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BUILDING A TOWER OF BABEL OR BUILDING A DISCIPLINE? TALKING ABOUT LEGAL WRITING

TERRILL POLLMAN*

"Somehow it seems to fill my head with ideas—only I don't know exactly what they are!"¹

Through the Looking Glass

"What if it should turn out that we are all jargon makers and jargon users, and that jargon is necessarily involved in the growth and change of language?"²

Walter Nash

I. INTRODUCTION

High-quality writing is one of the crafts most necessary to a successful career in law. Mature legal professionals, lawyers, judges, and law professors write every day. Often, they write cooperatively—editing and redrafting a shared document. Nevertheless, those trained in the law may lack a common language that enables them to talk with each other about writing. Like the workers building the tower in the biblical story of Babel,³ legal professionals sometimes find themselves unable to communicate about their work.

Unlike most subjects in the legal academy, legal writing has emerged as an area of serious study in law schools only in the last fifteen years.⁴

* Assistant Professor of Law, University of Nevada, Las Vegas. I would like to thank Rochelle Nguyen for her research assistance as well as Professors Ann McGinley, David Zlotnick, Mary LaFrance, Linda Edwards, and Carl Tobias for helpful comments on earlier drafts. Further, my thanks also goes to the colloquia participants at the Notre Dame Legal Discourse Conference and the Boyd School of Law for insight in the early stages. I am also grateful to James E. Rogers for his generous support.

1. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 119 (1981).

2. WALTER NASH, *JARGON: ITS USES AND ABUSES* 3 (1993).

3. *Genesis* 11:4-5 (King James).

4. Scholars conducted surveys of the scholarship in the legal writing area in the 1980s, although direct inquiry about the nature of the field occurred late in that decade. James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the*

As this new area develops, legal writing professionals create a diverse professional language that both illuminates and obscures the substance of the new discipline. Paradoxically, the new terminology, which should be instrumental in eventually creating greater understanding of the writing process, has created short-term confusion.

Language that obscures meaning or excludes non-professionals is often known as jargon.⁵ Jargon may also be defined as the language of a profession,⁶ and this Article uses "jargon" in that sense, as language created specifically for use in the workplace.⁷ The Oxford English Dictionary adds that jargon is "often a term of contempt for something the speaker does not understand."⁸ Legal writing professionals, who devote considerable time to teaching students to avoid the type of legal jargon commonly known as *legalese*,⁹ will probably resist the assertion that they also create jargon. The propriety of using jargon depends, however, on context or audience. When professionals use jargon with those who share an interest in the area but have not learned a specific idiom, jargon usually creates confusion. However, when used to speak to other professionals who understand it, jargon is simply convenient shorthand.

Prospects, 60 REV. EDUC. RES. 153, 155-57 (1990); George D. Gopen & Kary D. Smout, *Legal Writing: A Bibliography*, 1 J. LEGAL WRITING INST. 93 (1991) (noting that from 1970 to 1979 eighty-three legal writing books or articles were published, but that from 1980 to 1991, 207 were published). See generally Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067 (1999); Jan M. Levine & Kathryn Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 553-65 (2000) (including a history of surveys of legal writing programs, faculty, and salary information).

5. Webster's first definition is "confused, unintelligible talk or language; gabble; gibberish." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2d ed. 1957).

6. Webster's fourth definition is "the specialized vocabulary and idioms of those in the same work, way of life, etc., as journalism or social work: somewhat derogatory term, implying unintelligibility." *Id.* However, by 1981, the second definition of "jargon" in the Webster's Collegiate Dictionary read "the technical terminology or characteristic idiom of a special activity or group" and the "derogatory" definition was dropped. WEBSTER'S NEW COLLEGIATE DICTIONARY 614 (1981).

7. David Mellinkoff prefers the term "argot" for "a specialized vocabulary that is common to any group." DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 17 (1963).

8. OXFORD ENGLISH DICTIONARY 194 (2d ed. 1983).

9. Legal writing professionals teach students to distinguish between *legalese* and a *term of art*. *Legalese* usually is a pejorative term, and it refers to the unnecessary use of archaic and formalistic legal language. See BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 334-35 (1987). For example, most legal writing teachers today discourage students from using the word "such" to mean "this" or phrases like "the party of the first part." "If such party of the first part objects" might become "If the landlord objects."

Language, like law, is by its very nature ever-changing—a living thing. The paradox of legal writing jargon is that the confusing new terminology may also represent the robust and natural growth of an emerging discipline. It is my thesis that, however confusing in the short term, legal writing jargon, with all the problems that the term implies, is necessary to the healthy development of legal writing as a discipline.

Legal writing jargon, however, does create substantial problems. The most noticeable problems occur between those legal professionals who studied in an extensive legal writing program, and those who received little, if any, legal writing instruction in law school. If lawyers and judges attended law school before 1985–1990, they were not likely to learn any professional language, much less a common one, that would allow them to communicate efficiently about legal writing.¹⁰ For example, a student clerk may approach her employer, a judge in a United States District Court, concerning a draft of the analysis the judge requested that she prepare on respondeat superior. She asks, "Judge, how is my rule proof?" If the judge understands what she is saying, the judge is probably a relatively recent law school graduate who studied legal writing using one particular textbook.¹¹ However, more than likely, the judge is puzzled. Because the judge and student clerk do not share a common language, they are unable even to begin a conversation about the clerk's writing.

More surprising, the lack of a shared vocabulary for communicating about writing goes beyond the dialogue between mature professionals and newcomers to the profession. In an emerging area like legal writing, even those who teach legal writing may not share a common language. Legal writing professionals have not yet established a uniform common vocabulary within the legal writing academy. Jargon is often limited to

10. Students returning from summer clerking positions have told me that a typical editorial comment is the abbreviation "AWK" in the margins. This illustrates my point. The reader provides useful information only insofar as the writer now knows that the reader was uncomfortable. The comment is not a legal writing professional's term of art. It offers no guidance for the writer about *what exactly* is wrong or *how exactly* the writer might ease the reader's discomfort. General comments on grammar are more helpful. For example, the reader may tell the writer, "This sentence is too long." According to my students, lawyers and judges who use a professional legal writing vocabulary to talk about the more important aspects of the document, such as its structure or analysis, are rare.

11. Richard Neumann defines "rule proof" as that portion of a legal analysis that describes the rules, facts, and rationale of precedent the writer will apply to facts in the present case. RICHARD NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE* 89–104 (3d ed. 1998).

one textbook only or one legal writing teacher.¹² Students of one law school may not share the same legal writing language with students of another. Even within one program, the variation in terminology can be substantial. Jargon-confusion jeopardizes legal writing communication precisely when developing a professional language is vital to creating the substance of the legal writing field. This lack of a common language threatens an emerging field that is critical to training competent legal professionals for the next century.

In addition to its dangers, however, jargon may provide benefits. As noted above, it serves as a useful shorthand among professionals. Furthermore, language studies suggest that the act of jargon-creating may be important. Many rhetoricians, composition theorists, and language scholars conclude that the process of creating and using language is the process of making meaning.¹³ In an emerging area of study, creating new language may be critical to establishing the substance of the new area. Despite the traditional drawbacks of using jargon, the new legal writing discourse may give the legal community both a richer vocabulary and a better understanding of what legal writing entails. Thus, the emerging legal writing language simultaneously hinders communication and advances the field of legal writing by creating its substance.

This Article notes that, as the discipline emerges, legal writing professionals are developing a new language about legal writing.¹⁴ The Article analyzes the paradox of the developing professional language: that it simultaneously hinders and advances communication about legal writing. In addition to examining the origins and nature of legal writing jargon problems, the Article encourages further study of how legal writing professionals talk about writing. It rejects the potential solution of regulating legal writing jargon or language by committee, because that approach will stifle creativity and vitality in a new area. Instead, it suggests as a possible solution studying the emerging professional language, using care to expand the language only when the neologism

12. For example, Tom Goldstein and Jethro K. Lieberman use the term "lead" to refer to the first opening paragraph or question. They suggest that too many lawyers use a "chronological lead" without thinking through a problem or revising wording once they have solved the problem. TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 55, 90 (1989).

13. See *infra* Part II.A.3.

14. I use the term "legal writing professional" to refer to those full-time academics who primarily identify themselves as legal writing teachers, regardless of their employment status in the academy.

enriches, and finally, creating situations within and without the academy for sharing the rich and varied vocabulary of the emerging discipline.

Part II of the Article assesses how the emergence of legal writing as an area of study has created a problem involving jargon. The problem derives from the history of legal writing training, from the lack of training before the late 1980s to the evolving nature of legal writing teaching today. In particular, Part II analyzes how theories of modern rhetoric and composition have influenced the pedagogy and idiom of legal writing. Part II also analyzes how staffing decisions in legal writing programs have affected the development of a common language in legal writing. It explains how the lack of a common legal writing language grows out of legal writing's status as an emerging area of study in the legal academy.¹⁵

Part III examines the notion of jargon itself and how it operates. Commentators have long deplored jargon's use in the law because it hinders communication between professionals and the rest of society.¹⁶ Common objections are that using jargon is pretentious and that it confuses and divides.¹⁷ A professional vocabulary may create a sense of political solidarity or elitism among legal writing professionals, but jargon can also separate its creators from others, and could undermine the efforts of a group that has traditionally suffered low status in the legal academy.¹⁸

Part III also considers jargon's benefits. Jargon may be necessary to express new ideas or new configurations of old ideas. Many theorists now maintain that language and the writing process are constitutive of thought.¹⁹ Composition scholars posit that writing is a process that creates and shapes thinking, not simply the expression of already-formed thought.²⁰ If the process of speaking and writing is actually the process of making meaning, the process of developing a new area's language actually develops its substance.

15. Jargon in an emerging area poses somewhat different problems than jargon used in a well established area of study. See *infra* Part II.B.

16. For example, an early nutshell on Legal Writing asks readers to "omit archaic legalisms" because they create ambiguity. LYNN B. SQUIRES & MARJORIE DICK ROMBAUER, *LEGAL WRITING IN A NUTSHELL* 101-02 (1982); see also Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1985).

17. See NASH, *supra* note 2, at 3; MELLINKOFF, *supra* note 7, at 24-28.

18. See generally Levine, *supra* note 4; Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530 (1995).

19. See *infra* Part II.A.3.

20. See *infra* Part II.A.3.

The Article concludes that jargon's benefit to the emerging discipline outweighs the temporary confusion it creates. It suggests methods to ameliorate the confusion of the new language. First, the academy must address status issues surrounding legal writing that have exacerbated delay in the process of developing a common vocabulary. Next, to solve the communication problem that legal writing jargon creates, scholars must study the state of the language used to teach legal writing now. It is critical to know how those creating a new legal writing language—legal writing professors and their students—talk about writing. The legal community must concomitantly identify how judges and lawyers talk about writing. If we begin to understand how legal professionals use jargon differently, we can see how we need to clarify our speech. Additionally, legal writing professionals should make considered decisions when expanding legal writing vocabulary, creating new terms or neologisms purposefully and not merely for the sake of expansion. Finally, after studying the emerging legal writing language, legal writing professionals can begin teaching the entire legal community the vocabulary needed to talk about legal writing with each other as colleagues, teachers, and employers.

The legal academy may have underestimated the importance of a common language with which to talk about legal writing. James Boyd White has written that "[p]erhaps no aspect of legal life is more important, yet more widely misunderstood, than legal writing."²¹ White contends that teaching legal writing students to become "literate in the law" should be at the heart of legal education, even as he decries the narrow conception of much legal writing training.²² White argues that legal writing is not simply a mechanical skill or technique that students should model. The greatest opportunity that the study of law offers "is not that one can learn to manipulate forms, but that one can acquire a voice of one's own, as a lawyer and as a mind; not a bureaucratic voice but a real voice."²³ Lawyering is a craft at the center of which is communication. Thus, affording students and the profession a rich and sophisticated language to talk about writing is critical. Developing a common professional language about legal writing will enrich the emerging substance of the discourse community, facilitate legal communication, and enable individual legal writers to develop the

21. JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 25–26 (1999).

22. *Id.* at 25–27.

23. *Id.* at 34.

authentic voice of which White so eloquently speaks.

II. THE CHANGING NATURE OF TEACHING LEGAL WRITING

This section briefly traces the rise and growth of legal writing as a discipline. It describes various rhetorical theories, mainly from composition studies, and recounts the way these theories have influenced how legal writing teachers created jargon. These rhetorical theories are particularly important because the article relies on them to argue that creating jargon is essential to the development of the field's substance.

For many years, law schools did not teach legal writing.²⁴ When legal education began to offer this training, legal writing teachers first adopted a formalistic approach, applying rigid rules and formulae that emphasized the formal properties of model legal texts. Legal writing faculty later explored the principles of "New Rhetoric"²⁵ and composition theory, and legal writing professors began teaching the writing process.²⁶ New Rhetoric views language as constitutive: that is, the writing process does not simply reveal thought, it makes thought. In other words, in New Rhetoric theory, writing *is* thinking—a different way of thinking.

This section also examines the relationship between the development of legal writing language within the discipline and the method of staffing legal writing programs. It argues that staffing and status issues have further complicated the language of legal writing.

24. See generally Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 123-33 (1997).

25. "New Rhetoric" refers to a movement in composition theory. E.g., Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J., 1089 (1986). James Boyd White says that law is "most usefully and completely seen as a branch of rhetoric," which he defines as "the central art by which culture and community are established, maintained, and transformed." JAMES BOYD WHITE, *HERACLES' BOW* 28 (1985). He calls this "constitutive rhetoric." *Id.*

26. See, e.g., Phelps, *supra* note 25, at 1089. Phelps was one of the first scholars to apply principles of New Rhetoric to legal writing by arguing that writing is not simply putting the author's thoughts on paper, but it is a "conversation" between author and reader. *Id.* She contends that "[t]eaching legal writing as conversation allows for far more than just the polishing of a necessary skill; it encourages students actually to see the law differently." *Id.* at 1090. See also *infra* Part II.A.3.

*A. A Brief Look at the History of Legal Writing Teaching and How
Composition Theory Has Affected It*

1. The Rise of Legal Writing

Commentators have urged better legal writing for centuries;²⁷ however, few law schools offered much formal training in legal writing as a separate discipline before the 1980s.²⁸ Even then, only a small number of schools offered legal writing programs taught by those who identified themselves as full time legal writing professionals.²⁹ Thus, lawyers and judges who graduated from law school before the mid-1980s may lack any formal training in legal writing. The conventional wisdom was that entering law students already possessed the writing skills that they would need.³⁰ Some viewed writing ability as inherent and unteachable.³¹ Others believed that first employers would impart any instruction that young associates might need in practical matters, such as the form or special conventions of legal writing.³²

Law schools began to recognize the necessity of offering students legal writing training as early as the late 1940s and early 1950s, usually attributing the need to the poor state of entering students' writing

27. See *infra* Part III.A.

28. Maureen Arrigo notes that law schools first recognized the need for legal writing instruction as early as the 1950s. Arrigo, *supra* note 24, at 133-34. However, when Allen Boyer reviewed the state of legal writing programs in 1985, he identified three primary models for teaching legal writing: 1) using doctrinal faculty teaching legal writing as an add-on; 2) using graduate students or new associates to teach it; and 3) using upper-division students to teach it. *Id.* at 134-37 (citing Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23 (1985)). Professor Boyer recommended that full-time tenure-track legal writing professors teach the program but suggested that few schools would be willing to commit the resources necessary for that model. *Id.* The "graduate student or young associate" model gradually has grown into the "full time professional" model. *Id.*

29. *Id.* at 118. See also WHITE, *supra* note 21, at 25. "Law firms and law schools alike seem ready to regard legal writing as a technique of expression that one should somehow pickup on one's own, or be taught by overworked graduate-student instructors." *Id.*

30. E.g., Stratman, *supra* note 4, at 160. Stratman contended in 1990 that legal writing should be given disciplinary status. *Id.* He argued against the conclusion that "students who learn to write well as undergraduates need merely deploy their writing skill to legal brief and memo writing, there being little that distinguishes these tasks from, say, writing an evaluation of a novel." *Id.*

31. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 41-42 (1994). Rideout and Ramsfield refer to a "traditional view" which includes the idea that legal writing classes are essentially remedial in nature. *Id.*

32. *Id.* at 46-47. Rideout and Ramsfield ascribe this to the traditional view that all legal writing is a drafting process, rather than an analytical process: "Because these are exclusively practical matters, they should not absorb the resources of the academy." *Id.*

skills.³³ By the 1980s and 1990s, however, other influences may have been at work. For example, the clinical education movement became more prevalent in the 1970s and 1980s, bringing skills and experiential training.³⁴ Law school clinics and externships offered students the opportunity to practice law under supervision while still in law school. As students represented actual clients, whether in the law school's clinic or in local law offices, they necessarily drafted legal memoranda, pleadings, motions, and even appellate briefs that were not just for learning purposes, but actually filed in courts. This experience may have reinforced law faculties' perceptions that students needed to study legal writing more formally prior to graduation.

In the 1980s, the nature of law practice changed, exhibiting a new emphasis on business practices and the bottom line.³⁵ Hourly rates, billable hours requirements, and salaries soared.³⁶ Law firms, which formerly allotted generous time to teaching and mentoring new

33. Arrigo, *supra* note 24, at 130.

34. This time also saw great changes in the legal profession:

By 1987, law schools and the profession at large had witnessed two decades of unprecedented change. The profession had more than doubled in size. The number of ABA-approved law schools had risen from 136 to 175, and J.D. enrollments had risen from approximately 57,000 to 124,000. Enrollment of women had increased from approximately four percent to about forty percent of the total J.D. enrollments.

Clinical education had a presence at virtually every law school in the country.

Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1099 (1982) (citations and footnotes omitted). Professor Frank Bloch noted in 1982 that "[d]uring the past ten years, a period in which many law schools have established clinical programs in earnest, the debate over the value of such a reform has dominated the literature on legal education." Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 321 (1982).

35. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 271-314 (1993) (discussing how the drive to maximize profits has affected law practice in large corporate firms). See generally DEBORAH RHODE, *IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

36. For example, in 1989, the Los Angeles Times noted, "Salaries for 25-year-old associates are rising so fast that brochures printed for an American Bar Assn. conference last month, which said starting salaries in New York City were \$76,000, were out of date by the time the conference was held. The salaries were already at \$82,000." Ted Rohrlich, *Top Lawyers Get \$400 an Hour as Fees, Salaries Rise*, L.A. TIMES, Sept. 18, 1989, at 1. Starting salaries recently took another much publicized jump. For example, one article noted, "The Class of 2000 is receiving the highest pay rate ever handed out to new associates. The majority of the 22 firms responding to Texas Lawyer's annual associate hiring survey . . . are paying these recent graduates more than \$100,000—and that doesn't include signing and productivity bonuses." Lisa M. Whitley & Lisa Fipps, *It's a Good Time To Be a New Associate; Hiring Numbers and Salaries on the Rise*, TEX. LAW., Sept. 11, 2000, at 31.

associates, were reluctant to "waste" time training new lawyers who could be using that time to bill the hours that would support the higher salaries.³⁷ Surveys began reflecting firms' views that new lawyers possess fully developed writing skills.³⁸ Law school faculties began to understand that students might not receive training beyond that offered by the law school. The American Bar Association's 1992 MacCrate Report also urged greater attention to practical training in communication for law students.³⁹ In response to students' poor entry skills and the demands of the legal market, between 1985 and 1990, a trend developed where many law schools began offering more substantial legal writing programs.⁴⁰

2. Instruction in Early Legal Writing Programs: Formalism

Instruction in writing programs during this early period generally followed what composition theorists have labeled "the current-traditional model" or a "formalist" approach.⁴¹ Formalism in legal writing emphasizes the product, especially the formal features of various documents that lawyers produce.⁴² Formalism also emphasizes clarity and accuracy.⁴³ Formalist writing teachers believe that students analyze

37. "Educational traditionalists might still assume that the law firms can teach law school graduates their required practical skills. This assumption is outdated." Arrigo, *supra* note 24, at 138.

38. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993) (surveying Chicago lawyers to rank legal skills in importance and to determine whether firms expect students to leave law school with necessary skills or develop them on the job).

39. American Bar Association, *Legal Education and Professional Development—An Education Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992). This report is referred to as the MacCrate Report.

40. The trend is evident when one compares early articles surveying the state of legal writing instruction, such as those written by Marjorie Dick Rombauer, a pioneering matriarch of the field, to later, similar articles. Compare Marjorie Dick Rombauer, *First Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538 (1973), and Marjorie Dick Rombauer, *Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem*, 44 ALB. L. REV. 392 (1980), with Boyer, *supra* note 28, Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 J. LEGAL WRITING INST. 123 (1991), Jo Anne Durako, *A Snapshot of Writing Programs at the Millennium*, 6 J. LEGAL WRITING INST. 95 (2000), and Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (2000).

41. See, e.g., Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 173–74 (1993). "One current-traditional classroom activity is therefore the study of the forms of writing appropriate for each mode of discourse." *Id.* at 174. See also Rideout & Ramsfield, *supra* note 31, at 49.

42. Rideout & Ramsfield, *supra* note 31, at 49.

43. *Id.*

a problem by thinking about it, and that students should begin writing only when their thoughts are complete. The craft of learning to write is learning to express thoughts, thoughts that are already complete and well developed.⁴⁴ Some scholars have called the approach "instrumental writing" because it views writing as simply a tool for expressing thought, not forming thought.⁴⁵ While formalism remains dominant in some legal writing classrooms today, and elements of formalism undoubtedly exist in every program,⁴⁶ most programs have moved beyond an exclusively formalist approach.⁴⁷

For example, legal writing classes that used a formalist approach typically showed students a model of a particular legal document. Legal writing teachers gave students a new set of facts, and perhaps a few cases, then asked the students to produce a document like the model. During the time the students worked on the paper, professors offered little additional guidance, for fear of "giving it away." When students turned in the document, under a formalist approach, legal writing professors zealously reviewed papers for clarity and accuracy. They found as many errors as possible, and returned the papers to students covered with corrections.⁴⁸ Under a formalist model, students did not rewrite assignments, making it probable that they simply checked the paper grade, usually with some disappointment, glanced at the comments, and began work on a new assignment.⁴⁹ Students learned two valuable lessons from the approach: familiarity with the conventional legal forms and the premium that the legal profession

44. *Id.* The formalist perspective "is based on an unproblematic view of language—that language does not contribute to the construction of meaning, but rather is a transparent medium for meaning." *Id.*

45. Philip Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 138 (1987). Kissam notes that "[t]he concept of instrumental writing is pervasive in American legal education and, I suspect, in the writing practices of most American lawyers." *Id.*

46. With the premium placed in the law on clarity and accuracy, the rationales that support formalism are persuasive.

47. Jo Anne Durako, *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997).

48. Fajans & Falk, *supra* note 41, at 174. "Further instruction comes in the form of critiques focused on students' finished work. . . . Teachers provide suggestions for revising organization or syntax, as well as comments on ambiguities or inaccuracies in content." *Id.* This focus on commenting and editing has prompted the frequent query of legal writing teachers and others as to who has written the paper and learned from it—the student or the professor? See generally Anne Enquist, *Critiquing Law Students' Writing: What the Students Say is Effective*, 2 J. LEGAL WRITING INST. 145 (1996).

49. Many students have difficulty addressing comments even when required to produce a subsequent draft of the same document; therefore, it seems very likely to me that comments on a paper which the student does not have to redraft are, for the most part, ignored.

places on attention to detail. Students learned less about the writing process. Although told to write clearly, they received little instruction on how to accomplish that goal.

During the period when most programs employed solely a formalist approach, legal writing teachers began creating a language to facilitate learning. The focus on the formal aspects of legal documents meant that teachers were teaching issue statements, brief answers, discussion sections, and conclusions. In particular, when teaching the discussion section of an analytical memorandum, legal writing professionals taught the conventions of organizing a formal legal analysis. The attempt to articulate a step-by-step guide to analytical organization fostered the creation of IRAC,⁵⁰ and its variations.⁵¹ Some have questioned the efficacy of IRAC, suggesting that it leads students to produce formulaic responses and ultimately uninspired writing.⁵² Others find it a useful teaching tool.⁵³ In any event, creating jargon to describe the organization of legal documents has become common in legal writing. Professor Linda Edwards, for example, uses the term "umbrella section" to describe an introductory paragraph that states a thesis and sets out

50. The IRAC acronym stands for Issue, Rule, Application, and Conclusion. It is probably the most widely known of the acronyms describing conventions for organizing a legal analysis. Many books or popular courses on law school exam-taking tips suggest that using the acronym will increase performance on law school exams. See, e.g., KIMM ALAYNE WALTON, *STRATEGIES AND TACTICS FOR FIRST YEAR LAW* 108-12 (1990). But see RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS* 147-49 (1999) (urging students to "avoid IRAC like the plague"). Even a term as ubiquitous as IRAC, however, illustrates the idiosyncrasies of individual writing professors. Transfer students have told me that I have it all wrong. Some say the "I" stands for introduction, not issue; others maintain the "A" is analysis, not application. The question remains whether the legal community uses those words, "introduction" and "issue" or "analysis" and "application," as true synonyms in this context.

51. The trouble with IRAC, from the viewpoint of most legal writing teachers, is that it does not ask students for a thesis nor does it tell students that they need to describe facts from relevant precedent and synthesize the law interpreting the black letter rule. Thus, legal writing teachers and texts have offered alternatives like CRAC (Conclusion, Rule, Application, Conclusion) or FORAC (Facts of precedent case, Outcome of precedent case, Rule, Application, Conclusion).

52. E.g., Jane Kent Gionfriddo, *Dangerous! Our Focus Should Be Analysis, Not Formulas Like IRAC*, *THE SECOND DRAFT*, Nov. 1995, at 2 (stating that "[c]omplex legal problems simply don't break down easily into a statement of a 'rule' and a statement of 'legal reasoning' or 'policy'"). The IRAC formula is controversial enough that the editors of *The Second Draft*, the bulletin of the Legal Writing Institute, devoted an entire issue to discussion of its merit.

53. E.g., Linda H. Edwards, *IRAC Format Accomplishes the Limited Purpose It Is Designed to Achieve*, *THE SECOND DRAFT*, Nov. 1995, at 7 (arguing IRAC works best for the organization of a single element).

the broad rules that apply to the analysis.⁵⁴ In contrast, Professor Sue Liemer uses the term "thesis section" to describe the introductory paragraph,⁵⁵ and Professors Nancy L. Schultz and Louis J. Sirico, Jr. call the introductory paragraph a "road map paragraph."⁵⁶

3. Elsewhere in the Academy: Beyond Formalism

This section briefly catalogs the movements in rhetoric and composition studies that have greatly influenced legal writing teaching and theory, thus influencing legal writing jargon. The theories supporting these movements also provide the basis for the arguments in Part II.2, that creating jargon is beneficial to legal writing as a discipline. For many years, formalism had also dominated composition and other teaching in various undergraduate and graduate programs.⁵⁷ The focus changed during the late 1960s with an explosion of theory in English departments across the country. Rhetoric, and changes in thinking about rhetoric, have influenced legal writing teaching and legal writing's emerging language.

"Rhetoric" today may refer to classical rhetoric—the art and strategies of persuasion based on the work of ancient Greeks. In the late eighteenth and early nineteenth centuries, invention received little attention from rhetoricians, who saw the rhetorical function as reporting objectively, rather than interpreting.⁵⁸ Scholars have labeled this view

54. LINDA HOLDEMAN EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* 138 (2d ed. 1999).

55. Sue Liemer, *Memo Structure for the Left and Right Brain*, 8 *PERSP.* 95 (2000).

56. NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 107 (3d ed. 1998).

57. In composition studies, Patricia Bizzell writes that "[w]e used to assume that students came to us with ideas and we helped them put those ideas into words. We taught style, explaining the formal properties of model essays and evaluating students' products in the light of these models." PATRICIA BIZZELL, *ACADEMIC DISCOURSE AND CRITICAL CONSCIOUSNESS* 75–76 (1992). Other scholars, writing about interpretation using formalist principles, speak of the "univocality" of text meaning: "readers sought a stable, singular, and universal core meaning—a public and objective truth—inscribed, as it were, in the text itself." Martin Nystrand et al., *Where Did Composition Studies Come From? An Intellectual History*, 10 *WRITTEN COMM.* 267, 275 (1993).

58. Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 *S. CAL. INTERDISC. L.J.* 613, 633 (1999). "Because current-traditional rhetoricians hold that truth exists prior to language and is independent of the writer, they tend to neglect invention, 'the process whereby a writer discovers ideas to write about.'" Fajans & Falk, *supra* note 41, at 173 (citing Paul Northam, *Heuristics and Beyond: Deconstruction/Inspiration and the Teaching of Writing Invention*, in *WRITING AND READING DIFFERENTLY: DECONSTRUCTION AND THE TEACHING OF COMPOSITION AND LITERATURE* 115 (G. Douglas Atkins & Michael L. Johnson eds., 1985) (quoting W. Ross Winteroud, *Invention*, in

the "current-traditional paradigm."⁵⁹ By the mid-twentieth century, however, the view changed. In the modern sense, "rhetoric" may also refer to "the use of symbols to construct alternative meaning frames."⁶⁰ The modern rhetorical view that language is constitutive of thought or that language "makes meaning" is critical to the argument that through creating language, legal writing teachers are creating meaning.

The change in rhetorical studies is clear when consulting either literary criticism or composition studies in the late 1960s.⁶¹ Prior to that, literary criticism experienced a period of formalism in which scholars, such as Emilio Betti and E.D. Hirsch, saw hermeneutics, or theories of interpretation, as a search for the objectively correct interpretation of an author's intention.⁶² In the 1960s, however, Hans-Georg Gadamer introduced a new view of hermeneutics, which abandoned the search for objective meaning in favor of interpretation that was contextualized to the interaction between a particular reader and the text. For Gadamer,

CONTEMPORARY RHETORIC: A CONCEPTUAL BACKGROUND WITH READINGS 39 (W. Ross Winteroud ed., 1975)).

59. Phelps, *supra* note 25, at 1089.

60. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 165 (2000) (citation omitted). Amsterdam and Bruner note that post-modern rhetoric focuses on the areas of study, while classic rhetoric was more concerned with teaching specific skills. *Id.* at 165-67. They analyze the language process "through which a speaker's words are almost always taken to mean more than they say, even when interpretation is not complicated by controversy." *Id.* at 167. Modern rhetoricians use a broad definition. "For us, rhetoric is the human use of symbols to communicate. We believe this definition is broad enough to cover most contemporary uses of the term. . . . We take seriously the notion that humans create their realities through symbols." SONJA K. FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 1-2 (3d ed. 2002).

61. *E.g.*, Nystrand et al., *supra* note 57.

During the late 1960s and 1970s, departments of English became a fertile field for many innovations, including composition studies. Thus the recent inception of composition studies as a scholarly discipline—that is, research on writing, texts, and discourse—should be viewed as but one particular result of the consciousness raising that occurred as departments of English began to poke beyond the boundaries of texts themselves and confronted problems like the modality of text production (orality vs. literacy; written texts vs. oral utterances), the language processes of reading and writing, and the roles of authors, readers, and interpretive communities in the phenomenon of text meaning. Fully understanding the intellectual history of composition studies requires situating the field in this more general intellectual history.

Id. at 274.

62. Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L.J. 353, 354, 358-59 (1985).

meaning resided in the dialectic that occurs between reader and text.⁶³

Postmodernism, poststructuralism, and innovative theories in linguistics and psychology also influenced literary criticism, as well as composition studies and other subjects of discourse in the academy. To poststructuralists, language is the medium through which our experience is organized and not simply the transparent medium for objective truth.⁶⁴ Language shapes and forms our experience.

Jacques Derrida's theory of deconstruction locates "meaning in texts and their relation with other texts, insisting that this meaning is not only plural but constantly deferred in the never-ending webs of textuality in which all texts are located."⁶⁵ Modern views of rhetoric also derive from these sources. In law schools, Critical Legal Studies scholars used poststructuralist techniques, such as deconstruction, to analyze the law.⁶⁶ Legal writing departments (like the rest of the legal academy) were affected by these movements. The law and literature movement, largely founded by James Boyd White, similarly applied the modern conception of rhetoric to studying the law.⁶⁷

Rhetoric, as explored in the composition studies departments, was even more influential in legal writing departments than poststructuralism. In the late 1960s, composition scholars, who questioned the adequacy of formalism or the current-traditional model,⁶⁸ began exploring the cognitive processes of reading and writing.⁶⁹

63. *Id.* at 363–64.

64. CHRIS WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* 80–82 (2d ed. 1997).

65. *Id.* at 159. Compare this with the formalist view of interpretation *infra* Part II.A.2.

66. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

67. See generally JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984) [hereinafter WHITE, WORDS]; JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990). James Boyd White writes of rhetoric:

To put it in a single word, I would say that our subject is rhetoric, if by that is meant the study of the ways in which character and community—and motive, value, reason, social structure, everything, in short, that makes a culture—are defined and made real in performances of language.

WHITE, WORDS, *supra*, at x–xi.

68. In the "current-traditional model," "Student writers were taught to create unambiguous, explicit texts by manipulating text elements, including topic and clincher sentences, usage, and syntax." Nystrand et al., *supra* note 57, at 276. See also Phelps, *supra* note 25, at 1093. Phelps says that the current-traditional paradigm "neglects the role of the reader and the writer, seeing writing as form rather than conversation." *Id.*

69. Nystrand et al., *supra* note 57, at 278.

Several models of the writing process emerged, all of which emphasized its dynamic nature.⁷⁰ During the writing process, "reading and writing comprise a series of transactions between reader and writer, reality and language, prior texts and this text, the individual and the context."⁷¹ In composition studies, the first movement away from formalism and toward writing as a cognitive process was known as "The New Rhetoric."⁷² New Rhetoric was only the first in a series of new theories developed in composition studies during the last thirty years, but legal writing scholarship generally uses the term "New Rhetoric" to delineate them all.⁷³

New Rhetoric research by composition scholars generated branching theories of how the writing process works. Linda Flower and John Hayes, cognitive constructionists, studied the writing process of individuals, concluding that readers do not simply relay or even discover meaning in a text, rather they "construct" meaning.⁷⁴ Linda Berger, a legal writing scholar, characterizes writing as "the weaving of thought and knowledge through language, not merely the clothing of thought

70. See generally Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 J. LEGAL WRITING INST. 1 (2000). Professor Oates examines several models of the writing process including the Flower and Hayes models from 1980 and 1981, and the Flower, Stein, Ackerman, Kantz, McCormick, and Peck model from 1990. The arrows on the models that link one stage of the writing process with another grow more numerous and more often point in two directions with each model, depicting the growing conviction that each stage in the process links and loops back on other stages in recursive patterns. *Id.* at 10-12. See also, the Berthoff model, which depicts the writing process as a double helix with elements of "naming," "opposing," and "defining" repetitively vining in and around each other. ANN E. BERTHOFF, *THE MAKING OF MEANING: METAPHORS, MODELS, AND MAXIMS FOR WRITING TEACHERS* 8 (1981).

71. Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 58 (2000) (citing Marlene Scardamalia & Carl Bereiter, *Development in Dialectical Processes in Composition*, in LITERACY, LANGUAGE AND LEARNING 307, 327 (David R. Olson et al. eds., 1985)). "These transactions generate response, response generates reflection, and reflection generates further response and revision." *Id.*

72. Nystrand et al., *supra* note 57, at 269. The name is attributed to R. Young, who argued that "the recent work of rhetoricians has been devoted to finding ways of teaching the process of discovery and of making it a part of rhetoric that is not only new but practical." *Id.* "[N]ew rhetoric fused classical rhetoric with cognitive and linguistic theories of creativity and problem solving and drew insights from tagmemic linguistics." *Id.* (citations omitted).

73. See generally Phelps, *supra* note 25; Fajans & Falk, *supra* note 41; Berger, *supra* note 71; Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999). Jessie Grearson wryly uses the even more common phrase that legal writing professionals employ: "the process approach." Jessie C. Grearson, *Teaching the Transitions*, 4 J. LEGAL WRITING INST. 57, 61 (1998).

74. Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION AND COMM. 365, 365-87 (1981).

and knowledge in language."⁷⁵

The process of writing is the process of creating knowledge.⁷⁶ As writers experience the reciprocal nature of the process, writing and then reading what they have written, negotiating meaning between writer and text, reader and text, writer and reader, meaning is created. The cognitive constructionists also claim that writing is actually a different mode of thinking, a different method of learning.⁷⁷

While cognitive constructionists studied the process by which the individual creates meaning through writing, another group of composition scholars, the social constructivists, focused on how individuals use language socially to position themselves in relation to others.⁷⁸ This placed emphasis on the rhetorical context or the audience that a writer hoped to reach. "Language-using in social contexts is connected not only to the immediate situation but to the larger society, too, in the form of conventions for construing reality."⁷⁹ Social constructivists believe that context is a strong influence on the writing process as writers enter various diverse social groups, or "discourse communities."⁸⁰ In law, "context" would refer to the conventions of the discourse community made up of trained legal professionals. Understanding this context is as important to students' ability to write well as understanding grammar rules or using a concise writing style. The social discourse theorists have also proposed ways that writing

75. Berger, *supra* note 71, at 58.

76. "Meanings don't just happen: we make them; we find and form them. . . . It is the discursive, generalizing, forming power of language that makes meanings from chaos." BERTHOFF, *supra* note 70, at 69-70.

77. Janet Emig, *Writing as a Mode for Learning*, 6 C. COMPOSITION AND COMM. 340 (1977).

78. Nystrand et al., *supra* note 57, at 288.

79. BIZZELL, *supra* note 57, at 87.

80. Grearson, *supra* note 73, at 67-73. Grearson identifies the beliefs associated with social construction:

Writers . . . are influenced by the sometimes unarticulated rules of the discourse communities they enter. Many problems students encounter are temporary and arise because students are confused about . . . the new rules and conventions of an unfamiliar discourse community. Expertise in writing per se is a myth; expertise exists within and in relation to a particular discourse community and what that community values. Writers are "written" by culture and context; writers making "individual choices" is a myth. Individual voice is a myth. Students best learn to write within a new discourse community by critiquing and reading "skeptically" texts produced within that community in order to see how each writer is written by culture and context.

Id. at 68.

teachers can be more aware of the social consequences of their teaching.⁸¹ Like the cognitive constructionists, the social constructivists emphasized the interdependence between thought and language, even though they criticized some principles the cognitive constructivists embraced.⁸² For example, Patricia Bizzell found that "what's missing here is the connection to social context afforded by the recognition of the dialectical relationship between thought and language. . . . [w]e can know nothing but what we have words for, if knowledge is what language makes of experience."⁸³

There has been little interaction⁸⁴ within English departments between poststructuralist thought about how language is constitutive of thought⁸⁵ and the New Rhetoric about how writing is constitutive of thought, although the theories are parallel.⁸⁶ Despite this lack of crossover, in both hermeneutics and composition theory, scholars have examined the exchange of meaning—a dialogue between thought and language, between writing and thought, and between reading and writing—finding a recursive, negotiated, reciprocal process. During the writing process, we learn more than we do by speaking, thinking, listening, or reading because we engage in all of those activities and more when we write.⁸⁷

New Rhetoric theories led to what some scholars call the "epistemic" view, that writing is a mode of thinking.⁸⁸ One outgrowth of the epistemic view—that writing generates thought—that has also influenced legal education was the Writing Across the Curriculum movement (WAC).⁸⁹ Composition scholars held workshops to teach professors from other disciplines how they might use writing to improve

81. See, e.g., *WRITING AS SOCIAL ACTION* (Marilyn M. Cooper & Michael Holzman eds., 1989).

82. Ann E. Berthoff illustrates the social constructivist expansion to consider the social context in which writing occurs. BERTHOFF, *supra* note 70, at 11. She writes of New Rhetoric that "[t]he notion, for instance, that there is a 'writer-based prose' and then a 'reader-based prose' is radically faulty, since constraints to be developed heuristically can come *first of all* from an awareness of how one or another audience can shape our purposes." *Id.*

83. Nystrand et al., *supra* note 57, at 288 (quoting PATRICIA BIZZELL, *COGNITION, CONTEXT, AND CERTAINTY* 223 (1982)).

84. Berger, *supra* note 73, at n.55.

85. See WEEDON, *supra* note 64.

86. See *supra* Part II.A.3.

87. Oates, *supra* note 70, at 2.

88. Rideout & Ramsfield, *supra* note 31, at 55.

89. See, e.g., Robert Parker, *The "Language Across the Curriculum" Movement: A Brief Overview and Bibliography*, 36 C. COMPOSITION & COMM. 173 (1985).

learning.⁹⁰ The assignments were primarily for the purpose of improving thought—and not for the purpose of improving writing. The assignments, while they were often ungraded, or at least not critiqued, required students to use writing constitutively—to build thought.⁹¹

4. Beyond Formalism in Legal Writing Programs

Rhetoric has long influenced legal writing pedagogy. Legal writing teachers have used the classical rhetorical focus on an advocate's appeal to logic, emotion, and the speaker/writer credibility (*logos*, *pathos*, and *ethos*, respectively) to teach advocacy.⁹² They have also used Aristotle's classification of argumentation into definition, comparison, causation, and substantiation to guide law students writing scholarly papers.⁹³ Less discussed in the legal writing literature is the division of rhetoric into five parts: invention, arrangement, style, memory, and delivery.⁹⁴ Writing instruction focused on arrangement, style and memory, especially when formalism dominated teaching methods. Much of legal education, however, where students are called on to recite extemporaneously more often than they are required to write, focuses

90. See Kissam, *supra* note 45, at n.5 (acknowledging the Writing Across the Curriculum movement as the source of many ideas in the article, *Thinking (By Writing) About Legal Writing*, *supra* note 45). The author also attended a WAC workshop at the University of Illinois in 1997. The university put such a premium on the WAC movement that it paid professors (in extra travel account money) to attend. The workshop also showcased the inventive ways University of Illinois professors had incorporated writing into teaching—even in very large classes.

91. Laurel Currie Oates, a founding member of the Legal Writing Institute, has recently evaluated the claims that writing promotes learning. Oates, *supra* note 70. Surveying the research, she found mixed results and concluded that, while not all types of writing promote learning, some types of writing facilitate some types of learning. *Id.* at 7–8. Consequently, she recommends that teachers carefully determine the goals of each assignment and pick the kinds of writing assignments that will best accomplish those goals. *Id.* at 25.

92. Legal writing teachers speak of the legal theory of the case, (*logos*), the equity arguments or "emotional hook" of the case (*pathos*), and persuasive power of establishing credibility through attention to detail and ethical use of precedent (*ethos*). Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 J. LEGAL WRITING INST. 113, 115 (1996). "Although these rhetoricians discuss *logos*, *pathos*, and *ethos* separately, they regarded all three as integrally connected to one another and resisted any impulse to compartmentalize them or regard one as more important than the others." *Id.* Many legal writing teachers use the schema to teach advocacy.

93. ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS 18–19 (1996).

94. Frost, *supra* note 58, at 617 (citing MARCUS TULLIUS CICERO, RHETORICA AD HERENNIIUM (H. Caplan trans., 1954)). Frost provides a good, short historical overview of rhetoric and the law. *Id.*

on "delivery" or "orality."⁹⁵

In legal writing departments, writing teachers have also relied on the modern work in composition and rhetoric to move beyond the current-traditional model to develop a pedagogy that focused on more than formalism's basics of style and grammar rules. The Legal Writing Institute was established in 1984, and legal writing professionals addressed process-based legal writing teaching that year at the Institute's first biennial conference.⁹⁶ Legal writing scholars have written much about both the legal writing process⁹⁷ and the legal reading process.⁹⁸ Other conferences have also explored composition theory or rhetoric and the law.⁹⁹

The effects of modern rhetoric and composition theory, with their emphasis on process over product, are also manifested in many legal writing texts and in many teaching methodologies. In using the process approach, legal writing teachers have created more jargon. Several of the most widely adopted legal writing texts use the most simplified paradigm of the writing process: prewriting, writing, revising, and polishing.¹⁰⁰ Students learn that the process is recursive rather than

95. E.g., Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?* 40 ARIZ. L. REV. 105 (1998). Professor Eichhorn traces legal writing's low status in the hierarchy of the legal academy to Socrates's mistrust of the written word. *Id.* She argues that imposing a hierarchy of speech over writing in law schools is "dangerous" because "attempts to separate speech and writing are artificial and futile," and "the legal academy needs the dangerous supplement of legal writing." *Id.* at 106. See also Kissam, *supra* note 45, at 143-44.

96. Rideout & Ramsfield, *supra* note 31, at 53.

97. See, e.g., Berger, *supra* notes 71, 73; Grearson, *supra* note 73; Kissam, *supra* note 45, at 143-44; Phelps, *supra* note 25; Rideout & Ramsfield, *supra* note 31; Nancy Soonpa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 J. LEGAL WRITING INST. 81 (1997).

98. See Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154 (1995); Mary A. Lundeborg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407 (1987); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997); James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 J. LEGAL WRITING INST. 35 (1991).

99. Notre Dame Law School has hosted two conferences on legal discourse and scholarship, which have been invaluable for legal writing scholars. The schedule is rigorous, designed with participation in mind, and enrollment is limited. Prominent scholars present a lecture in the morning. For example, speakers have included James Boyd White, Linda Flower, Martha Nussbaum, and Steven Maillouxengage. After the morning presentations, scholars engage participants in an afternoon workshop and conversation during the dinner hour. Participants present working papers in the evening.

100. E.g., EDWARDS, *supra* note 54; Sam Wineburg & Laurel Currie Oates, *Education's Promise*, 3 J. LEGAL WRITING INST. 1, 16 (1997); see also Oates, *supra* note 70.

linear; in other words, the process requires looping back to form a spiral of learning and thinking.¹⁰¹ Various techniques and assignments guide students through the process, including freewriting,¹⁰² writing plans, peer edits,¹⁰³ and other elaborate staged edits.¹⁰⁴ For example, Professor Mary Beth Beazley assigns a complex self-edit that requires many steps, including marking certain parts of the text with certain colors and then checking to ascertain that the colors are in a pattern that she has designated. She creates jargon in the assignment, for example, referring to the "'key words' of the rule—i.e., the words or phrases that are in controversy in the current case" as "'the phrase that pays.'"¹⁰⁵ Another example is the term "zero draft."¹⁰⁶ Many legal writing professors stage paper assignments into at least two drafts, but expect a "first draft" to conform to legal writing norms established in class. How then, to teach students that the "first" draft is not really the first? Most students need

101. Fajans & Falk, *supra* note 41, at 176. "'As [writers] move through this cycle, [they] are continually composing and recomposing [their] meanings and what [they] mean.' . . . Far from moving sequentially through planning, writing, and rewriting, writers shuttle back and forth among these activities." *Id.* (quoting SANDRA PERL, *THE WRITING TEACHER'S SOURCE BOOK* 113, 118 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1958)). In moving among these activities, the writer "makes meaning." *Id.*

102. Freewriting is a process where students write whatever comes into their heads, working continuously for a set amount of time. It is more difficult than it sounds and results in wheat and chaff. Students often feel silly trying it, but the process of continuing to write after first thoughts have emerged sometimes helps writers think more deeply. *E.g.*, FAJANS & FALK, *supra* note 93, at 45–58. Laurel Oates, Ann Enquist, and Kelly Kunsch advise students who are blocked or having difficulty with organization to use a similar technique, which they call "the brain dump." LAUREL OATES ET AL., *THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS AND WRITING* 510–13 (2d ed. 1998). Students list everything they think the final draft should include and then create several more lists as they organize and re-organize the material in the list. *Id.*

103. See generally Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum," 31 ARIZ. ST. L.J. 957 (1999).

104. Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 J. LEGAL WRITING INST. 175, 182 (1997).

105. *Id.* (citation omitted). Students must analyze the rule to determine the "phrase that pays," and then Professor Beazley's self-graded draft exercise requires students to link the "phrase that pays" with facts from the current problem. *Id.*

106. Berger, *supra* note 73, at 175. Berger attributes her discovery of the term to Fajans and Falk who describe composition theorists Burkland and Petersen's exercise in freewriting, which they call a zero draft. Fajans & Falk, *supra* note 41, at 183 (citing Jill N. Burkland & Bruce T. Petersen, *An Integrative Approach to Research: Theory and Practice*, in CONVERGENCES: TRANSACTIONS IN READING AND WRITING 189, 199 (Bruce T. Petersen ed., 1986)). Note that Berger extends the definition of the term, calling it "somewhere between freewriting and a knowledge-driven or narrative draft. . . . Even in zero drafting, some thought of purpose and audience and format will intrude." Berger, *supra* note 73, at 175.

to allow their unordered thoughts to spill onto paper without worrying about quality, while still giving themselves something to revise. Thus, legal writing vocabulary expands when the term "zero draft" replaces "first draft" because "first draft" no longer describes the process that the teacher encourages the student to use or the product that students should create.

Moreover, many legal writing teachers identify an analytical process and stage analytical assignments for students. A typical progression might include briefing a single case, applying the case to a new fact pattern, outlining a statute, applying the case and the statute to a new fact pattern, and building a more sophisticated analysis from there. Legal writing professors intervene at every stage to make explicit the analytical process the student should employ.¹⁰⁷ Legal writing programs have become one of the few aspects of the law school curriculum that try through explication, rather than through demonstration or the Socratic method, to articulate exactly what lawyers mean when they talk about "legal analysis."¹⁰⁸

Another hallmark of the New Rhetoric approach to teaching legal writing is emphasis on the rhetorical context, sometimes called an "audience-based approach."¹⁰⁹ Theresa Phelps describes "good legal writing as writing that effectively fulfills its aim and meet[s] its audience's needs."¹¹⁰ Some legal writing teachers require students to analyze audience and purposes before ever beginning the document assigned, in order to accomplish the aim of the document.¹¹¹

The social discourse view of the writing process also has had an impact on legal writing. Joseph Williams, a prominent composition scholar, has written on novice learning theory and behaviors to expect when law students join a new discourse community—the law.¹¹² Jill Ramsfield and Christopher Rideout have argued for more awareness of

107. See, e.g., HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (3d ed. 1995). This text instructs students how to analyze cases, synthesize cases, and work with statutes. *Id.*

108. E.g., EDWARDS, *supra* note 54; NEUMANN, *supra* note 11; SHAPO ET AL., *supra* note 107. The Edwards text includes a schema for recognizing "modes of reasoning." EDWARDS, *supra* note 54, at 4–8.

109. See generally Berger, *supra* notes 71, 73; Fajans & Falk, *supra* note 41; Phelps, *supra* note 25.

110. Phelps, *supra* note 25, at 1092.

111. Fajans & Falk, *supra* note 41, at 167.

112. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991).

the social context that students bring to the legal writing process.¹¹³ Kathryn M. Stanchi also examined the influence of social context influences by writing about the constitutive nature of language and the power relationships in the legal writing classroom.¹¹⁴

Some legal writing scholars have embraced the view that writing is thinking.¹¹⁵ Others, observing certain tensions between the linear, outcome-oriented ways of thinking in law and the process-based approach of New Rhetoric, have stressed the affinities between the two and applied New Rhetoric principles to legal writing.¹¹⁶ Writing Across the Curriculum has also arrived in the legal academy,¹¹⁷ illustrating that law faculties in general have also begun to explore the epistemic view on the connection between writing and thinking.

To illustrate how a New Rhetoric approach has generated different legal writing jargon, consider the effort to describe legal analysis. Helene Shapo, Marilyn Walter, and Elizabeth Fajans use a familiar but abstract word—"synthesis"—to describe deriving a new rule from rules in several authorities.¹¹⁸ In comparison, Deborah Schmedemann and Christina Kunz, in a text with the word "synthesis" in the title, use the term "textual fusion" to describe close reading and a word-by-word comparison of rules in cases that students "fuse" to form a new rule.¹¹⁹

113. Rideout & Ramsfield, *supra* note 31, at 84, 99. Although clinical legal education has a long history of including social justice issues in law school classes, fewer legal writing scholars have addressed these issues. Brook Baker has written most extensively on social justice issues and legal writing. See e.g., Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994); Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491 (1997). See also, e.g., Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 3 J. LEGAL WRITING INST. 79 (1997).

114. Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voice*, 103 DICK. L. REV. 7 (1998).

115. Theresa Phelps's *The New Legal Rhetoric*, *supra* note 25, and Phillip Kissam's *Thinking (By Writing) About Legal Writing*, *supra* note 45, were among the first articles to link New Rhetoric theories to legal writing. Recently, Linda Berger has written comprehensively on the subject. Berger, *supra* notes 71, 73.

116. Berger, *supra* note 73, at 165.

117. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997). The section of Legal Writing, Reasoning and Research presented a panel on Writing Across the Curriculum at the Association of American Law Schools annual meeting in the year 2000. Audio tape: Panel on Writing Across the Curriculum, held at the Association of American Law Schools, presented by the section of Legal Writing and Research (on file with author). The response was so great that the section meeting was moved to a larger room and still had standing room only.

118. SHAPO ET AL., *supra* note 107, at 47-53.

119. DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL*

While Schmedemann and Kunz probably use and understand the word "synthesis" similarly to Shapo, Walter, and Fajan, they are extending the language to help students better understand the sophisticated process of extracting a rule from a group of cases.

Thus, New Rhetoric and other process-based composition theories have greatly influenced the pedagogy of current legal writing. This influence, like the formalist principles earlier, has generated a new vocabulary. Legal writing faculty teach the changing concepts in a language that most lawyers, judges, and law professors will find unfamiliar.

B. How Status and Other Issues Complicate Legal Writing Talk

Composition theory has not been the only influence on the variety in legal writing jargon, and other factors may have led to increasingly fragmented ways of talking about legal writing. For example, legal writing has enjoyed less respect in the legal academy than other areas of instruction. The status and salary of legal writing teachers and the limited time and resources for scholarship have made legal writing less attractive as a permanent career choice, contributing to a transient population of legal writing teachers. A transient population has less opportunity to develop a common language. The legal writing community is consistently faced with the task of educating a significant number of newcomers to the emerging substance and vocabulary of the discipline.

The problem that legal writing jargon presents is not confined to mature legal professionals who cannot communicate with newer colleagues about writing, or to younger colleagues who had different legal writing teachers. Jargon creates misunderstandings even among legal writing professionals. Staffing problems, including disparate formative experiences among those who teach legal writing, have exacerbated the problem.

A major staffing issue that causes common language problems is the failure to staff legal writing programs with legal writing professionals—those teaching legal writing who already are, or are committed to becoming expert in the theory and literature of the field.¹²⁰ Many law

READING, REASONING, AND WRITING 44 (1999).

120. If legal writing is an emerging area of study, professionals self-identified as dedicated to teaching it are an emerging group. Consider how many professors are listed in the American Association of Law Schools (AALS) directory as having once taught legal writing, and how few of those still teach it. Still, as working conditions slowly change, the

schools only recently have recognized the need to employ professionals.¹²¹ Some programs have yet to do so.¹²²

Some programs use adjuncts to teach,¹²³ while a few schools rely on upper division students to teach newcomers.¹²⁴ Adjuncts bring expertise concerning the local legal writing culture, but they may have little time to develop a broad based knowledge by reading the current literature because professional responsibility demands that the adjuncts' first duty of loyalty is to their clients. Adjuncts, like most mature professionals, will probably have had less formal legal writing training. Students who are teaching suffer from the same time restraints and will have limited experience and knowledge. Students use the legal writing language, which they recently learned, usually without reflection or broader study. They may also introduce misinformation about the language.

Because comprehensive programs have been developed only recently, even many legal writing professionals have had minimal formal training themselves in the subject they teach. Full-time professionals are either self-trained or trained in only one of the wide variety of programs available. In short, legal writing professors do not share the common training that could create a common language. Therefore, they grapple with concepts, reach for words, and often create their own terms to teach students.¹²⁵

Even those legal writing professionals who graduated from excellent legal writing programs may have difficulty communicating with others about legal writing because their legal writing vocabulary probably

number of self-identified legal writing professionals, who want to make a career of teaching legal writing, seems to be growing.

121. In the survey conducted by the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) for the school year 1998–1999, forty-three schools used full-time teachers. 1999 ALWD/LWI Survey Report, *available at* http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002). In the 2000–2001 ALWD/LWI Survey Report, *available at* http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002), most programs use full-time teachers. Of the 140 schools responding, ninety use full-time non-tenure track teachers for some part of their program and another nineteen use full-time tenure track teachers hired specifically to include legal writing in their course load. *Id.*

122. *Id.*

123. *Id.* The 2001 ALWD/LWI Survey finds that twenty-five of the 140 responding schools use only adjuncts to teach.

124. *Id.* The 2001 ALWD/LWI Survey reports that the remaining thirty-four schools use some mix of adjunct, graduate student, upper division students, and full-time professionals.

125. The author is also guilty. In my second year of teaching, I created a variant on IRAC that I called a "classic case presentation." My former students will recognize it—but no one else!

reflects the textbook adopted by their program. In the last fifteen years, at least a dozen legal writing textbooks have been published.¹²⁶ Although many of the texts are excellent, few use the same terminology when referring to organization or analysis in legal writing. The texts contribute significantly to the field, but new texts often bring terminology of their own because they are creating an emerging area, rather than documenting a consensus about shared language. Comparing two texts that emphasize legal analysis illustrates the point. If a student has studied using Richard Neumann's fine text, *Legal Reasoning and Legal Writing: Structure, Strategy and Style*, the student has learned to "prove" the rule.¹²⁷ If a student used Linda Edwards's equally valuable *Legal Writing: Process, Analysis, and Organization*, the student has learned to "explain" the rule—or to write a "rule explanation."¹²⁸ If either student asks a supervisor on the job whether the student did an adequate job "proving the rule" or "on my rule explanation," their supervisors will probably greet the question with a blank look.

Therefore, hiring full-time legal writing professionals will not guarantee uniformity in the vocabulary of legal writing. Furthermore, the need to staff writing programs with full-time professionals is only one difficulty. Because legal writing professionals are not given the same status as other members of the law school faculty—tenure-track positions—they do not remain at one school long enough to establish even a "program-wide" language.¹²⁹ In the early years of legal writing programs, some law schools imposed a cap on the number of years one legal writing teacher could teach at the institution.¹³⁰ The cap is logical

126. E.g., JOHN DERNBACH ET AL., *A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD* (2d ed. 1994); EDWARDS, *supra* note 54; BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* (2001); TERRI LECLERCQ, *GUIDE TO LEGAL WRITING STYLE* (2d ed. 2000); NEUMANN, *supra* note 11; OATES ET AL., *supra* note 102; TERESA GODWIN PHELPS, *2 A TEXT FOR ADVANCED LEGAL WRITING: PROBLEMS AND CASES FOR LEGAL WRITING* (1990); JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* (2000); MARY BARNARD RAY & BARBARA J. COX, *BEYOND THE BASICS* (1991); SCHMEDEMANN & KUNZ, *supra* note 119; SCHULTZ & SIRICO, *supra* note 56; SHAPO ET AL., *supra* note 107.

127. NEUMANN, *supra* note 11, at 90.

128. EDWARDS, *supra* note 54, at 92.

129. One of the inspirations for this Article was my surprise at the amount of time it took for an experienced legal writing professor who was new to my law school to come to an understanding of the terms used in the legal writing program. She had taught legal writing for nearly ten years, as had I; however, our vocabularies were markedly different.

130. In the 1999 ALWD/LWI survey, eighteen schools reported a limit on the number of years that legal writing teachers could renew contracts. 1999 ALWD/LWI Survey Report,

only if you assume that professors become worse teachers with experience. It is an indication of the viewpoint that no intelligent person would spend a career teaching legal writing. Contract caps are especially difficult for anyone with a family who cannot continuously move, or hopes to put down roots in one community. Thus, the caps force many who desire a career in legal writing to leave the profession, which exacerbates the problem of establishing a common language.

Further, even if legal writing professionals do not face employment caps, other circumstances such as low salaries,¹³¹ high teaching loads,¹³² and low status within the faculty hierarchy may encourage even the most dedicated professional to seek other employment. While there is a new marked trend away from caps on employment,¹³³ the other status issues¹³⁴ mean that legal writing professionals are more transient than other faculty members.¹³⁵ Some legal writing teachers may change jobs, seeking better conditions, but others simply tire of fighting status

available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002). Caps may have been put in place to avoid lawsuits by legal writing professionals alleging they are entitled to constructive tenure. Although many schools have abolished the caps, the threat of constructive tenure suits has not materialized. Seven schools still impose caps. *Id.*

131. The 2001 ALWD/LWI survey reported a nationwide average entry level salary for full-time nontenure-track legal writing professors as \$42,433. 2001 ALWD/LWI Survey Report, available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002).

132. The ABA Source Book for legal writing suggests a maximum faculty student ratio of 1/45, a number many professionals regard as too high for the individual attention that good teaching practice requires. The current *average* is 1/46 with some faculty teaching as many as 190. 2001 ALWD/LWI Survey Report, available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002).

133. In the 2001 ALWD/LWI Survey, seven schools report that they impose a cap on renewing contracts. 2001 ALWD/LWI Survey Reports, available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002). This number can be contrasted with eighteen schools four years ago. 1999 ALWD/LWI Survey Reports, available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002); *see also supra* note 130.

134. Out of the number of schools responding, the 2001 ALWD/LWI Survey reports that forty-two schools allow legal writing professors to attend faculty meetings and vote on at least some matters. 2001 ALWD/LWI Survey Report (1999), available at http://alwd.org/resources/survey_results.htm (last visited Feb. 28, 2002). Another forty-seven schools allow legal writing professors to attend as a non-voting member of the faculty. *Id.* Eight schools do not allow legal writing professors to attend faculty meetings. *Id.* Legal writing faculty serve as a voting member of committees at sixty schools. *Id.* Legal writing faculty are eligible for summer research grants at fifty-two schools. *Id.* Seven schools report that legal writing faculty are not eligible for developmental funding at all. *Id.* Twenty-seven schools do not fund research assistants for legal writing faculty. *Id.*

135. In 1992, one survey reported that forty-five out of eighty-five schools reported that legal writing professionals stayed three years or fewer. Rideout & Ramsfield, *supra* note 31, at n.8 (citing Jill J. Ramsfield & Brien C. Walton, *Survey of Legal Research and Writing Programs* (1992) (unpublished manuscript, on file with the Washington Law Review)).

battles, and leave the profession.

The mobility of legal writing teachers within the profession could help develop a common language because as legal writing professors change programs, they teach others the language they use. It is, however, a slow process and attrition erases any gains from mobility. The better approach would be to retain experienced legal writing teachers in the profession. Legal writing faculties must have the time in one place that allows for study, attending national conferences, and scholarly writing—activities that would facilitate more expeditious development of a common legal writing language and promote a working knowledge of our current vocabulary.

Thus, the slow acceptance of legal writing as a discipline deserving of study and respect has hindered the development of a language the legal profession could share to talk about writing. In the early stages of understanding legal writing, and without the opportunities for consensus that higher status would bring, legal writing professionals have attempted to create a vocabulary that will resonate with students and clarify communication about writing. This situation has created jargon—not simply jargon—but rather jargon in an emerging area.¹³⁶ Thus, in addition to all the disadvantages that jargon traditionally brings, legal writing jargon develops without a professional consensus about what the new professional language or the substance of the field means.

III. JARGON—ABUSES AND USES

A. *The Trouble with Jargon*

Jargon has long been despised, and the jargon that legal writing professionals create to teach legal writing will not be regarded differently. Deploring the use of jargon is certainly not new. Aristotle proclaimed, "How many a dispute could have been deflated into a single paragraph if the disputants had dared define their terms."¹³⁷ Chaucer used the word "jargon" "to describe the twittering of birds."¹³⁸ The term "gargle" and "jargon" share the same root because jargon was analogized to a sort of gargling noise in the throat.¹³⁹ The use of the

136. See *infra* Part III.B.

137. LEGAL BRIEFS: A LAWYERS QUOTATION BOOK 19 (James Charleton ed., 1990).

138. PETER BURKE, LANGUAGES AND JARGONS: CONTRIBUTIONS TO A SOCIAL HISTORY OF LANGUAGE 2 (Peter Burke and Roy Porter eds., 1995).

139. *Id.* Burke notes that the word originated in the twelfth and thirteenth centuries in

term "jargon" eventually broadened to mean the variety of technical terms and forms of slang used by different social groups.¹⁴⁰

Professionals in the fields of sociolinguistics and discourse analysis have described jargon.¹⁴¹ Common features of jargon include metaphor, acronymy, and compound words.¹⁴² Jargon is often formed by adding a suffix or a prefix to make a new word.¹⁴³ Jargon can be ordinary words that become fashionable-buzz words or "mode words."¹⁴⁴ Abstract nouns as jargon contribute to confusion.¹⁴⁵ Criticism of jargon ranges from unintelligibility to pomposity and corruption.¹⁴⁶ Some scholars question the intelligence and the motives of those who use it.¹⁴⁷

France and slightly later in England. *Id.*

140. *Id.* at 4.

141. *E.g.*, ROGER ANDERSEN, *THE POWER AND THE WORD: LANGUAGE, POWER AND CHANGE* (1988); BURKE, *supra* note 138; ALLEN D. GRIMSHAW, *WHAT'S GOING ON HERE?: COMPLEMENTARY STUDIES OF PROFESSIONAL TALK* (1994); NASH, *supra* note 2; TALK AT WORK: *INTERACTION IN INSTITUTIONAL SETTINGS* (Paul Drew & John Heritage eds., 1992).

142. NASH, *supra* note 2, at 18-23. For examples in legal writing, consider Jill J. Ramsfield's lavishly illustrated legal writing text that uses principles of architecture as a metaphor for legal writing. RAMSFIELD, *supra* note 126. IRAC is a perfect example of acronymy. *See supra* notes 50-53 and accompanying text. As for compound words, Linda Edwards uses the term "counter-analogical reasoning" to describe reaching a result by distinguishing precedent from the client's facts. EDWARDS, *supra* note 54, at 5.

143. NASH, *supra* note 2, at 19. Nash's example is the word "active" becoming "pro-active" in business jargon. *Id.* In legal writing, planning activities connected to writing become "pre-writing." *See id.*

144. *Id.* at 18. For an illustration in the legal academy, see Dennis Arrow, "Rich," "Textured," and "Nuanced": *Constitutional "Scholarship" and Constitutional Messianism at the Millennium*, 78 TEX. L. REV. 149 (1999). The article is Arrow's response to criticism of his hoax article on "Pomobabble." *See infra* note 179 and accompanying text.

145. Walter Nash observes: "Bad jargoning becomes possible because abstraction is always possible and occasionally necessary." NASH, *supra* note 2, at 56. "Analysis" or "legal analysis" is one example of an abstract term that legal writing teachers use but probably lack a common notion of exactly what it means. It certainly is difficult to communicate to novice law students what we mean when we use the term.

146. *Id.* at 10-13.

147. For instance:

One might suggest that jargon, in the last quarter of the twentieth century, contains four essential elements:

It reflects a particular profession or occupation.

It is pretentious, with only a kind of meaning underneath it.

It is used mainly by intellectually inferior people, who feel the need to convince the general public of their importance.

It is, deliberately or accidentally, mystifying.

ANDERSEN, *supra* note 141, at 142 (citing KENNETH HUDSON, *THE JARGON OF THE PROFESSIONS* 3 (1978)).

Lawyers also have long condemned the use of legal jargon. Thomas Jefferson described the language in statutes,

which, from verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *aforesaid*s, by *ors* and *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.¹⁴⁸

Modern commentators on legal jargon reach similar conclusions.¹⁴⁹ Legal scholars have observed that jargon most frequently obscures communication and prevents non-lawyers from understanding the law.¹⁵⁰ The Plain English movement has been one response to the problems that legal jargon generates.¹⁵¹

However, some observers find that lawyers write with the understanding that the adversary system insures that others will attack what they write.¹⁵² Interpreting law, writing law, or practicing law requires unambiguous precision.¹⁵³ Thus, one common justification for legal jargon is the need to write precisely. Precision, however, fails to excuse "all the inessential legalisms that clutter so much mediocre drafting."¹⁵⁴

The legal academy, however, must contend not only with the traditional use of jargon in the law but also the traditional use of academic jargon. For example, language scholar Walter Nash offers a

148. BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 334 (1987) (quoting 1 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb ed., 1905)).

149. E.g., George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 347 (1987). Jeremy Bentham is often cited because he used especially colorful language, calling legal writing "excrementitious matter," and "literary garbage." MELLINKOFF, *supra* note 7, at 262 (citing 3 JEREMY BENTHAM, WORKS 260 (Bentham ed., 1843)); Benson, *supra* note 16, at 521 (citing 3 JEREMY BENTHAM, WORKS 260 (Bentham ed., 1843)).

150. Benson, *supra* note 16, at 530-31.

151. For an example of legal writing scholars who advocate universal adoption of Plain English proposals, see Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1 (1992).

152. Walter P. Armstrong, Jr., *Point: In Defense of Legalese* 3 SCRIBES J. LEGAL WRITING 33 (1992).

153. Benson, *supra* note 16, at 559 (citing SIR EARNEST GOWERS, THE COMPLETE PLAIN WORDS 19-20 (Pelican ed., 1962)).

154. Stanley M. Johanson, *Counterpoint: In Defense of Plain Language* 3 SCRIBES J. LEGAL WRITING 37 (1992).

schematic explanation of how various segments of society use jargon.¹⁵⁵ Nash divides jargon into "shop talk"—the language of professions,¹⁵⁶ "sales talk"—the language of production and consumerism,¹⁵⁷ and "show talk"—the jargon of pretension.¹⁵⁸ It is "show talk" that Nash finds objectionable. He has said that "[i]t is a claim to status. To speak in this way is to assume the guise of the articulate, the secure, the self-assured; the speaker lets the world know that he knows his stuff."¹⁵⁹ Nash puts the language of the academic in the category of "show talk."¹⁶⁰ Nash is not the only language scholar who has deplored the use of jargon in the academy.¹⁶¹

An early study in a different academic area may show that academics are unduly impressed with professional language of any sort.¹⁶² In 1973, the scholars Donald Naftulin, John Ware, and Frank Donnelly asked an actor to play "Dr. Fox."¹⁶³ Dr. Fox gave a lecture to an audience of psychiatrists, psychologists, professors, and administrators.¹⁶⁴ Although the lecture relied on authentic scholarship

155. NASH, *supra* note 2, at 7-8.

156. *Id.* Nash calls "pure shop talk," "the distinctive terminology of a profession, craft, or practice, old or new." *Id.* at 110. He notes that some pure shop talk becomes accepted idiom, such as the word "'countdown,'" which started as occupational talk for space explorers and now we read of a "'countdown to the summit conference'" or a "'countdown to Christmas.'" *Id.* at 8.

157. *Id.* at 12-13. "Sales talk," in Nash's view, has even more dangerous consequences than "show talk." Sales talk "pleads acceptance for some kind of product . . . and which seeks to control the potential consumer's responses to the product." *Id.* at 12. Nash offers the example of the word "time-share," which "[t]he purchaser does not-cannot-own' a piece of a place and a slice of a season. He 'owns' no more than the right to reserve a limited tenancy; yet the general discourse of time-sharing encourages and enforces, often with a manner pitched somewhere between the gravity of the lawyer and the evangelical fervour of the theologian, the sense of ownership as having and holding, and the sense of time as for ever [sic] and ever." *Id.* at 13.

158. *Id.* at 9-12. Nash illustrates "show talk" using the character Osric, from Hamlet, as "a jargonist of the first rank, a smooth-operating, gobbledygooking man-about-Elsinore, with all the latest words and wondrous phrases in this repertoire." *Id.* at 10. In describing "show talk," Nash creates his own jargon: *metaphrase*. *Id.* at 11. It is "a technique of transmuting simple, sturdy expression into ramshackle verbiage." *Id.*

159. *Id.*

160. *Id.* at 14. He includes "educationists, office administrators and professors of critical theory."

161. E.g., *id.*; Peter Burke, *The Jargon of the Schools*, in *LANGUAGES & JARGONS: CONTRIBUTIONS TO A SOCIAL HISTORY OF LANGUAGE* (Peter Burke & Roy Porter eds., 1995).

162. ANDERSEN, *supra* note 141, at 140 (citing Donald Naftulin et al., *The Doctor Fox Lecture: A Paradigm of Educational Seduction*, 48 J. MED. EDUC. 630, 630-35 (1973)).

163. *Id.*

164. *Id.*

in mathematics, the scholars had rewritten it with "'excessive use of double talk neologisms, non sequiturs and contradictory statements . . . and meaningless references to unrelated topics.'"¹⁶⁵ The audience was almost unanimously favorable in responding to a questionnaire on the quality of the lecture.¹⁶⁶ One problem with the audience response might be that the audience was comprised of experts in psychology, and not the lecture's topic, mathematics.¹⁶⁷ The audience was, however, generally familiar with mathematics, and the researchers concluded that presentation mattered more than content, and it was important enough to the audience to be "in the know" that they would not question content dressed up in gobbledegook.¹⁶⁸

The Dr. Fox study drew considerable attention, and in 1980 another researcher, J. Scott Armstrong, expanded on the idea.¹⁶⁹ Armstrong took sample passages from ten well-known academic journals and applied the Flesch Reading Ease test.¹⁷⁰ The results showed that the more prestigious the journal, the more difficult the reading.¹⁷¹ Although this result left open the possibility that the "better" journals selected more complex ideas, a further study by Armstrong suggested that was not true.¹⁷² In that experiment, Armstrong edited four previously published articles to make them either easier or more difficult to read.¹⁷³ Then he asked thirty-two academics, this time specialists in the article's field, to rate them.¹⁷⁴

All of the original articles were rated higher than the easier to read version.¹⁷⁵ Similarly, the more complex articles often rated better than the original, and always rated at least as well. The inescapable conclusion for scholars who hope to publish an article in a prestigious

165. *Id.*

166. *Id.* Andersen notes that "[i]n academic circles it seems especially important to be in the know; this is often done simply by nodding in recognition of references and names you do not really know. One person in Dr. Fox's audience even claimed to have read the speaker's previous publications." *Id.* at 140-41.

167. *Id.* at 140.

168. *Id.*

169. *Id.* at 141 (citing J. Scott Armstrong, *Unintelligible Management Research and Academic Prestige*, 10/2 INTERFACES 80-85 (1980)).

170. Rudolph Flesch devised a test that purports to measure ease of reading. Benson, *supra* note 16, at 548-49. The widely-used formula takes into account the average number of syllables in words and the average number of words in a sentence. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

journal is that they are more likely to attain that goal using a complex and difficult-to-read style.

Although these studies are dated, a more recent example of the academy allowing jargon to cloud professional judgment was Alan D. Sokal's notorious hoax. Sokal, a physics professor at New York University, submitted a jargon-laden article entitled *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity* to the prestigious journal, *Social Text*.¹⁷⁶ Shortly after the professionally edited journal accepted and published the piece, Sokal announced that his article was an experiment to see whether his garbled nonsensical article would fool the editors of a major journal of social criticism.¹⁷⁷

Although these examples did not involve the field of law, similar principles should prove equally applicable in the legal academy. Student editors choose articles for publication in most law reviews. Student editors may be more clear-sighted and less pompous about elitist jargon than the professionals in the Armstrong study or the editors of *Social Text* in the Sokal hoax. However, as novices to the profession, some student editors have more difficulty recognizing "an excessive amount of double-talk, non-sequiters, contradictory statements and jargon . . . and meaningless references to unrelated topics" of a "Doctor Fox" article.¹⁷⁸ For example, recognizing that articles full of post-modern jargon were in "vogue," the *Michigan Law Review* published a clever spoof titled, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*.¹⁷⁹ Although there is no record revealing why the student editors decided to publish the article,¹⁸⁰ a frustration with the popularity of post-modernist jargon may be one reason. Nevertheless, the decision that it was funny enough

176. Alan D. Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, SOC. TEXT, Spring-Summer 1996, at 217.

177. Alan D. Sokal, *A Physicist Experiments with Cultural Studies*, LINGUA FRANCA, May-June 1996, at 62; ALAN SOKAL & JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE 1-4 (1998) (explaining the experimental hoax).

178. See ANDERSEN, *supra* note 141, at 140.

179. Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997). The article provoked an exchange in the *Texas Law Review* when Ronald J. Krotoszynski, Jr. criticized the decision to devote so much space to the prank. Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 325 (1998). Arrow responded with more parody. Arrow, *supra* note 144.

180. See Krotoszynski, *supra* note 179.

to print, and the initial momentary confusion readers may have felt as they decided whether it was parody, indicate that post-modern jargon has been plentifully published by law reviews. At least it is probable that the student editors of the *Michigan Law Review* knew that they were publishing a parody, unlike the editors at *Social Text*.

The rise of cross-disciplinary studies has led to another common illustration of how jargon may create misunderstanding within the legal academy. More than one faculty member, more versed in traditional doctrinal analysis than modern rhetorical theory, has left a faculty colloquium presented by a post-modernist "law and scholar" asking plaintively, "What were they talking about?" Jargon in this instance hinders communication. However, if the "Doctor Fox" principles still apply, as the publication of the *Pomobabble* article suggests that they may, some of these jargon-laden presentations have led not only to confusion but also to job offers from faculties impressed by the elite language. Thus, while jargon-laden speech or writing may limit accessibility, it may enhance the status of the jargon user.

Similarly, jargon may create a sense of community but at the same time distance the user from others. Employing specialized, "expert" language creates a world of insiders, members of the tribe who know the language, which in turn creates a sense of solidarity.¹⁸¹ In an emerging area of study, disciples recognize each other by the language they speak. Thus, identifying others who also participate, who "speak the same language," can create a needed sense of commonality, and may actually create political power.

The "Dr. Fox" principle suggests that other legal academics will be impressed by this "show talk" and respect the emerging area more as its language develops. A professional vocabulary may legitimize an area of study and create a sense of solidarity among those traditionally disadvantaged in the legal academy. Professional jargon can at least lead other legal academics to recognize that legal writing is an emerging area of substance. To those impressed by "show talk," the jargon confirms the contention that study is necessary before one can claim to be an expert in the area.

On the other hand, however, in addition to creating solidarity by identifying insiders and impressing colleagues susceptible to "show talk," using jargon can reinforce the political isolation of those who

181. "Language is, after all, a symbolic system, and we should at least ask ourselves about the possible symbolic functions of jargon. . . . The use of jargon . . . both expresses and encourages an *esprit de corps*, a form of bonding" BURKE, *supra* note 138, at 14.

speak the new language.¹⁸² In a field as conservative and resistant to change as law, being part of an emerging area and separating oneself from the accepted doctrine is often politically risky. Those who participate in the new area may already be marginalized because of mainstream disdain for the new area, and the jargon of the new area may serve to further marginalize the speakers.¹⁸³

Legal writing teachers already are separated from their colleagues by status issues,¹⁸⁴ and the language that they use might distance them further from others in the legal community. At the same time, this distance may reflect the emerging boundaries of the new discipline. In effect, recognition of the boundaries could lead to recognition of legal writing as an area of study with its own substance.

In sum, legal writing professionals face complex decisions when balancing the positive and negative political effects of using jargon. Legal writing needs legitimacy in the legal academy,¹⁸⁵ but jargon may lend a false, "Dr. Fox" legitimacy. Whether legal writing can afford this type of legitimacy is questionable. The pretensions of "show talk" are especially dangerous for teachers of communication who are working to develop a true "shop talk." The legal writing professionals' ultimate goal of furthering efficient and inclusive communication within the legal community must trump the political benefits of impressing other academics by using impenetrable jargon.

182. "Much jargon is a token of recognition, like a regimental tie or a Masonic handshake . . ." NASH, *supra* note 2, at 100.

183. For example, many have noted the jargon-laden style of writers from the Critical Legal Studies (CLS) movement:

[T]he crits bombard us with jargon that parodies more usual technical vocabulary. They use terms like "praxis," "reification," "loopification," "deabsolutization," intersubjective "zap," and "podness." They deploy this argot to create a strident, irreverential tone aimed at goading us into reactionary responses. At the same time, the abandonment of law-review style is supposed to make CLS works more accessible and dismantle yet another paralyzing structure.

Jeffery L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924, 1938 (1989) (citations omitted). It has drawn heavy criticism. See, e.g., Owen Peter Martican, *Unmasking Jargon as Substance: How the Crits Have Made a Dialect Out of a Dialectic*, 1 SCRIBES J. OF LEGAL WRITING 111 (1990). This has also had some defense. See, e.g., John D. Ayer, *Not So Fast on the Crits: A Grudging Tribute (Or Concession) to Crit Style*, 1 SCRIBES J. LEGAL WRITING 45 (1990). Judging from anecdotal experience, the jargon has served to separate "crits" more than it has made them accessible.

184. See *supra* notes 129-37 and accompanying text.

185. See Stratman, *supra* note 4.

B. Benefits of Jargon: Making Meaning

Despite the nearly universal vilification of jargon, jargon may be useful. In addition to the troubling utility of the "show talk" legitimacy rejected above, jargon may serve a helpful pedagogical purpose by developing a new language for the new ideas, or new combinations of old ideas, that legal writing professionals use to teach. Moreover, if language and writing create meaning, as modern rhetoricians, literary theorists, and composition theorists maintain,¹⁸⁶ the process of creating language in a new area of study may actually create the substance, whether spoken in the classroom or written in texts and articles. The effort to be precise, often offered as a justification for legal jargon generally,¹⁸⁷ may be particularly important when legal writing professors are articulating principles for the first time. Thus, when jargon is created in an emerging area, the benefits of jargon may be especially compelling.

Professors Kahan and Klausner have provided an interesting examination of the tension between standardization and innovation in language within contract provisions, a long-established area.¹⁸⁸ Kahan and Klausner use a law and economics approach and an empirical study to analyze contracting efficiency.¹⁸⁹ They hypothesize that learning externalities (the benefits to a firm of already having learned how a term works) and networking externalities (the benefits to a firm of others already knowing the term) work against innovation or creating new contracting terms.¹⁹⁰ Judicial interpretation of common contract terms offers a certainty that innovative terms cannot.¹⁹¹ Many of Kahan and Klausner's observations could apply to the language legal writing professionals use to teach. There are concrete benefits to legal writing professionals in using language that all legal writing professionals understand, as well as language that other academics, lawyers, and

186. See *supra* Part II.A.3.

187. See *supra* text accompanying notes 153–55.

188. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (or "*The Economics of Boilerplate*"), 83 VA. L. REV. 713 (1997).

189. *Id.*

190. *Id.* at 717–22. Others have also commented on the costs of experimental, albeit "plain language," terminology. E.g., Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 513 (1999). For example, Professor Cohen notes that "[i]n addition to increased actual costs, rewriting tried and true language carries the risk of additional costs. There is the potential for litigation costs if the new language requires judicial interpretation." *Id.* at 514 (citation omitted).

191. Kahan & Klausner, *supra* note 188, at 722.

judges understand. The analysis of the costs and benefits of innovative language differs in several important ways, however, because legal writing is an emerging area.

The legal writing field has not existed long enough for terms to prove their workability, and there is no pool of participants who already share common knowledge of a particular term.¹⁹² Legal writing professors greet a new class each year. In fact, a variety of terms may allow legal writing professors to teach to a broader variety of learning styles, and may encourage, rather than inhibit, learning within the small group of participants in the classroom.¹⁹³

Creating jargon may serve other beneficial uses for legal writing professors as the field emerges. First, new language may arise to fill a need.¹⁹⁴ It may be necessary to create new language for new ideas and for new configurations of old ideas. Disciples of an emerging area claim, usually with some justification, that new words are required to express the richness and nuance of the new perspective, discipline, or area of study.¹⁹⁵

Legal writing professionals, who are attempting for the first time to articulate the conventions of legal writing and the process they use when writing, need language which is different from ordinary composition language, just as legal writing is different from other types of composition. For example, legal writing professors, in teaching, need to identify law's particularized organizational structure,¹⁹⁶ a step in legal analysis,¹⁹⁷ or a step in the writing process that may not be common in

192. See *supra* Part II.A.1.

193. See generally M.H. Sam Jacobson, *Using the Myers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype*, 33 WILLAMETTE L. REV. 261 (1997); Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998).

194. For an interesting study of jargon in an emerging area other than law, see David McNeill, *Speaking of Space*, in THE PSYCHOSOCIOLOGY OF LANGUAGE (S. Moscovici ed., 1972) (producing an index based on the length and number of compound words in "NASAese," in the United States space program). BTW, IMHO please also consider the jargon that has arisen around e-mail and internet use—which did not exist just a few years ago. (For the readers who have resisted the lure of the net, "BTW" and "IMHO" are internet jargon in the familiar pattern of acronymy: BTW stands for "by the way" and "IMHO" stands for "in my humble opinion." JOSH BLACKMAN, HOW TO USE THE INTERNET FOR LEGAL RESEARCH 58 (1996).)

195. "The result [of using technical terms] is to communicate more quickly and effectively than otherwise to the initiated. Outsiders will not understand, but then this kind of talk does not concern them." BURKE, *supra* note 138, at 13–14.

196. One of the many variations on IRAC for example.

197. For example, the Kunz-Schmedemann text uses the term "fact weaving" to describe a step in the application of law to facts in the analysis. SCHMEDEMANN & KUNZ, *supra* note

other writing.¹⁹⁸ Further, given the broad acceptance in legal writing departments of the principles of the New Rhetoric, legal writing professors must communicate to students how legal analysis and understanding are actually created through the writing process.¹⁹⁹

Second, the very process of creating jargon may be vital to the emerging area. Modern rhetorical theory suggests that creating jargon is necessary to building an emerging area of study. If language shapes thought²⁰⁰ and writing shapes thought,²⁰¹ creating language, both spoken or written, is essentially creating the thought and substance of a new discourse area. The very process of creating and refining a language also creates and refines the principles that form the basis of the new area. Substance emerges from that process. A perfect symbiosis exists: to create a language, and to write in it, *is* to create a new discipline.

In short, creating and using jargon may impede communication about writing temporarily because it is inaccessible to many in the field, but jargon also benefits legal writing professionals. It facilitates a more sophisticated level of communication with students and may actually create the substance of an emerging area of study. As the substance of the legal writing area emerges and legal writing scholarship educates others in the legal community to legal writing theory and language, the legal academy and the profession will begin to absorb the jargon and those who use it.

IV. CONCLUSION AND RECOMMENDATION

Creating jargon complicates communication within the legal profession, but it also affords essential benefits to an emerging area of study. The goal of the legal writing community should be minimizing the barriers to communication while maximizing the benefits of jargon. Lawyers need a sophisticated legal writing language, which is slowly growing, to communicate well with each other about their writing. Legal writing professionals also need a developing jargon to teach and talk to each other about the emerging substance of the field. Maturation of the field of legal writing coincides with language

119, at 140.

198. For example, at some point in the process, the legal writing professor may ask students to look at the organizational structure through the lens of the relative weight of authority of the various sources used.

199. Berger, *supra* note 73, at 168-83.

200. See *supra* notes 74-91 and accompanying text.

201. See *supra* notes 74-91 and accompanying text.

development. Discovering substantive principles through creation of a language is particularly important. Jargon also announces and illustrates that an area has a substance of its own and that the academy needs professionals who choose to spend a career studying and teaching it. The entire legal community, however, must recognize and minimize the misunderstanding, lack of communication, and separation that jargon's use creates.

One way to solve communication problems with students would be to use a simpler language to teach and to use a richer, more developed terminology for legal writing discourse with lawyers and judges. However, this solution is unacceptable because it does not further legal writing for the entire profession. Students, lawyers, and judges all need to be able to communicate at a sophisticated level when speaking about writing.

Another way to solve the jargon communication problems would be to request that the legal writing community limit the language it uses or creates to teach legal writing. The Legal Writing Institute or the Association of Legal Writing Directors could form committees that would encourage legal writing professionals to standardize legal writing language. The committee might encourage legal writing professionals and authors in the field to use the language common in composition studies when possible, or to use only the language currently at hand to describe the legal writing process.

This would be a mistake. As discussed above, if language constitutes thought, and if it makes meaning, then the creation of language is, to some extent, creating knowledge. If we limit the creation of legal writing jargon, we perforce limit the creation of legal writing knowledge. Because legal writing professionals would resist an organized effort to dictate speech, this solution would also be unworkable as a practical matter. Language by committee is not a solution.

Better solutions lie in five areas: (1) improving conditions to retain legal writing faculty and encourage legal writing scholarship; (2) researching the current legal writing vocabulary; (3) defining legal writing vocabulary precisely; (4) avoiding needless duplication; and (5) educating the entire legal community.

First, to address the most accessible origins of the problem, law schools must accord legal writing professors the status and resources that will facilitate legal writing scholarship and the development of a common vocabulary. Capping the term of legal writing professors' employment and assigning them a lower status destroy the stability that the legal writing community must enjoy to develop a common language.

Lower salaries afford legal writing professionals scant resources to devote to summer scholarship. For their part, legal writing professionals must reject using jargon to gain respect. The easy elitism of "show talk" will not replace the important task of developing a true "shop talk," and will defeat legal writing's goal of efficient communication.

Legal writing scholars should pursue two lines of inquiry when researching legal writing language. Researchers must discover exactly *how* the legal community talks about writing. Legal scholars should study the legal writing vocabulary of lawyers, judges, and legal academics to develop a better understanding of how the legal community's various segments talk about their writing today. It is especially important to discover the language legal writing professionals use to teach, because their vocabulary is the future of legal writing language.

Other aspects of legal writing language also warrant study. Anecdotal evidence suggests that a study of regional differences might prove useful if we intend to understand the state of legal writing vocabulary today.²⁰² Equally instructive would be a study of gender and legal writing language. Women comprise a disproportionately large percentage of legal writing professionals.²⁰³ Because women and men clearly use language differently,²⁰⁴ it is crucial to know if the emerging legal writing jargon reflects gender differences, and if so, whether those gender differences impact practices of the greater legal academy where women are traditionally under-represented.²⁰⁵ Writing instruction at elite law schools generally has lagged behind writing programs at more

202. In Florida, I assigned students the task of writing a document arguing in favor of a motion at the trial level, a "Trial Brief." In Illinois, I assigned the same task, but asked for a "Memorandum of Points and Authorities." In Nevada, the students writing the same assignment write a "Memorandum in Support of a Motion."

203. Surveys consistently find that over 70% of legal writing faculty are women. See, e.g., Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 326 (2000). The figures for directors of legal writing programs are similar. Association of Legal Writing Directors & Legal Writing Institute, Survey Results 2000 (conducted by JoAnne Durako) (copy on file with the author). See also Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997); Levine & Stanchi, *supra* note 4.

204. See generally DEBORAH TANNEN, *GENDER AND DISCOURSE* (1994).

205. In 1996, the ABA reported that women held less than one-third of the jobs in American law schools, and only 16% of the tenured professor positions. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997) (citing ABA Comm. on Women in the Prof., *Elusive Equality: The Experience of Women in Legal Educ.* 23 (1996)). In 2000, Richard K. Neumann, Jr. reported that 22% of tenured professors were women. Neumann, *supra* note 203, at 325.

practically oriented schools.²⁰⁶ Scholars could discover whether the legal writing vocabulary differs as well. The demographics of a law school's student body, or whether the law school is public or private, or urban or rural might also affect legal writing jargon. Legal writing scholars should study the state of the language now and gather empirical data. When we know more about language differences among professionals, regional differences and gender differences, and many other phenomena, we can begin to teach a broad vocabulary that will enable the legal community to communicate more easily about writing.

After researchers have identified the words the legal community uses, the next step is to understand precisely *what* the terms mean. Precision is a traditional justification for jargon.²⁰⁷ All law professors who supervise student writing must learn a varied legal writing vocabulary and should carefully define the legal writing language they use. Is an "introduction" the same thing as a "thesis paragraph" or an "umbrella rule paragraph"? Is there a difference between a "rule proof" and a "rule explanation"? If there are subtle and important differences, what are they? If the terms are truly synonymous, legal writers also need to know that.

Jargon creators should avoid needless duplication. Legal writing professionals should expand legal writing vocabulary only when expansion purposefully enriches legal writing doctrine. The distinction between a "term of art" and "legalese" is useful. Just as the Plain English movement seeks to limit the use of unnecessary jargon, legal writing professors should create only "terms of art," not add useless "legalese."

Finally, educating the legal community is vital. In legal writing classrooms, students can learn a working vocabulary that includes different terms for the same concept, instances when one term has multiple meanings, and the subtle shades of meaning that close synonyms encompass. Legal writing professionals should also offer Continuing Legal Education tutorials for the practicing bar and for judges on how they can talk to law clerks and new associates about writing. Moreover, legal writing professionals should present faculty colloquia to educate other legal academics on the writing vocabulary

206. In general, elite schools have lagged behind in legal writing training by failing to award its students the time, credit, or professional staff it deserves. The trend, however, is to improve programs. The University of Michigan School of Law revised their program and hired full time legal writing professionals in 1995. In December 2000, Harvard advertised that it was revising its program and hiring full-time positions titled "First Year Lecturers."

207. See *supra* text accompanying notes 153-54.

that students are learning. As students and lawyers understand more about the vocabulary choices involved when they talk about writing, miscommunication will decrease and legal writing knowledge will become more accessible.

These five measures: (1) improving working conditions for legal writing professionals, (2) researching the state of legal writing vocabulary, (3) defining terms carefully, (4) choosing to limit expansion when duplicative, and (5) educating the legal community should minimize the communication barrier, without impairing the development of legal writing doctrine. Legal professionals must have a vocabulary that enables them to communicate with ease and sophistication about their writing. If the legal academy seeks to further students' quest for authentic voices, as Professor James Boyd White suggests,²⁰⁸ then legal writing language is at the center of that task because legal writing is at the center of the lawyer's craft. We must foster legal writing communication by nurturing legal writing's emerging vocabulary.

208. WHITE, *supra* note 21.