challenge teachers to ask not only how these ideas can be applied in law school curricula, but also what barriers impede inclusion of writing-to-learn activities in law-school courses—that is, what will we do Monday, and why aren't we doing it already?

My first encounter with these essays left me brimming over with ideas I wanted to express—the first sketchy shaping of plans to incorporate reflective and expressive writing into my classes—and wondering which of this rich mix of ideas I use might in class next Monday. I was especially excited about assigning learning logs. That idea clicked for me immediately because I want to encourage students to follow the surprises they encounter in texts, to identify questions and seek to resolve them, but I have not been entirely satisfied with my attempts to do so, in part because I lacked the right vocabulary. Next, I vowed to become more intentional about bringing stories into the classroom to encourage students to think beyond the texts—to seek out in the linguistic distance the human stories underlying legal disputes, so as to be able to faithfully translate clients' stories into law's metaphors. And I decided to encourage students to think about lawyers' stories, as well—including their own—to encourage development of professional identity and voice.

Reflecting further, though, I realized that while incorporating expressive and reflective writing into small upper-level classes has seemed easy and natural to me, I have been far less creative in assigning writing in large-section doctrinal classes. Why would that be, when I am entirely convinced of the educational value of writing in law school? Having thought for pages about the reasons for assigning expressive, exploratory writing, I'd like to muse a bit about why we might not do so.

First, we simply may not think of it, and we certainly have enough other things to think about. Expressive writing likely had

little role in our own legal education, and we may fear student resistance to an unfamiliar teaching method.³³

On the other hand, though, many of us are troubled by studies that show, as Nancy Lester noted, that “expressive writing—writing to think, to reflect, to take chances, to work through understanding, to question—is virtually absent from school settings.”³⁴ Moreover, having graded three-hour exams, we have direct experience in reading “the shallow regurgitation that can result when students are asked to produce polished ideas and correct answers without having opportunities to mess around or tinker with their sketchy shaping of these ideas.”³⁵

Second, we may not have used writing in doctrinal courses before and may fear that we don’t know how to design effective assignments. On the other hand, we do know our course goals, and thinking about what we would hope to accomplish through writing assignments suggests ways to achieve those goals. As Art Young has observed, “Successful assignments are embedded in the unique goals of each course and are integral to the building of knowledge in that course. Effective writing assignments are not ‘add-ons.’”³⁶

Writing in law school can help students relate their study of law to their personal experiences and to their understanding of society and culture. Writings of various length and degrees of formality can encourage students to think about the complicated factual circumstances and values surrounding legal issues. Reflection papers and journals can help students grapple with ma-

33. See e.g. Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 Vand. L. Rev. 135, 149 n. 40 (1987) (noting his own and a colleague’s experiences of student evaluation ratings that declined when ungraded writing assignments were required and returned to their previous levels when writing exercises were not assigned). Professor Kissam observed that “writing exercises in a basic doctrinal course are likely to violate the general norms and expectations of the law school community. Under these conditions, the student ratings of the professor’s work quite possibly could decline.” *Id.* at 149. For a discussion of students’ silence in response to unconventional teaching methods, see Ofri, *supra* n. 18.

It is possible, though, that at least for some kinds of courses, those norms and expectations have changed in recent years, making students more receptive to writing exercises and more appreciative of teachers who assign them. See e.g. Susan L. DeJarnatt, *In Re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 J. Leg. Educ. 50, 69 (2000).

34. Lester, *supra* n. 3.

35. *Id.*

36. Young, *supra* n. 1, at 9.

terial on a personal level and build habits of life-long learning in the profession. Seminars and other “paper courses” offer opportunities for students to use writing to focus their thinking as they explore specialized areas of interest.

Even in large classes, students benefit from writing assignments designed to support the more sophisticated learning necessary for them to make sense of complicated areas of law. The hard work of distilling, reformulating, and expressing the applications of key ideas embodied in texts promotes deeper learning of underlying principles and policies. Potential assignments range from asking students to generate hypotheticals that might be governed by authorities discussed in class, to short papers or outlines supplying factual background surrounding legal issues to be discussed in class, to position papers, testimony for legislative committees, comments on proposed administrative rules, amicus briefs, and law review comments.

The preceding panelists offered numerous examples of expressive-writing assignments, such as learning logs to facilitate engagement with texts, seminar papers for which a key purpose is to encourage exploration of and reflection on moral issues, and use of stories and poems and genre-bending to deepen contextual understanding. Legal-writing teachers have an important role to play in uncovering these possibilities for our less-experienced colleagues.

Third, our courses are overloaded already, and writing is time-consuming. A teacher who assigns writing in a survey class may have to sacrifice some coverage in favor of the purposes served by writing. The opportunity that writing affords students to consider a narrower set of topics in more depth, however, may justify that sacrifice. In addition, it is possible to use writing assignments to increase the breadth of coverage to include topics that will not be discussed in class. For example, a teacher can enrich the content of a survey course by providing a list of topics suitable for short, exploratory papers.

Paradoxically, coverage concerns themselves may provide good reasons for assigning writing: tools for self-education are most needed when doctrine is complicated and evolving. Accordingly, developing skills of synthesis and selection through written assignments may be increasingly important. Electronic media brings information to students in torrents—uncatalogued and

random. The vast resources present educational challenges as well as benefits. As Molly Lien wrote in her article, *Technocentrism and the Soul of the Common Law Lawyer*,³⁷ “Students appear to equate the ability to access the material with mastery of the material. They view downloaded information as learned information.”³⁸ Writing forces students to make sense of the vast informational resources. In an increasingly interactive learning environment, writing affords time to process information and to reflect on its meaning.

In any event, the choice to assign writing in a course or not to do so should be a deliberate choice. Teachers designing courses should examine the educational benefits of writing and weigh them against the benefits of breadth of coverage.

Fourth, we don’t have time to grade writing assignments. Evaluating written work is time-consuming, and teachers may worry that not to grade written work will remove students’ incentive to do good work and serve as tacit endorsement of mediocre writing.³⁹ However, other methods of providing feedback are available: class discussion, exercises requiring students to test the document by using it for its intended purpose, teacher-generated models to which students may compare their work, peer evaluation, general oral comments from the teacher, guided self-evaluation, comments but no grade, comments on only specific aspects of the assignments, check-list comments, or simple check-off lists that each student has completed the written work.

Another method of reducing grading time is to assign collaborative writing tasks. Using collaborative groups reduces the number of assignments for the teacher to read, and the experience of working with others may help students develop professional judgment. Lawyers often write in collaboration with other lawyers, and collaborative assignments can teach important lessons in offering and receiving constructive criticism within a group of their peers.

37. Molly Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 Am. U.L. Rev. 85 (1998).

38. *Id.* at 118.

39. On the other hand, much of the important work done by students in law school is ungraded. Examples include class preparation, moot court, and extra-curricular activities. Sometimes students are motivated to do good work by the hope that it will pay off in graded assignments; sometimes social rewards provide incentive.

For some purposes, these methods may even be preferable to reading and grading every piece of written work that each student produces. Responding to writing without “final grades” may encourage students to use writing to help them organize their thoughts, rather than thinking of writing only in terms of the end product, and it may help students develop their ability to evaluate their own work.

On the other hand, grading does serve important purposes by providing students with both useful information and incentive to improve their work in successive assignments. It may be possible to achieve these benefits without requiring much more than the usual amount of grading time. For example, by substituting a short writing assignment for one examination question, a teacher can spread out grading over the semester rather than concentrating that work in the short, intense period following semester examinations. Even the simple step of including a take-home portion in an end-of-course examination, which need not add to grading time at all, may serve writing goals of encouraging both creative and critical processes by giving students sufficient time to rewrite their responses.⁴⁰

Derrick Bell has challenged us to think about the effectiveness of the writing we *do* have time to grade: examinations. Are they the most effective modes of assessment? What are we measuring? Why do we choose this mode of assessment over other possibilities?

IV. CONCLUSION

Writing is a tool for constructing meaning. Writing provides a vehicle for reflection and a discipline to focus thinking and perhaps to liberate thought. By writing, students connect the dots of experience, integrating the various aspects of their legal education, described in the Carnegie Report as “knowledge, know-how, and ethical judgment.”⁴¹ To be able to draw connections between fragments of information drawn from multiple sources is increa-

40. See Philip C. Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433, 500–501 (1989).

41. Sullivan et al., *supra* n. 32, at 81–82 (noting the importance of integrating these types of intelligence in the practice of law).

singly more important and difficult, as those fragments increase in quantity and instantaneous availability.

Expressive writing is integral to the process of developing critical understanding and provides deliberate practice in reflection, itself an essential professional skill.⁴² Reflective-writing assignments encourage students to connect with parts of themselves they may be silencing during their law school experience and may ameliorate feelings of alienation experienced by some, perhaps many, law students.⁴³ Through written expression, in forms ranging from journal entries to law review articles, students may discover and test their own thoughts, find their professional voices, and develop the self-awareness that is the foundation of professional integrity. Three-hour examinations given at the end of each semester do not provide sufficient writing experience to achieve these educational goals.

The preceding essays and other panel presentations invite law teachers to explore the idea of assigning expressive writing and to reflect on its possibilities for enhancing legal education. What will you do on Monday?

42. See Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 *Widener L.J.* 91, 100 ("Reflective inquiry is itself a professional skill, critical for assimilating learning experiences.").

43. See e.g. Student Author, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 *Harv. L. Rev.* 2027 (1998). One of my former students, describing a class in which students were required to keep journals, told me that her law school experience had been transformed by the opportunity that journal assignment gave her "to tell someone and have them listen."