

THE METHODOLOGY OF PERSUASION: A PROCESS-BASED APPROACH TO PERSUASIVE WRITING*

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INTRODUCTION

Persuasive writing is an important and fundamental lawyering skill. Legal writing programs are designed in support of this belief. Indeed, an overwhelming number of law schools introduce persuasive writing in the first year,¹ and more than half of the core writing assignments students complete are devoted to it.² There also is a voluminous amount of scholarship written on the subject.³ Despite this collective experience, however, teaching persuasive writing remains a challenge, in part, we believe, because legal writing professors have not been taking a process-based approach to teaching it.⁴

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¹ Of the 184 schools that participated in the 2007 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, 151 introduce a “required advocacy course” to students in the first year of law school, compared to 23 that introduce it in the second year, and zero that introduce it in the third year. And, on average, schools assigned slightly more than two credits to this advocacy portion. ALWD & Leg. Writing Inst., *2007 Survey Results*, question 13 (2007) (available at http://www.alwd.org/surveys/survey_results/2007_Survey_Results.pdf).

² Of the core writing assignments distributed to students in the 2006–2007 academic year, pre-trial, trial, and appellate briefs accounted for 317 assignments, whereas 277 assignments were devoted to office memoranda and client letters. *Id.* at question 20.

³ Of the over 90 pages of bibliographic references to legal writing texts and articles in the American Bar Association’s *Sourcebook on Legal Writing Programs Bibliography*, there are numerous references to persuasive writing scholarship on virtually every page. See Commun. Skills Comm., Sec. Leg. Educ. & Admis. to the B., *Sourcebook on Legal Writing Programs, Bibliography*, <http://www.abanet.org/legaled/publications/sourcebook/sourcebookbibliography.pdf> (accessed June 20, 2007).

⁴ We note immediately that our use of the term “process” does not refer to the stage process model. Under this traditional legal writing model, “writing was seen as a linear

Initially, we used a “learn by example” approach, which is grounded in the idea that since we know persuasive writing “when [we] see it,”⁵ students can learn to be persuasive writers by evaluating other persuasive writing examples. While this method teaches students to recognize persuasive writing, we realized that it cannot be the sole means of teaching persuasion because it does not teach students the *process* of how to write persuasively, which, ultimately, may limit their ability to learn persuasive writing as a transferable skill.

This challenge provided the framework for an advanced persuasive writing class we developed four years ago for our moot court students.⁶ Our goals were to teach students how to create original, compelling, and truly persuasive papers and to present the brief-writing process as a series of standardized steps so students could transfer and apply these skills to future assignments. These goals seemed unexceptional in the sense that every legal writing professor wants his or her students to write well and learn transferable skills. Nevertheless we questioned whether original thoughts and creative ideas could be fostered by a standardized approach. Thankfully, we found they can.

This Article will focus specifically on the process of drafting statements of fact and arguments and a system of argument organization that we created to supplement the “learn by example” approach. In Part One, we discuss the limitations of the “learn by example” approach. In Part Two, we explain our method and how we teach it. And in Part Three, we explain why the method is effective.

process separated into discrete stages [Under this approach,] writing begins with pre-writing where a writer plans her thesis, then she writes it, performs whatever rewriting or revising that is necessary, polishes it, and turns in the finished product.” Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better*, 8 Leg. Writing 23, 27–28 (2002) (footnotes omitted). While our method does present writing as a series of steps, or stages, our approach differs greatly from the process model because our stages treat writing as a *cycle* of brainstorming, creating, and revising. For the benefits of our recursive writing model, see *infra* Part III.

⁵ See Justice Stewart’s famous reference to pornography: “I shall not today attempt further to define the kind of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁶ Although our techniques were developed for an upper-level advocacy class, they are transferable and equally applicable to any class that addresses persuasive writing. Indeed, we like the method so well that we use it in our first-year writing course with much success.

I. THE “LEARN BY EXAMPLE” APPROACH AND ITS LIMITATIONS

Although professors may not use the phrase “learn by example,” most use some learn-by-example techniques when teaching persuasive writing. Under this approach, professors may describe the goals of persuasive writing and pitfalls to avoid; distribute examples of good and bad persuasive writing; create a sample product in class; examine famous speeches; review high-profile case briefs and oral argument transcripts; explore the persuasive value of media arts, such as television commercials and print advertisements; and conduct role-playing exercises.⁷ While there are benefits to this approach, it should not be the only instructional method used to teach persuasive writing. In general, it does not address persuasive writing as a process, and this omission can create obstacles to student learning.⁸

First, the “learn by example” approach focuses mainly on the “what” and not the “how” of persuasive writing. As a result, students may complete this aspect of their legal writing class with the ability to identify good persuasive writing but remain unable to achieve that level of persuasion on their own or in a different context. In other words, because students evaluate the end result, without an emphasis on the step-by-step process by which it was created, they ultimately develop only an appreciation for the difference between good and bad examples instead of learning how to create a good product themselves.⁹

⁷ For fourteen examples of such techniques and more, see 16 Second Draft (Bull. of the Leg. Writing Inst.) 1 (Dec. 2001).

⁸ See *infra* sec. III(A) (recursive processes enable students to learn writing as a transferable skill); *infra* sec. III(C) (method supported by modern learning theories, which increases the likelihood that students will learn the substance and the writing process); see generally Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 Notre Dame L. Rev. 721 (1991) (discussing use of method in teaching advocacy).

⁹ “[W]e learn things that work, but rarely why they work. Understanding why techniques work helps us translate them to other situations and to expand our repertoire” Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 Appalachian J.L. 127, 127 (2006) (discussing this idea in the context of helping law professors become more effective teachers).

In addition, using only the “learn by example” approach invites students to misuse examples. Without instruction on the process of creating a persuasive document, students tend to copy the structure and organization of the example, rather than replicate its persuasive qualities.¹⁰ This misuse of examples may be exacerbated by students’ misconceptions about legal writing. Often they do not see it as a creative process and are unwilling to accept that there may be more than one right answer to the same question.¹¹

II. A BETTER APPROACH: “LEARN BY EXAMPLE” + THE PROCESS = THE METHODOLOGY OF PERSUASION

Although we use the “learn by example” approach throughout the semester, we also include a great deal of instruction on a step-by-step process of persuasive writing.¹² We recognize that certain aspects of our method are not novel.¹³ Nevertheless, when taken together, these steps become a recursive model of brainstorming and creating compelling facts and argument sections.¹⁴

¹⁰ Louis J. Sirico, Jr., *Beyond Offering Examples of Good Writing: Let the Students Grade the Models*, 14 *Persps.* 160, 160 (2006) (“Perhaps all legal writing professors have offered students an excellent brief or memo as a model and then found themselves reading a stack of student papers that verged on being clones of the model.”).

¹¹ Nancy Millich, *Building Blocks of Analysis: Using Simple “Sesame Street Skills” and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 *Santa Clara L. Rev.* 1127, 1148 (1994) (describing that the use of creative thinking as an analytical tool helps students “accept the fact that there may be several different, equally ‘correct’ answers to the same question”).

¹² We even structure the syllabus so it serves as a visual guide to the process. See app. A (our Advanced Advocacy syllabus).

¹³ See Bradley Clary et al., *Advocacy on Appeal* pt. 1, § III, 11–16 (2d ed., West 2004) (formulating balanced arguments through the use of a two-column “balancing chart” that lists the predicted arguments of both parties); Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* § 1.2.3, 10–11 (2d ed., Aspen 2005) (using a three-column chart to organize ideas); Michael N. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* § 1.9, 16–17 (2d ed., Wolters Kluwer L. & Bus. 2007) (explaining that, before preparing an outline, students should note their arguments and identify the opponent’s arguments and how they should be countered); Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Arguments* 441–444 (2d ed., Matthew Bender 2006) (using two-column charts to organize “anticipatory rebuttals”); Myra Orlen, *Learning Factual Analysis and Negotiation Skills Using Collaborative Techniques*, 15 *Second Draft* (Bull. of the Leg. Writing Inst.) 10 (June 2001) (using a fact identification and grouping exercise to teach how to draft persuasive statements of facts).

¹⁴ At least one scholar has noted the benefits of an advocacy course that stresses the sustained use of facts, the use of complex case files, a de-emphasis on presentation as an

A. The Process

Our method focuses especially on two of the most significant sections of a persuasive brief: the Statement of Facts and the Argument (see figure 1, *infra*). Other portions of the brief and brief writing process (e.g., Statement of the Case, Summary of the Argument, point headings, thesis paragraphs, and editing) are taught by alternative means, including lecture and in-class exercises.

We introduce our entire method on the first day of class. When doing so, we stress that although the steps are presented as a series, the method is not linear but a cyclical or recursive process.¹⁵ To stress the importance of the process and to encourage students to think critically about it, the first assignment we distribute asks students to describe the process in their own words and evaluate how, if at all, it might help them work through a legal problem.

end in itself, and that encourages students to learn how to structure facts and law into a compelling case. Lubet, *supra* n. 8, at 733–735.

¹⁵ As one commenter observed,

[N]ovice writers must abandon any allegiance to the traditional model of the writing process, the stage process model, because this linear theory does not adequately explain the complexities of the writing process. Instead, the recursive model more accurately describes the writing process because writers continually move back and forth among various writing activities

Anzidei, *supra* n. 4, at 26.

FIGURE 1: THE PROCESS

- (1) **Review** all case documents and **create** a case chronology, including citations to where individual facts can be found.¹⁶
- (2) Begin to **identify and research** the legal issues presented.
- (3) **Re-review** the facts; **continue** to research and identify issues.
- (4) Taking into account the issues presented and the relevant law, **characterize** the facts as good, bad, or neutral, and **record** your thoughts on the chronology document that was created in Step 1. (Note: Within the neutral category, facts should be characterized further as relevant or irrelevant.)
- (5) **Outline and draft** the Statement of Facts.
- (6) Taking into account strategies and themes that were identified through the fact characterization process (Step 4), **outline** your arguments using the Three-column Chart system.¹⁷
- (7) **Draft** arguments using the Argument Placement formula.¹⁸
- (8) **Coordinate** the Statement of Facts and the Argument sections¹⁹ while considering the strategies and themes identified through the fact characterization process (Step 4) that were adjusted through the process of outlining and drafting the arguments (Steps 6 and 7).
- (9) **Finalize** the Statement of Facts and Argument sections.
- (10) **Finalize** the entire document.

¹⁶ We use a commercially published case file that contains individual court documents, including pleadings, deposition transcripts, motions, briefs, court orders, etc. Given the amount of material, some students have expressed reluctance to compile a record synopsis that takes every fact into account. We, however, have encouraged them to do so. From a practical perspective, doing the work at the beginning actually saves time. Students become better acquainted with the file earlier in the process than their counterparts who did not devote time to this first assignment. Students who devote time to this assignment also are able to return to facts with greater ease because they have organized the material in a way that suits their individual learning style. And record compilation itself is a learned skill that attorneys need to master. The case file we use, while complete for academic purposes, pales in comparison to the multitude of documents and transcripts that make up a true appellate record.

¹⁷ The Three-column Chart system is described *infra* Section II(B)(3)(a).

¹⁸ This Argument Placement formula is described *infra* Section II(B)(3)(b).

¹⁹ The goal is to have students learn and appreciate how facts and arguments work together to further the point of the paper. To this end, it is crucial to discuss important facts in the Statement of Facts and Argument sections. Likewise, irrelevant or distracting material should be streamlined out of these sections. In short, the two sections must be consistent in terms of coverage, theme, and tone.

*B. How We Teach the Process of Persuasive Writing***1. The Course**

Students learn this method in our Advanced Advocacy class, which is a two-credit, fall-semester course that is numerically graded. It meets one day a week for one hour and fifty minutes. We either team teach one section of approximately thirty to thirty-five students or teach individual sections of approximately fifteen to twenty students. The course is open to all students but required of all new members of our Moot Court Board of Advocates, which is composed of external moot court competitors and student moot court coaches.

Students work in two- or three-person teams, half for appellant and half for appellee, and, to the extent possible, moot court team members are paired together. This pairing process has helped teams build *esprit de corps* and learn how to work together before their specific moot court competition begins.²⁰

As in most appellate writing courses, our students write various portions of an appellate brief throughout the semester. Then, after receiving professor and peer feedback, students rewrite these portions, compile them into a team appellate brief, and submit the document as their final writing assignment.

What might be a unique approach, however, is that we cluster specific portions of the appellate brief with the corresponding oral components, instead of looking separately at brief writing and oral argument in a linear or chronological way. For example, one week students learn how to draft a written Statement of Facts section and present it orally. Students return the next week with a draft section and present the piece to the class as if they were before an appellate panel.

²⁰ James B. Levy, *Can't We All Just Get Along?—Cooperative Legal Writing Assignments*, 15 Second Draft (Bull. of the Leg. Writing Inst.) 1 (June 2001) (“Studies show that students who work together typically learn the material better than students who work in isolation. . . . In addition, the opportunity to discuss assignments with peers increases confidence in each student’s ability to successfully complete those assignments.”).

In addition, written assignments are peer reviewed.²¹ At the beginning of the term, we teach students how to *effectively* critique a peer's paper. We ask that they evaluate the paper as an objective reviewer and offer meaningful and constructive comments, instead of merely correcting typographical errors and citations. To this end, we instruct them on the difference between editing and proof-reading.²²

We also give them a set of peer-review questions to answer when critiquing a paper.²³ These questions reinforce the teaching points we cover with respect to the appellate brief. For example, when peer reviewing a Statement of Facts section, a student is asked whether the author has a recognized and workable theme, uses appropriate tone and word choice, and cites accurately to the record. When peer reviewing a draft argument, a student is asked to evaluate whether the author has used an effective structure and helpful topic sentences, appropriate authority, and necessary facts in the analysis paragraphs.

The entire peer-review process takes one week per document. On the day a written assignment is due, each student submits a copy to the professor and exchanges another copy with a student who is not a member of his team. As homework for the week, the pair critique each other's work and meet outside of class to discuss their comments. Students return the following week and submit a hard copy of their peer-review comments and a revised version of their assignment that incorporates some or all of the changes suggested by the peer reviewer. In this revised version, students are asked to explain why they accepted or rejected particular advice.

Students are evaluated on their peer review work, oral argument presentations, and revised written documents. While stu-

²¹ In our syllabus, all peer-reviewed assignments are designated by italics. See app. A. For a comprehensive discussion and evaluation of peer review, see *Peer-Assisted Learning* (Keith Topping & Stewart Ehly eds., Lawrence Erlbaum Assoc. 1998), and 15 Second Draft (Bull. of the Leg. Writing Inst.) (June 2001) (the entire issue). See also Commun. Skills Comm., Sec. Leg. Educ. & Admis. to the B., *Sourcebook on Legal Writing Programs* 51–52 (Eric B. Easton ed., 2d ed. ABA 2006) [hereinafter *Sourcebook*] (citing Kirsten K. Davis, *Designing and Using Peer Review in a First-year Legal Research and Writing Course*, 9 Leg. Writing 1 (2003), and Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 Persps. 73 (1999)).

²² See Enquist & Oates, *supra* n. 13, §§ 1.4–1.6, 15–21 (useful discussion of revising, editing, and proofreading).

²³ A sample Peer Review Instruction sheet for a full appellate brief is included as Appendix B. It comes almost directly from the list Terry Jean Seligmann provided in a 2001 Second Draft article. Terry Jean Seligmann, *Testing the Waters*, 15 Second Draft (Bull. of the Leg. Writing Inst.) 13 (June 2001). She disclaimed authorship of the list, noting that she had compiled it from sources that she could no longer identify.

dents also submit their draft written documents, usually one week before the revised documents are due, we do not grade the drafts per se. Instead, we collect the drafts and later compare them to the revised versions to evaluate how students incorporated peer-review feedback and whether they independently identified areas that needed improvement. This is also a useful way to verify that students are working on the project in the early stages.

Although the majority of the semester is spent working through discrete aspects of the process, eventually, in the last weeks of the class, we come full circle and ask students to apply the entire process to their final written and oral assignments.

2. A Process for Creating a Persuasive Statement of Facts

Because the facts drive the creation of compelling themes and creative arguments, our approach to persuasive writing requires students to immerse themselves in the course case file, which presents the facts through a series of court documents, deposition transcripts, press clippings, etc. Students also continually evaluate these facts throughout the writing process.²⁴ We teach this portion of our method during Weeks III-V of the semester.²⁵

We start by explaining Step 1, which requires students to review objectively the entire case file and to create a case chronology, with informal citations to the record. Students are expected to work through Steps 2 and 3, which involve issue spotting and research, as they review the case file. We then work through an in-class exercise that illustrates Step 4, which is a brainstorming technique that helps students evaluate the facts from their own and their opponents' perspectives. The purpose of this step is not to help students become more familiar with the facts in general. Although it certainly helps achieve that result, we hope students are beyond that point after completing the case chronology exercise. Instead, the purpose is to teach students to read the facts with an eye toward developing arguments and strategic themes.

In this brainstorming exercise, students are split into two small groups: one for appellant and one for appellee. Each group is given an identical list of facts. We explain the legal issue and rele-

²⁴ Abraham P. Ordovery, *Teaching Sensitivity to Facts*, 66 Notre Dame L. Rev. 813, 818–819 (1991) (discussing the benefits of using a case file rather than a “canned” fact pattern and the importance of continued factual evaluation).

²⁵ See app. A.

vant law. The students are then asked to work through the list and characterize each fact as “good,” “bad,” or “neutral.” When we reconvene as a class and discuss each fact on the list, students for each side justify their characterizations.

The exercise involves a young girl who was struck and killed by a sports utility vehicle while riding her bicycle to school. The girl’s parents sued the county road commission, alleging that their daughter’s death was caused by a defectively designed intersection. The following sentence is the first that students are asked to review:

On September 1, 2004, Elizabeth Jones, age 8, was riding her new bicycle to school with four friends.

In their individual groups, students tend to gloss over this sentence as one single fact, and most students characterize it as neutral. When we reconvene as a class, we remind the students that this exercise is intended to help them identify facts that will bolster their existing arguments or lead to the creation of new arguments.²⁶ We then ask them what argument either party could make based on the fact that the accident occurred at the beginning of the school year. Could the Road Commission argue that Elizabeth was inexperienced with the route because it might have been one of the first times she rode her bike to school? What about the fact that she was eight years old? Was it negligent for her parents to let her ride her bicycle to school? What argument could be made about the fact she was riding a new bicycle? Could the parents bolster their defense to a contributory negligence claim by arguing that they had carefully equipped her with a new top-of-the-line bicycle to prevent injury? Finally, is it significant that she was with four friends? The Road Commission might argue that the accident was not caused by the design of the intersection, but instead, that Elizabeth was distracted by her friends. Elizabeth’s

²⁶ This exercise is not meant to encourage students to “invent” facts. We use it to show students how to identify facts that should be highlighted. We also discuss in class what a student might do with the results of the brainstorming session. Specifically, if the case were at the trial level, these ideas might be used to create a discovery plan. At the appellate level, these results could be used to make permissible inferences to support an argument. For example, highlighting the fact that Elizabeth was riding a new bicycle is not creating a new fact. It is simply using that fact to create a tone or theme or to support a legal theory. See also Ordover, *supra* n. 24, at 818–819 (An additional benefit to continual fact evaluation is that it helps students identify relevant facts and the permissible inferences that can be drawn from them.).

parents might argue, again to rebut the negligence point, that they allowed her to go to school with her friends because there was safety in numbers. In any event, reviewing this one sentence, with all of its possibilities, is an eye-opening experience for students. The exercise also sparks a discussion of what inferences are appropriate to draw from facts and what inferences go too far and begin to enter the realm of fiction. This point prompts a discussion of ethical obligations and an attorney's role as an officer of the court.

Following this in-class exercise, we distribute the Fact Characterization assignment that students complete in teams using the assigned case file. In Week IV, students return with their completed Fact Characterization assignment, and we discuss it as a class, again having each side present their characterizations. At this point, we instruct them on the mechanics of writing and orally presenting the facts, paying particular attention to using facts in a way that reflects the themes and strategies they created in the fact characterization process. Finally, using the class case file, students complete the Statement of Facts assignment, which is Step 5 of our process.

Students return the following week to submit their written draft of the Statement of Facts and present it to the class as they would in an oral argument. Each presentation is several minutes long. Students introduce the case and present all or a portion of the facts. The class serves as a mock appellate panel, asking questions of the speaker and critiquing the presentation. We grade the oral presentations, the students' peer review efforts, and the revised written fact sections. Students apply this feedback to write a Statement of Facts section for the final writing assignment, an appellate brief, and orally present these facts during the in-class moot court competition that takes place during Weeks XIII and XIV.

The most important thing to stress when presenting this material is that drafting the fact section is a recursive process, and facts must be drafted in tandem with the argument section. The more a student works through the facts, the better. At first, working with the facts helps streamline research efforts and identify issues. Continuing to consider the facts through the fact characterization and argument drafting sessions then takes students into more nuanced levels of argument and persuasion.

3. A Process for Creating Complete and Compelling Arguments

After completing the fact-oriented aspects of our process, students are prepared to move into argument development. This begins in Week VI. We lay the foundation for the argument methods that follow by discussing brief writing in general and asking students to write a simple argument based on the class case file. The next week, we explain Steps 6 and 7 of our method.

a. Brainstorming the Argument: The Three-Column Chart System

Step 6 involves the use of a Three-column Chart system²⁷ to brainstorm and create arguments (see figure 2, *infra*). The system is straightforward. Students create a chart with three columns. Column One is titled “Principal Argument Column.” In this column, a student outlines each argument he or she will raise in the written brief. Column Two is titled “Opponent’s Response Column.” In this column, a student identifies the points, including facts and legal authority that the opponent might raise in response to the student’s principal argument. Column Three is titled “Reply Column,” in which a student identifies a reply to the opponent’s argument, again including facts and legal authority.

²⁷ For a discussion of the benefits of using visual techniques as a way of improving “law teaching,” see Angela Passalacqua, *Using Visual Techniques to Teach Legal Analysis and Synthesis*, 3 Leg. Writing 203, 205 (1997) (“Visual techniques are an efficient method of conveying and organizing information to all types of people.”).

FIGURE 2: THREE-COLUMN CHART DESCRIPTION

| <u>PRINCIPAL ARGUMENT COLUMN</u> | <u>OPPONENT'S RESPONSE COLUMN</u> | <u>REPLY COLUMN</u> |
|--|---|--|
| Outline your argument using an IRAC formula. ²⁸ | Identify your opponent's response, including facts and legal authority. | Identify your reply to the opponent's position, including facts and legal authority. |

b. Structuring the Argument: The Argument Placement Formula

Once we describe how to create a three-column chart, we teach students a formula for argument placement that is designed to give structure to the principal argument and incorporate the Reply Column material to achieve its maximum persuasive effect (see figure 3, *infra*). There are three options for placement of the Reply Column material. Option One incorporates the Reply Column material into the original principal argument. Option Two uses the Reply Column material as a rebuttal paragraph within the principal argument. Option Three transforms the Reply Column material into an independent, stand-alone argument that comes after the principal argument.

²⁸ IRAC stands for Issue, Rule, Analysis/Application, and Conclusion. Enquist & Oates, *supra* n. 13, at 34.

**FIGURE 3: REPLY COLUMN MATERIAL
PLACEMENT FORMULA**

| <u>PRINCIPAL ARGUMENT COLUMN</u> | <u>OPPONENT'S RESPONSE COLUMN</u> | <u>REPLY COLUMN</u> |
|--------------------------------------|---|---|
| Argument in IRAC form. | Identify your opponent's response, including facts and legal authority. | <p>Identify your reply to the opponent's position, including facts and legal authority.</p> <p>This material can be incorporated into your brief using one of these three options:</p> <p>Option One: Incorporate the Reply Column material directly into your principal argument.</p> <p style="text-align: center;"><i>or</i></p> <p>Option Two: Include the Reply Column material as a rebuttal paragraph within your principal argument.</p> <p style="text-align: center;"><i>or</i></p> <p>Option Three: Incorporate the Reply Column material as an independent argument within your paper.</p> |

After we explain the Three-column Chart method and the Argument Placement formula, we work through these steps twice in class.²⁹ We use a fictional, non-legal example involving ice cream first, because its simplicity allows students to focus exclusively on the method, rather than being distracted or intimidated by the

²⁹ For more detailed information regarding these examples, see the Legal Writing Institute's Conference website, *Conference News, Twelfth Biennial Conference of the Legal Writing Institute, Conference Information, Bibliographies and Handouts*, <http://www.lwionline.org/publications/documents2006/Streicher-CunninghamHandouts06.doc>.

substantive law.³⁰ The principal argument is that vanilla ice cream is the most popular ice cream in the United States, and the author intends to cite a 2005 Annual Report of American Dairy Farmers regarding general vanilla ice cream sales to support this claim.

i. Option One: Principal Argument Option

If the contents of the Reply Column and Principal Argument Column are identical or very similar, and the Reply Column material improves the overall point of the section, we advise the students to write the principal argument (using the IRAC organizational structure) including information contained in both columns (see figure 4, *infra*). The chart that follows is an Option One example.

³⁰ For a discussion of the benefits of using non-legal examples in the classroom, see Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 *Leg. Writing* 37, 38–39 (2001). As Professor Calleros explained,

Unless students can relate our words to some concrete experience within their present knowledge, our explanations will remain abstractions to most students, and many will continue asking the wrong question: “Yes, but what is the correct answer to your assignment?”

To help students understand their academic task, we can try to build on their schemata, their existing foundations of knowledge. By relating a new concept to a student’s existing intellectual foundation, we can help the student to assimilate the new concept more quickly. With each such learning experience, the student’s foundation of knowledge grows incrementally, providing a stronger basis for assimilating more new concepts, including increasingly complex ones.

Id. at 38. For additional sources that discuss the use of non-legal examples, see also Howard A. Denmark, *How to Alert New Law Students to the Ambiguity of Language and the Need for Policy Analysis Using a Few Minutes and the Directions on a Bottle of Salad Dressing*, 36 *Gonz. L. Rev.* 423 (2000–2001); Michele G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 *Touro L. Rev.* 349 (2005); and Millich, *supra* n. 11.

**FIGURE 4: OPTION ONE OF THE GREAT
ICE CREAM DEBATE**

| <u>PRINCIPAL ARGUMENT COLUMN</u> | <u>OPPONENT'S RESPONSE COLUMN</u> | <u>REPLY COLUMN</u> |
|--|---|--|
| <p>Vanilla ice cream is the most popular ice cream in the United States.</p> <p>Support: 2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</p> | <p>Butter pecan is the most popular ice cream in the United States.</p> | <p>Vanilla ice cream is more popular than butter pecan.</p> <p>Support: 2006 survey in <i>Ice Cream World</i> magazine compared vanilla and butter pecan ice cream and found that three out of every five people preferred vanilla ice cream.</p> |

Under this option, the material in the Reply Column naturally fits within the principal argument. Before considering the opponent's butter pecan ice cream argument, the author might not have looked for this information or, if acquired, may not have used it. However, after the author considers the opponent's point, the Reply Column material becomes directly relevant, and it should be included as additional support for the principal argument. An IRAC of the revised principal argument would look like this:

IRAC OF OPTION ONE:

REPLY COLUMN MATERIAL BOLSTERS PRINCIPAL ARGUMENT³¹

- I: Vanilla ice cream is the most popular ice cream in the United States.
- R: Authority to support the proposition:
- 2005 Dairy Farmers Report (general ice cream sales);
 - 2006 *Ice Cream World* magazine survey (specific vanilla vs. butter pecan comparison).
- A: Explanation that vanilla ice cream is the most popular.
- C: Conclude section.

³¹ For the students, we print Reply Column material in red type.

ii. Option Two: Rebuttal Option

Students should use Option Two if the Reply Column raises new points that were not raised in the Principal Argument Column, and the new points are related but might affect negatively the flow or structure of the principal argument if they were inserted directly within it (see figure 5, *infra*). Under this scenario, the principal argument is written using the material in the Principal Argument Column, and the Reply Column material is incorporated as a rebuttal paragraph(s) at the end of the analysis section of the principal argument.

FIGURE 5: OPTION TWO OF THE GREAT ICE CREAM DEBATE

| <u>PRINCIPAL ARGUMENT COLUMN</u> | <u>OPPONENT'S RESPONSE COLUMN</u> | <u>REPLY COLUMN</u> |
|---|---|--|
| <p>Vanilla ice cream is the most popular ice cream in the United States.</p> <p>—2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</p> | <p>Butter pecan is the most popular ice cream in the United States.</p> | <p>Butter pecan ice cream cannot be more popular than vanilla because it poses a risk to human health.</p> <p>—In response to a 2001 U.S. Department of Health and Human Services report, the U.S. Department of Education has banned butter pecan ice cream from all schools because of peanut allergies in children. In each successive year since the ban, the Annual Preference Survey of the American Association of Ice Cream Producers noted that the percentage of people who prefer butter pecan as their favorite ice cream over vanilla has declined.</p> |

The Reply Column material contained in this chart is best suited for Option Two: rebuttal paragraph treatment. This material would not have seemed relevant when the author was researching only the principal argument. Indeed, it might have been confusing to refer to a ban on nut products at the same time as discussing the popularity of vanilla ice cream. However, this material is related to the specific debate about whether vanilla is more popular than butter pecan, and it fits naturally with a section devoted to that subject. Moreover, as long as it is presented after the idea that vanilla ice cream is the most popular, its insertion does not break the flow or disturb the tone of the principal argument. An IRAC of this material would look like this:

IRAC OF OPTION TWO:

REPLY COLUMN MATERIAL AS REBUTTAL PARAGRAPH

- I: Vanilla ice cream is the most popular ice cream in the United States.
- R: Authority to support the proposition:
- 2005 Dairy Farmers Report (general ice cream sales).
- A: Explanation that vanilla ice cream is most popular:
- Rebuttal Paragraph:** U.S. Department of Education ban and corresponding decline in popularity.
- C: Conclude entire section.

A rebuttal paragraph might be written this way:

Unlike vanilla ice cream, butter pecan ice cream actually poses a risk to human health. In 2001, a report issued by the U.S. Department of Health and Human Services noted that over three million people are diagnosed with nut allergies each year, and a vast majority of these people are children. As a result of this report, the U.S. Department of Education banned nut products, including ice cream with nuts, from all schools. In each successive year since the ban, annual preference surveys conducted by the American Association of Ice Cream Producers reveal a consistent decline in the percentage of people who prefer butter pecan as their favorite ice cream over vanilla. Because preference

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surveys taken after the government health report and subsequent ban note a six-year decline in the favoring of butter pecan ice cream, Appellee cannot legitimately assert that it is the most popular ice cream in the United States.

iii. Option Three: Separate Arguments Option

Students should use Option Three when the Reply Column raises new points that were not raised in the Principal Argument Column, and when these points would overshadow or outweigh the principal argument if included within it (see figure 6, *infra*). Under this scenario, two separate arguments should be created, using one IRAC for each. One IRAC, with its own point heading, is devoted to the Principal Argument Column material. The other IRAC, with its own point heading, is devoted to the Reply Column material and becomes an affirmative argument intended to dilute the persuasive value of the opponent's principal argument.

**FIGURE 6: OPTION THREE OF THE GREAT
ICE CREAM DEBATE**

| <u>PRINCIPAL ARGUMENT COLUMN</u> | <u>OPPONENT'S RESPONSE COLUMN</u> | <u>REPLY COLUMN</u> |
|---|---|--|
| <p>Vanilla ice cream is the most popular ice cream in the United States.</p> <p>—2005 Annual Report of American Dairy Farmers (vanilla ice cream sales data).</p> | <p>Butter pecan is the most popular ice cream in the United States.</p> | <p>Because of its health risks and an increasingly health conscious public, butter pecan is not the most popular ice cream.</p> <p>—Since the U.S. Department of Education ban, national ice cream preference studies show that the percentage of people who prefer butter pecan has declined in each successive year since the ban, and projected sales data indicate the decline will continue.</p> <p>—Popularity will continue to decline as children are exposed to other flavors and develop other preferences.</p> <p>—According to two separate studies reported in the <i>Midwest Journal of Medicine</i>, parents are changing household behavior to protect children with nut allergies. This shift includes purchasing more vanilla ice cream.</p> <p>—Manufacturers have spent less money to market butter pecan ice cream and have increased significantly the price per gallon to account for increased production costs.</p> |

The Reply Column material in this example should be incorporated into the paper as a separate argument (Option Three). It is too voluminous to be a simple rebuttal paragraph, and if an author attempted to use it as such, the Reply Column material would overshadow the principal argument, both in terms of its authority and its sheer volume. Used in its own IRAC, the principal argument is clean and focused, and the second IRAC, which will be built using the Reply Column material, further supports the principal argument but also preemptively steals thunder from the opponent.

IRACS OF OPTION THREE:

REPLY COLUMN MATERIAL AS INDEPENDENT ARGUMENTS

Principal Argument

- I: Vanilla ice cream is the most popular ice cream in the United States.
- R: Authority to support the proposition:
- 2005 Dairy Farmers Report (general ice cream sales).
- A: Explanation that vanilla ice cream is the most popular.
- C: Conclude section.

Second Argument

- I: Because of its health risks and an increasingly health conscious public, butter pecan is not the most popular ice cream, and its popularity continues to decline.
- R: Authority to support the proposition:
- Dept. of Ed. Ban;
 - National ice cream preference studies;
 - Projected sales data;
 - *Midwest Journal of Medicine* studies;
 - Price increase;
 - Production costs; and
 - Decrease in marketing.
- A: Explanation of argument.
- C: Conclude section.

This non-legal example illustrates how to create a three-column chart and structure an argument that takes the opponent's position into account. After we have explained Steps 6 (Three-column Chart creation) and 7 (Argument Placement formula) in this context, we work through an in-class exercise using a legal example. To begin this exercise, we distribute a principal argument that was written without taking the opponent's argument into account. We also distribute three completed three-column charts, with Reply Column material suited for each argument placement option. For each chart, students must identify whether the Reply Column material should be used as part of the analysis of the principal argument, as a rebuttal paragraph, or as an independent argument.

After making these decisions, students apply the Argument Placement formula and identify where to insert the Reply Column material. At the end of the in-class exercise, we distribute an "answer guide" that contains the original principal argument with the Option One, Option Two, and Option Three material incorporated and highlighted with margin commentary.

The answer guide gives students a sense of whether they understand the Argument Placement formula. It also is demonstrable proof that using the Three-column Chart method and Argument Placement formula improves persuasiveness. Indeed, students' revised principal arguments that incorporate the Reply Column material are more organized, complete, and persuasive than their original arguments.

Finally, we ask students to apply these concepts to the course case file. At the end of this class, we distribute the Three-column Chart and Improved Argument assignments that students complete using the course case file. Students are asked to evaluate the principal argument they wrote in Week VI, create a three-column chart for that argument, and revise the principal argument by incorporating the Reply Column material.³²

After attending a workshop to develop oral advocacy skills,³³ students return to class the following week with their revised

³² See app. A.

³³ An interesting aspect of our class is an innovative workshop we developed with the Detroit branch of "The Second City," a Chicago-based improvisational comedy group. This two-hour hands-on workshop focuses on commanding an audience, voice and diction, responding to questions, effective body language, and team and confidence building. The event has been extremely well received, and "The Second City" is working toward offering the seminar to law schools across the country.

principal argument and present it orally. Each student is given approximately five to seven minutes, and classmates act as appellate judges, questioning and critiquing the argument.³⁴ Both the oral and written arguments are evaluated and peer reviewed, and after receiving this feedback, students re-write their principal argument a second time. This second revised version is graded. Then, at the end of the term, students present the written argument as part of the final appellate brief and orally present it as part of the in-class moot court competition.

4. Trouble-Shooting Each Option

When teaching the Argument Placement formula, it is important to remind students that there is no “right” answer. If a student is struggling with which option to use, the best approach is to pick an option, draft the argument according to the Argument Placement formula, and use the following trouble-shooting techniques, which can help students identify whether they are using the most effective option.

A student might be misusing an Option One structure if the principal argument loses focus or impact after the Reply Column material is inserted into the principal argument. This may be the case because the two points are not sufficiently related or the placement creates a problematic structure.³⁵ In this instance, the solution is to use the Reply Column material as a rebuttal paragraph (Option Two) or as an independent argument (Option Three).

A student may be misusing an Option Two approach if the rebuttal paragraph material simply repeats the principal argument. If so, the solution is to use Option One and incorporate the rebuttal material into the principal argument. Another way to misuse Option Two is if the rebuttal paragraph overshadows the principal argument. For example, if a rebuttal paragraph requires full case discussion(s) or the material itself exceeds three or four paragraphs, there is a good chance that this material is too much for a rebuttal paragraph. The solution in this instance is to use the

³⁴ When we are team teaching a large section, we break into two groups and work in separate classrooms in order to complete all arguments in one class period.

³⁵ One potential structure problem occurs when there are repeated shifts between rule and analysis paragraphs.

third option and convert the rebuttal into an independent argument.

Finally, a student will know if he or she is misusing the third option if the stand-alone argument lacks legal authority or sufficient analysis—that is, if it contains insufficient material to justify using a separate IRAC. If so, the student should convert the material into a rebuttal paragraph (Option Two) or use it to bolster the principal argument (Option One).

III. WHY IS OUR METHOD EFFECTIVE?

Students have responded positively to our method. They have explained that they feel more comfortable approaching a writing project on their own and outside of the classroom because they have a clear process to apply.³⁶ Moreover, we have noticed a dramatic improvement in the readability, creativity, and overall persuasive quality of their work product. Initially, we found it ironic that moving to a formulaic and mechanical approach to creative writing helped students become better writers. Beyond some initial surprise, however, we realized that there are legitimate explanations for the result.

A. Our Method Enables Students to Learn Persuasive Writing as a Transferable Skill

One of the biggest frustrations in teaching legal writing is that students do not recognize that their writing skills are transferable to other tasks outside the legal writing classroom.³⁷ One way to increase the likelihood that transfer will occur is to use a method or process.³⁸ The process of writing has been the focus of composition studies and pedagogy for more than thirty years,³⁹

³⁶ These students are describing the recognized benefits of using a definitive method or process. “[M]odels strive to capture the whole of something in [an] overall, integrated fashion. Models also show sequence, interconnection, pattern, flow, and organization. Models are critically important to mental functioning because they allow us to anticipate future actions, needs, and steps.” Paul Plsek, *The Directed Creativity Cycle*, <http://www.directedcreativity.com/pages/Cycle.html> 1 (accessed June 21, 2007).

³⁷ Laurel Currie Oates, *I Know That I Taught Them How to Do That*, 7 *Leg. Writing* 1 (2001).

³⁸ *Sourcebook*, *supra* n. 21, at 66; Oates, *supra* n. 37, at 9 (citing Todd L. Chmielewski & Donald F. Danserreau, *Enhancing the Recall of Text: Knowledge Mapping Training Promotes Implicit Transfer*, 90 *J. Educ. Psychol.* 407, 407 (1998)).

³⁹ Lad Tobin, *How the Writing Process Was Born—And Other Conversion Narratives*,

and has been found to enable students to focus on and better understand the core structure and purpose of a particular document rather than its “surface” features, which, in turn, permits them to use that structure in other contexts.⁴⁰ Our method is grounded in the use of process to develop ideas and communicate information in the social context of the legal community.⁴¹ As a result, students become more creative and effective writers and, at the same time, are able to transfer the process to their future work as law students and, ultimately, as lawyers.

Our process approach to writing was informed by earlier approaches used in basic college composition classes. Prior to the late 1960s, writing or composition pedagogy focused on the product.⁴² This teaching method did not utilize an invention or brainstorming stage, and has been described as linear.⁴³ Proponents of the product-focused method of writing provided little to no instruction on the composing process.⁴⁴ Evaluation of the written product was done only after the student had completed a formal draft.⁴⁵ Successful writers were identified as those who could “systematically produce a 500-word theme of five paragraphs, each with a topic sentence.”⁴⁶

In the late 1960s and early 1970s, composition theorists shifted their attention away from the product-driven approach and toward the process of writing. In promoting the process approach, theorists argued that “we cannot teach students to write by looking only at what they have written. We must also understand *how* that product came into being and *why* it assumed the form that it did.”⁴⁷ “Process pedagogy,” as it came to be called, shifted

in *Taking Stock: The Writing Process Movement in the 90s* 1, 5 (Lad Tobin & Thomas Newkirk eds., Boynton/Cook 1994) (“Every single written product is the result of *some* process—and almost every process leads to some sort of product.”).

⁴⁰ Oates, *supra* n. 37, at 9.

⁴¹ Pamela Lysaght & Cristina D. Lockwood, *Writing-across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73, 96–100 (2004) (explaining successful legal writing programs will use a comprehensive process approach as well as emphasize the social context within which the writing occurs).

⁴² Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 College Composition & Commun. 76, 77–80 (1982).

⁴³ *Id.* at 78.

⁴⁴ *Id.*

⁴⁵ Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”*: Integrating Socratic Method with the Writing Process, 64 Temp. L. Rev. 885, 888 (1991).

⁴⁶ Hairston, *supra* n. 42, at 78.

⁴⁷ *Id.* at 83–84 (citing Mina P. Shaughnessy, *Errors and Expectations: A Guide for the Teacher of Basic Writing* 5 (Oxford U. Press 1977)).

the focus of writing away from the end product and toward the process of creation.⁴⁸ The purpose of this shift has been explained by Donald M. Murray, an early proponent of the process method:

The process of making meaning with written language cannot be understood by looking backward from a finished page. Process cannot be inferred from product any more than a pig can be inferred from a sausage. It is possible, however, for us to follow the process forward from blank page to final draft and learn something of what happens.⁴⁹

Composition instructors who followed this method began to intervene in the writing process to provide feedback and guidance, rather than waiting to critique a finished draft or final submission.⁵⁰ In this way, students were better able to understand and remedy the problems in a particular document and learned how to approach and write more effectively.⁵¹ In fact, the theory of the process approach to writing is that effective writing skills will be learned if an inexperienced writer is taught the processes, activities, methods, and strategies that an experienced writer uses.⁵² To that end, writing began to be taught as a process of recursive activities that include invention, organization, and revision.⁵³

The Process Pedagogy approach has been described as having twelve principal features:

- (1) It focuses on the writing process; instructors intervene in students' writing during the process.

⁴⁸ Donald M. Murray, *Teach Writing as a Process Not a Product*, in *Rhetoric and Composition: A Sourcebook for Teachers and Writers* 89 (Richard L. Graves ed., Boynton/Cook 1984); Tobin, *supra* n. 39, at 1; Lad Tobin, *Process Pedagogy*, in *A Guide to Composition Pedagogies* 1 (Oxford U. Press 2001); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 52–56 (1994).

⁴⁹ Donald M. Murray, *Writing as Process: How Writing Finds Its Own Meaning*, in *Eight Approaches to Teaching Composition* 3, 4 (Timothy R. Donovan & Ben W. McClelland eds., NCTE 1980).

⁵⁰ Kearney & Beazley, *supra* n. 45, at 888–889.

⁵¹ *Id.*

⁵² Maisah Robinson, *How Academic Writing Became a Process*, http://www.associatedcontent.com/article/38458/how_academic_writing_became_a_process.html (accessed June 3, 2007); see also Anzidei, *supra* n. 4 (citing Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 *College Composition & Commun.* 365, 366–367 (1981), and Carol Berkenkotter, *Decisions and Revisions: The Planning Strategies of a Publishing Writer*, 34 *College Composition & Commun.* 156, 156–167 (1983)).

⁵³ Dartmouth Writing Prog., *Process Pedagogy: A Brief Explanation*, in *Teaching the Writing Process*, <http://www.dartmouth.edu/~writing/materials/faculty/pedagogies/process.shtml> (accessed June 2, 2007).

- (2) It teaches strategies for invention and discovery; instructors help students to generate content and discover purpose.
- (3) It is rhetorically based; audience, purpose, and occasion figure prominently in the assignment of writing tasks.
- (4) Instructors evaluate the written product by how well it fulfills the writer's intention and meets the audience's needs.
- (5) It views writing as a recursive rather than a linear process; prewriting, writing, and revision are activities that overlap and intertwine.
- (6) It is holistic, viewing writing as an activity that involves the intuitive and non-rational as well as the rational faculties.
- (7) It emphasizes that writing is a way of learning and developing as well as a communication skill.
- (8) It includes a variety of writing modes, expressive as well as expository.
- (9) It is informed by other disciplines, especially cognitive psychology and linguistics.
- (10) It views writing as a disciplined creative activity that can be analyzed and described; its practitioners believe that writing can be taught.
- (11) It is based on linguistic research and research into the composing process.
- (12) It stresses the principle that writing teachers should be people who write.⁵⁴

Our method is illustrative of the process pedagogy of composition studies. For example, there are numerous "interventions" in the writing process: multiple peer review exercises, the use of charts to develop and organize arguments, and the opportunity to verbalize an argument before including it in a final document.

Further, our method emphasizes audience and purpose, an important feature of the process pedagogy, and it addresses critics of the process approach who argue that it fails to teach "the conventions of the particular discourse [community] and the needs of

⁵⁴ Hairston, *supra* n. 42, at 86.

the audience or variety of audiences.”⁵⁵ Our method addresses this deficiency because students are informed of the purpose of their writing, the context for each document, and the audience (i.e., judge, client, opposing counsel). More specifically, our method provides students with strategies for working with complex case files that they will encounter in practice, allows for and encourages collaboration within the class, and emphasizes the purpose of component parts of the brief. In this way, as professors, we are able “not only to convey information but also to transform students’ . . . world view.”⁵⁶

In short, our methods have the potential to improve the transferability of persuasive writing skills. Instead of simply telling students to think creatively about the facts, we provide them with a system to organize and critically evaluate facts. Similarly, instead of merely telling students to think of an opponent’s point when crafting their principal argument, we provide students with a concrete chart method to use in order to catalogue ideas. Moreover, we explain in great detail how to effectively place the material to improve organization, readability, and tone. Working through each of these tasks, using both legal and non-legal examples, students learn how to use these processes when writing another law school assignment or when working as an attorney.

B. Our Method Fosters Creative Thinking

Although there are many definitions of the term “creativity,”⁵⁷ two in particular capture the essence of our approach. The first describes creativity as “the process of forming ideas or hypotheses, testing hypotheses, and communicating the results. Implied in this definition is the creation of something new. . . . It involves adventurous thinking, getting away from the main track, breaking out of

⁵⁵ Adam Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 *Baylor L. Rev.* 893, 923 (2006); see also Lysaght & Lockwood, *supra* n. 41, at 96–100 (discussing the importance of incorporating process and social discourse theory into legal writing programs).

⁵⁶ Lysaght & Lockwood, *supra* n. 41, at 98 (quoting Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need to Know about Writing*, 3 *PRE/TEXT* 213 (1982)).

⁵⁷ There are at least fifty to sixty different definitions of the term creativity. Calvin W. Taylor, *Various Approaches to and Definitions of Creativity*, in *The Nature of Creativity: Contemporary Psychological Perspectives* 99, 118 (Robert J. Sternberg ed., Cambridge U. Press 1988). And, indeed, it may be that the term defies one single, precise definition. E. Paul Torrance, *The Nature of Creativity as Manifest in Its Testing*, in *The Nature of Creativity: Contemporary Psychological Perspectives*, *supra* n. 57, at 43.

the mold.”⁵⁸ The second definition, which draws on the first, emphasizes that creativity involves “finding new ways, making unusual associations, . . . seeing unexpected solutions[,] . . . generating possibilities, seeing unexpected connections, [and] introducing novelty.”⁵⁹

This Section seeks to explain why our method fosters creative thinking in students. To better appreciate the concept that creative thinking can be improved by, or at least reduced to, a formal process, it is important to understand its origins.

1. A Brief History of Creative Process Theories

“For many centuries, it was believed that human creativity resulted from forces outside the individual’s control.”⁶⁰ In ancient times, it was believed that innovations were gifts from the gods or muses.⁶¹ It was not until the Renaissance that people began to understand their own role in the creative process. “The attitudes in this era mark the inauguration of humanistic philosophy, the belief that we ourselves are responsible for much of what happens to us.”⁶² During this time, creativity was seen as a matter of genetic inheritance.⁶³ By the Age of Enlightenment, the revelations of “Copernicus, Galileo, Hobbes, Locke, and Newton solidified belief in the scientific process. Faith in *humanism*, or humans’ ability to solve problems through their own mental efforts, grew rapidly.”⁶⁴

By the twentieth century, as our knowledge of the human brain and psychology began to expand, scientists began to study in earnest the processes of human cognition and creativity.⁶⁵ Although creativity had long been discussed in the context of traditional arts like music, sculpture, and dance, researchers began to examine creative thinking in a broad range of fields such as

⁵⁸ E. Paul Torrance, *Developing Creative Thinking through School Experiences*, in *A Source Book for Creative Thinking* 31, 32 (Sidney J. Parnes & Harold F. Harding eds., Charles Scribner’s & Sons 1962) (internal quotations omitted).

⁵⁹ Arthur J. Cropley, *Creativity in Education & Learning: A Guide for Teachers and Educators* 23 (Kogan Page 2001).

⁶⁰ John S. Dacey & Kathleen H. Lennon, *Understanding Creativity: The Interplay of Biological, Psychological, and Social Factors* 44 (Jossey-Bass Inc. 1998).

⁶¹ *Id.* at 15, 17; Scott G. Isaksen & Donald J. Treffinger, *Creative Problem Solving: The Basic Course* 3 (Bearly Ltd. 1985).

⁶² Dacey & Lennon, *supra* n. 60, at 24.

⁶³ *Id.* at 15.

⁶⁴ *Id.* at 25 (emphasis in original).

⁶⁵ *Id.* at 33.

mathematics, natural sciences, architecture, engineering, sports, business, industry, armed forces, and large scale organizations.⁶⁶

2. *Creative Process Theories and Common Themes*

Today, there are numerous creative process theories.⁶⁷ Despite the breadth of subjects studied and the number of corresponding methods, scholars suggest that there are consistent core concepts to these processes⁶⁸ that tend to be based on at least two common themes.⁶⁹ First, the creation process requires purposeful analysis, imagination, and evaluation. Second, people have direct control over the generation of new ideas.⁷⁰ Indeed, “[m]odern research in the social and behavioral sciences has demonstrated . . . that the concept of creativity does not have to be mystical or impenetrable, and that our power of reasoning, analysis, and experimentation can help us attain insights into the nature of creativity and its many faces or expressions.”⁷¹

Alex Osborn is credited with “outlin[ing] . . . basic steps to help individuals and groups be more successful in creative thinking,”⁷² and his central themes have become the basis for more modern discussions of creative problem solving,⁷³ which might be

⁶⁶ Cropley, *supra* n. 59, at 5.

⁶⁷ In 1976, Silvano Arieti discussed at least eight different creative thinking models. Silvano Arieti, *Creativity: The Magic Synthesis* (Basic Bks. 1979). Since that time, several additional theories have emerged. See Isaksen & Treffinger, *supra* n. 61, at 5 (“[R]ather than finding that we are *unable* to develop systematic theories of creativity, there is almost an *overabundance* of such theories.” (Emphasis in original)); Plsek, *supra* n. 36. It should be noted, however, that these theories are not without critics. Indeed, scholars have argued that creative thinking is a subconscious process that cannot be quantified or sequenced in a method. See Max Wertheimer, *Productive Thinking* 192 (Harper 1945) (“In [the] aim to get at the elements of thinking they cut to pieces living thinking processes, deal with them blind to structure, assuming that the process is an aggregate, a sum of those elements. In dealing with [creative] processes they can do nothing but dissect them, and thus show a dead picture stripped of all that is alive in them.”); see also Arieti, *supra* n. 67, at 18 (citing W. Edgar Vinacke, *The Psychology of Thinking* (McGraw Hill 1953) (Vinacke was “particularly critical of the theories that assume the creative process always unfolds in a given sequence of steps.”)).

⁶⁸ Plsek, *supra* n. 36; see also Donald A. Crosby & Ron G. Williams, *Creative Problem-Solving in Physics, Philosophy, and Painting: Three Case Studies*, in *Creativity and the Imagination: Case Studies from the Classical Age to the 20th Century*, *Studies in Science and Culture* vol. 3, 168, 168 (Mark Amsler & D. Heyward Brock eds., U. Del. Press & Assoc. U. Presses 1987).

⁶⁹ Plsek, *supra* n. 36.

⁷⁰ *Id.*

⁷¹ Isaksen & Treffinger, *supra* n. 61, at 3.

⁷² *Id.* at 6.

⁷³ *Id.* at 8.

most akin to legal writing. Osborn identified seven phases that are instrumental to creative thinking:⁷⁴

- (1) Orientation: Pointing out the problem;
- (2) Preparation: Gathering pertinent data;
- (3) Analysis: Breaking down the relevant material;
- (4) Hypothesis: Piling up alternatives by way of ideas;
- (5) Incubation: Letting up, to invite illumination;
- (6) Synthesis: Putting the pieces together; and
- (7) Evaluation: Judging the resulting ideas.⁷⁵

Our method will not transform a relatively un-creative person into a creative one. Nevertheless, our process mirrors the well-recognized steps of creative thought. It asks students to work through the creative process on at least three separate occasions: first with the facts, second with the arguments, and finally with the facts and arguments together. In turn, every student's existing creative potential is increased.⁷⁶

Moreover, this method strikes the appropriate balance of brainstorming, analysis, and evaluation to help students become more creative. It includes review and revision, two critical steps to creativity. "Repetitive [writing] is . . . essential [to] creative work Each time we re-view something we re-visit it, seeing

⁷⁴ Alex Osborn, *Applied Imagination: Principles & Procedures of Creative Thinking* 125 (Charles Scribner's & Sons 1953). At the time of the writing, however, Osborn did not characterize the steps in the same formal way they are seen today. Instead, he noted, "[T]hose who have studied and practiced creativity realize that its process is . . . one which can never be exact enough to rate as scientific. The most that can honestly be said is that it usually includes some or all of these phases"

⁷⁵ There also are useful creative problem solving ground rules to consider when working through the various creative process stages: (1) Defer judgment: It is important to keep one's mind open to all possibilities and to avoid using evaluation prematurely, which will inhibit the free flow of ideas; (2) Look for many ideas—quantity breeds quality; (3) Accept all ideas; (4) Make yourself stretch—extend yourself; (5) Take time to let ideas simmer—incubation; (6) Seek combinations. Isaksen & Treffinger, *supra* n. 61, at 17–19.

⁷⁶ "Psychologists long ago accepted the tenet that any primary ability can be trained—that even an average potential can be developed by exercise Thus creative power can be retained or regained—and it can actually be stimulated into growth." Osborn, *supra* n. 74, at 67–68.

new aspects of the same thing.”⁷⁷ Repetition plays a constructive role in the creative process.⁷⁸

C. Our Method Is Consistent with Modern Learning Theories

Modern learning theorists describe ways that students acquire, process, retain, and recall information. Our method is consistent with these theories, and, as a result, students can better understand the substantive law and underlying facts presented in a legal problem, which, in turn, increases the likelihood that they can create more accurate, sophisticated, and nuanced arguments. This consistency also increases the likelihood that students will retain our method and successfully recall and apply it to future assignments.

A detailed discussion of the numerous learning theories is outside the scope of this article, and they have been well covered by other authors.⁷⁹ Here, we will focus on four techniques or teaching themes that are consistent with learning theory research: (1) start with the basics in a subject area and then introduce increasingly complex material; (2) use a variety of teaching methods; (3) give students the opportunity to apply material and receive feedback; and (4) encourage autonomous learning.⁸⁰

The first theme suggests that professors should “start with information within the student’s preexisting knowledge base and work towards the student’s learning more complex materials that require more complex levels of thinking.”⁸¹ Consistent with this

⁷⁷ Linda R. Jeffrey, *Writing and Rewriting Poetry: William Wordsworth*, in *Creative People at Work: Twelve Cognitive Case Studies* 69, 69 (Doris B. Wallace & Howard E. Gruber eds., Oxford U. Press 1989).

⁷⁸ *Id.* at 81. Among other examples, Jeffrey discusses one poem that Wordsworth wrote originally in 1798, and edited again in 1799, 1805, and 1850. *Id.* at 71–72. Although we do not have that time span in our semester-long course, her point is well taken.

⁷⁹ See Dale H. Schunk, *Learning Theories: An Educational Perspective* (4th ed., Pearson 2004); *Sourcebook*, *supra* n. 21, at 53–54; Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. Det. Mercy L. Rev. 1 (2003); Robin A. Boyle, *Teaching Law Students through Individual Learning Styles*, 62 Alb. L. Rev. 213 (1998); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 Seattle U. L. Rev. 139 (2001); Lysaght & Lockwood, *supra* n. 41; Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347 (2001).

⁸⁰ Lysaght & Lockwood, *supra* n. 41, at 75–76, 92–94.

⁸¹ *Id.* at 92–93 (citations omitted); see also Margaret C. Wang, *Adaptive Education Strategies: Building on Diversity 2* (Paul H. Brookes Publ. 1992) (“[S]uccess in learning is maximized when students are provided with experiences that build on their initial compe-

theme, our method presents the writing process as a series of understandable steps that build upon the basic legal writing skills students have already developed. It also breaks the task of writing an appellate brief into small portions that are spread over the course of one semester. Students focus on discrete portions of the brief, mastering (or at least applying) skills, techniques, and substance that relate to each portion, before moving on to the next series of assignments. With this sturdy foundation, students are prepared for the challenge of completing the final writing assignment, which demands a more sophisticated demonstration of the writing process and nuanced application of the substance.

Second, we use various teaching methods in an effort to reach every type of learner⁸² and to help students link our material to their “preexisting knowledge base.”⁸³ In our first class, we present our process in its entirety, via lecture, PowerPoint slides, a hand-out showing the process in chart format, group discussions about the process, and a writing assignment where students describe our process in their own words and critically evaluate it. Students then learn how to use our process and apply it and the substantive law throughout the semester by reading class materials, listening to lecture and student evaluations, debating during in-class exercises, standing behind the podium vocalizing their ideas, acting as judges and offering critiques, writing their own work, and evaluating others’. These activities offer something for every type of learner, increasing the likelihood that these learners will apply and understand the method and substantive law and will ultimately learn transferable skills.

Consistent with the third theme, students have multiple opportunities to apply learned material and to receive immediate feedback.⁸⁴ They receive instruction on the method; have in-class opportunities to work through it and the law, individually and in groups, and receive feedback; apply the specific aspects of the method and law to their individual written and oral assignments;

tence and that are responsive to their learning needs.”); Jacobson, *supra* n. 79, at 172 (discussing the benefits of using incremental assignments).

⁸² The types of learners we focus on are visual learners (holistic thinkers who absorb information presented in its entirety); kinesthetic learners (tactile learners whose learning is linked to physical movement and who “learn by doing or touching”); aural learners (learners who best absorb material by listening); oral learners (those who use talking to process information or develop ideas); and verbal learners (those who best absorb information through written text and visual aids). See Jacobson, *supra* n. 79, at 150–156.

⁸³ Lysaght & Lockwood, *supra* n. 41, at 93.

⁸⁴ *Id.* at 93–94.

and, after receiving student and professor critiques of both, as well as offering their own critiques of others, incorporate all that they have learned by rewriting these discrete portions as part of the final appellate brief. In sum, students are more likely to learn our method and be able to apply it in future situations because they have had repeated exposure to it with feedback along the way. They also will have learned the substantive law and will be able to develop nuanced, polished points.

Finally, the structure of the class and its atmosphere encourage autonomous learning.⁸⁵ Adult learning theories reveal that today's law students are motivated to learn when they have opportunities to apply what they learn and to receive feedback, to feel respected as participants in their education, and to see how the course material is relevant.⁸⁶ Because the concepts of application and feedback were discussed above, this section will focus on respect and relevance.

It has been suggested that communicating respect for students and expecting them to perform at a high level will increase student motivation, enjoyment, and independent learning.⁸⁷ Generational considerations may bear on whether professors are able to successfully communicate this information to students. Today's students are of a different generation and may have a different concept of what constitutes respect.

They are likely to expect that adults, including law school professors, treat them as equally capable adults, simply lacking the specific knowledge of the faculty, but possibly bringing knowledge that the faculty member does not have. Rather than a hierarchical structure, involving learned instructors and eager

⁸⁵ *Id.* at 94 (internal citations omitted). For a discussion of creating autonomous learners through a "Facilitative Method," see Jim Andersen, *Courageous Teaching: Creating a Caring Community in the Classroom* (Corwin Press 1995). A successful teacher, acting as facilitator, encourages students' personal growth and enables them to actively learn. *Id.* at 18–19. A professor does so by directing the underlying process,

arranging learning activities and questions in a respectful manner so that every student has the potential to contribute to the next important step or question. The facilitator draws out the best each student has to offer. Through creating a conducive learning environment, the facilitator assists students with becoming more aware, responsible, and competent.

Id.; Wang, *supra* n. 81, at 3–4 ("The term 'adaptive' refers to the modification of school learning environments to respond effectively to student differences and to enhance the individual's ability to succeed . . .").

⁸⁶ Anderson, *supra* n. 9, at 138.

⁸⁷ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 *J. Leg. Educ.* 75, 83 (2002).

students, their vision of the law school world . . . involves ‘differently-abled,’ responsible adults sharing knowledge with each other in a mutually symbiotic manner.⁸⁸

This characterization helps explain why students are engaged in our course. We set an extremely collaborative tone and work the class more as a lab than a lecture-based class. Students are regularly on their feet, either presenting behind the podium or debating during in-class exercises. They are encouraged to “spread their wings” and experiment with various presentation techniques. Classmates are always encouraged to ask questions and to offer comments and critique, both during and after presentations. We sit at the back of the class and offer critiques, after students have had the opportunity to do so, either reinforcing points or addressing issues that the students did not raise. In addition, written assignments are peer reviewed. Our motivation in structuring the class this way was to create a safe environment where students would be willing to speak and to stretch their minds. We show students that we seek and value their input, and they respond.

The structure of our class also helps students see the relevance of our class material. While it is important that students see how tasks will serve them in practice, “explaining how a particular task or assignment fits into the objectives of the course establishes relevance for adult learners.”⁸⁹ Our approach of breaking the appellate brief into sections and coupling the written and oral components of each discrete section achieves this result. It permits students to see and explore the connection between the brief-writing process and the oral argument, rather than seeing them as two separate and isolated events. Students then are more inclined to devote themselves to learning and applying the course material.

D. The Method Addresses Common Persuasive-Writing Problems

1. Failure to Develop or Effectively Present a Theme

The development and inclusion of a theme is a necessary component of persuasive writing. A good theme can often make the

⁸⁸ Anderson, *supra* n. 9, at 131 (citing Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?* 9 Leg. Writing 119, 130 (2003)).

⁸⁹ *See id.* at 144.

difference between a winning or losing argument because it provides the audience with a motivating factor that can carry the day. To be successful, the theme must work with both facts and arguments. However, many students do not incorporate a theme, or their attempts to do so are not successful.

First, students may not include a theme within their paper because they do not know how to develop one, or they may have an unsound theme that leads them to use an inappropriate tone or take unsuccessful positions. Our method forces students through their facts multiple times and requires that every fact be considered and rated for relevance and importance. This helps students brainstorm potential themes. Moreover, a student is able to develop a theme that is supported by the facts. Our method then takes the students to the argument-drafting stage and asks them to evaluate the argument and fact sections in tandem, coordinating the two sections. This process helps students verify that their theme is appropriate.

Second, students may think they have created a theme only to find that they have actually created a legal theory. We address this problem through our fact characterization exercises and in-class discussions. Inevitably, when working through the Jones exercise involving the young girl's death or our case file, students refer to legal theories when asked to describe their theme. For example, when we ask students to describe a theme for the Jones exercise, legal arguments like negligence or liability inevitably creep into the discussion. In response, we encourage them to drop the legalese and consider what images can be invoked by the facts. Specifically, we ask them what can be done with the fact that Elizabeth's bike was new. Students tend to discard this fact unless it supports a specific legal theory. We ask them to think again and decide whether it could be used to create an image of a happy young girl with a scrubbed face riding her new, shiny bike to school. This might be a backdrop against which the legal theories can be framed. Repeated exposure to the legal theory and the theme helps students appreciate the difference between the two.

Finally, students may have an appropriate theme, but they might not know how to integrate it throughout their entire paper. The theme may appear in the Statement of Facts through tone or choice of words, but it might never appear again. Our process of brainstorming and drafting facts and arguments in tandem also addresses this issue. Because students coordinate these sections, they are more likely to be able to carry the theme throughout.

2. *Statement of Facts: A Lost Opportunity to Persuade*

When writing a Statement of Facts section, students generally struggle with how to draft compelling fact sections that personalize clients, motivate the reader, and set the foundation for the analysis that follows. This might be the case for some students because they write the facts early on, in an attempt just to put pen to paper, or at the end with the goal of quickly satisfying the requirements of the submission. When the student writes before knowing enough about the case to make informed decisions about which facts to highlight, or too late in the process to adequately develop them, the end result may be a lost opportunity to persuade.

This lost opportunity may take shape in several forms. It could be that the statement is an objective rendition of the facts, as opposed to a compelling story that motivates the reader. Or it could take an indiscriminating approach where the student includes every fact presented in the file without making any decisions about what facts are necessary and what facts should be highlighted or downplayed. Or the fact section could have an inappropriate tone, one that leaves the reader wondering whose brief he is reading. An example of this problem might be a criminal defense lawyer calling his client “the convicted murderer,” or the attorney representing the estate of a deceased child referring to his client as “the estate” or “the appellant” rather than using the deceased child’s name. These problems can be reduced by our method of requiring the students to critically evaluate the facts multiple times before the final writing assignment is submitted.

Because our method helps students better understand how to approach their role as advocates, it may encourage them to devote more time to developing persuasive fact sections. In our course evaluations, students often describe the Fact Characterization exercise as the time when the proverbial light bulb “went on.” One student went so far as to describe it as the best class she had ever had in law school. Beyond what they hear and read in class, after completing the exercise, they develop a new appreciation for the power of the Statement of Facts section, they understand that they can and should tell a unique story, and they see that the reader should be able to identify the side for whom the section is written based solely on the tone of the document.

3. *One-Dimensional Arguments*

One significant problem with writing persuasive arguments is that students often do not strike the appropriate balance between making their own affirmative arguments and responding to their opponents' points. Students tend to create arguments in a vacuum, without regard to the strength and placement of their opponents' arguments. Or students write from a purely defensive standpoint, focusing solely on why their opponents are wrong, never presenting their own affirmative arguments.

Our Three-column Chart system and the Argument Placement formula help students strike the appropriate balance between these two extremes. Those students who argue in a vacuum cannot help but present a more complete argument after going through the three-column system because it forces them to look at the total picture. Because they have to identify their argument, their opponents' reply, and their own response, their arguments will be more complete. For those students who tend to argue defensively, the Argument Placement formula helps them strike an appropriate tone. Under the formula, the advocate's position is always presented first and the opponent's position is relegated to a place of less prominence, either in the rebuttal or a second, stand-alone argument.

Finally, the Argument Placement formula improves the organization and flow of the paper, which enables students to incorporate more complex and nuanced arguments while at the same time maintaining the document's readability. The charts help students outline each argument individually, and the Argument Placement formula helps students keep the paper on track.

4. *Students Make Superficial Revisions Only*

Our approach also addresses the concern that students do not usually make major substantive revisions to their papers during the revision process. A recent study has shown that students tend to revise at a "micro" rather than at the "micro" and "macro" levels.⁹⁰ This phenomenon occurs in part because students are novice

⁹⁰ Anzidei, *supra* n. 4, at 38–39. "Micro-revisions" are defined as "any revision that would correct a perceived surface error in the text without providing new information or changing the substantive meaning of the text." *Id.* at 37 (citations omitted). "Macro-revisions" are defined as "any revision that would change the substantive meaning of the

legal writers and do not see the need for these substantive changes.⁹¹ The problem also may be exacerbated by pre-existing beliefs that macro-revisions are a form of punishment⁹² or involve moving “backwards” in the writing process.⁹³

Our coupling of oral and written assignments and the recursive nature of our process encourage students to make better use of revision opportunities. First, the structure of our class promotes macro-revisions. As a result of our process, students reconsider and rework their ultimate argument only after drafting, orally presenting, responding to judges’ questions and defending their positions, and receiving feedback. This helps them discover substantive errors, consider different approaches and strategies, and re-visit their original decisions about how to approach the problem.⁹⁴

Second, our process is recursive, and students are taught from the beginning that working through the facts or an argument several times is not a punishment or an indication that they have done something wrong. While it is hard to undo pre-existing ideas, we work hard to do exactly that. We explain that working through the cycle is rewarding because doing so increases the likelihood that they will create a persuasive product.

E. It Works

Finally, our method is effective because it works. While we have seen a noticeable improvement in our students’ papers, the most objective evidence comes from our moot court results. While our school has always had an energized and hard-working group of national moot court competitors, since this class began, our moot court teams have improved substantially. The first year we saw our students’ brief scores improve. The second year, our students began to move beyond the preliminary rounds in competitions. In the third and fourth years, they began to move into the final

text, whether by adding new information or deleting existing content.” *Id.*

⁹¹ *Id.* at 39, 40–41.

⁹² *Id.* at 35. (“For inexperienced writers, the idea of revising conjures up memories of their youth when they learned to spell by writing all the words they got wrong on their spelling test twenty times over.” (Citations omitted)).

⁹³ *Id.* at 28.

⁹⁴ *Id.* at 44.

rounds. In short, our students are beginning to win significant awards.⁹⁵

CONCLUSION

Our method has been called “overt.” We took this comment as high praise because that was exactly our goal. Our method was intended to break down the mystery of persuasive writing and give students concrete steps to follow. Happily, we found that applying this process also increases the likelihood that students will persuade by creating complete and better organized papers that include theme, appropriate tone, and novel and interesting connections of fact and law.

⁹⁵ Some of these include National Champions—Niagara International Law Competition (2007), Best Brief—NYU Immigration Law Competition (2007), and Finalist & Semifinalist teams at the PACE Environmental Law Competition in 2006 and 2007. Further data about our students’ awards is available from the authors.