

Should Permanent Faculty Teach First-Year Legal Writing? A Debate

NO—Willard Pedrick

The pages of this *Journal* and the proceedings of conferences on legal education are filled with reports and proposals urging the creation of first-year legal writing courses administered by full-time law faculty members. The label itself is off-putting since there is no such thing as “legal writing”—persuasive writing is neither legal nor illegal but just writing. Such programs, when staffed by full-time law teachers, pose a significant threat to legal education.

I have been reading the law student's written product for more than thirty years. One does encounter some absolutely marvelous and inventive approaches to writing from time to time, like a student's invention of an offense of attempted involuntary manslaughter. But in my time I have not noticed any decline in the ability of the student to write minimally acceptable English. I doubt the existence of a real problem and know of no empirical demonstration that the massive allocation of resources to the teaching of legal writing on the part of some law schools has been productive.

The complaint of the practicing bar that law graduates cannot write acceptably is a perennial one. It will continue to be heard as long as practitioners are somewhat more skilled in practicing than are recent law graduates. In part, the dissatisfaction with writing skills reflects the fact that a good lawyer is trained and becomes expert in finding fault with anything committed to the written word by someone else. “Anything You Can Draft, I Can Draft Better” could be a hit song in the legal profession. Most law students can, if they work at it, write at minimally acceptable levels when they come to law school and by and large they gain rather than lose ground on that front as a result of their law-school experience. Skepticism about the dimensions of the problem is warranted.

Commitment of the full-time faculty to instruction in elementary legal writing should be reduced and not enlarged. Investing a very substantial segment of faculty time and energy in a legal-writing instruction program is unwise. First there is the matter of the self-image the law teacher holds as respects his proper functions. This self-image is characterized by a vision of the law teacher before a relatively large class teaching in some version of the Socratic method, à la Professor Kingsfield, having an

accompanying function of legal research (commonly in the law library) and spending many hours in writing for consequent publication in the law journals. That self-image is reinforced by the generally accepted criteria for promotion and tenure—with the emphasis those criteria put on classroom teaching and publication. Under the circumstances, it is not surprising that the young law teacher sees assignment to legal writing instruction as a kind of second-level assignment and one that represents a real threat to success in achieving genuine legitimacy as a law teacher in the accepted image. The disinclination of older and established teachers to rush forward to volunteer to take on legal writing instruction assignments confirms the judgment that this is not really the kind of thing that a law teacher is properly expected to do. Young and old may join in wondering whether it is wise to hire relatively high-salaried legal specialists to teach basic writing skills. Those in the university who regularly teach writing are specifically trained for that task and are commonly rewarded at a much lower level of compensation than are law teachers.

The young law teacher may also wonder whether a law teacher as such is particularly fitted to teach writing. To call the subject “legal writing” does not really alter the nature of the task. Writing is writing. The ability to write an organized, persuasive argument is in no way peculiar or special to the legal profession. It follows that law teachers are no better and indeed perhaps less equipped to teach writing skills than would be those persons in the university who approach that task as their specialty—and approach it with some enthusiasm.

The cost of administering a law-school program of instruction in “legal writing” through the regular full-time faculty can be very high indeed. What is at issue is the question of allocation of the teaching capabilities of the full-time faculty. There is a finite limit to the time and energy which full-time faculty are able to give to their profession. If heavy demands are made on their time for the “donkey work” of reading, criticizing, and suggesting revision for the purpose of improving the elementary-level papers assigned to first-year law students, it must be recognized that the time so spent will not be spent on research and writing; nor, for that matter, can it be spent on preparation for conventional classroom teaching. In the end, a law school that invests a heavy segment of faculty time in legal writing instruction will pay a price in terms of the productive scholarship of its faculty. It risks losing ground in the recognition accorded that faculty in the world of legal education.

The object here is not to root out first-year legal writing instruction which may do a bit of good if staffed by other than the regular faculty. Teachers of English composition and some of those lawyer practitioners who are keen on having law schools teach basic writing are among the possibilities. The object, rather, is to urge that the energies of the regular

faculty and particularly the younger faculty not be scattered on such fallow ground.

Law teachers can play a part in improving the law student's ability to use the written word in connection with the solution of legal problems. Using law teachers in a basic first-year writing course, however, as against the alternative of emphasizing writing in the lawyer's context at an advanced level, is a great waste of their time and talent. In a third-year seminar, or a specialist course, student writing may relate to the teacher's research interests or to drafting problems representing genuine professional challenge. In that setting the law teacher's capabilities can be used to help the advanced student learn to use language with more precision. A very scarce resource—law teachers' instructional capabilities—must be expended where the promise of return is greatest. Others can be enlisted for assignments less demanding and less rewarding.

Willard H. Pedrick
Professor of Law
Arizona State University

YES—Hines and Reppy

Willard Pedrick's ominous warning about the dangers of using full-time law faculty to instruct first-year students in basic lawyer skills reminds me of the educational approach of a very strict penmanship teacher from my elementary-school days. This teacher repeatedly admonished my left-handed classmates that there were two ways they could learn to write, her way (right-handed) and the wrong way. Her discipline was imposed in all good faith, but she inflicted substantial damage on her students nevertheless. Ped is a more tolerant pedagogue; I doubt that he wants to forbid law faculties from adopting teacher-intensive programs to improve lawyer skills but only wishes us to consider seriously the merits of such commitments before undertaking them. Though it displays Ped's customary wit as a provocateur, I find his commentary disappointing as a framework for probing the pros and cons of what is a modest, but important, educational reform.

My major objections to Pedrick's approach are twofold. First, he trivializes the proposed reform by arbitrarily confining it to the teaching of "legal writing" when in fact it goes much farther. Second, instead of presenting an objective cost-benefit analysis of the proposed reform, he focuses his attention solely on the risks, which I think he exaggerates, and totally neglects any discussion of the educational gains we might realize from intensification of formal faculty involvement in skills learning by first-year students. Any educational reform can be made to appear nonmeritorious if only its possible negative effects are considered. When

the scope of the proposal is made clear, the risks are more closely examined, and the positive effects are identified and accorded appropriate weight, the assessment powerfully supports the faculty-intensive first-year program Iowa and an increasing number of other law schools now offer.

Pedrick's critique is puzzling in its insistence on limiting the issue to a question of who should teach legal writing, which he views narrowly as embracing elementary writing skills. Who could quarrel with the conclusion that it would be a waste of scarce teaching resources to have full-time law faculty instruct students in spelling, basic grammar, punctuation, word usage, sentence structure, proper transitions, organization of paragraphs, etc.? The curriculum reforms Ped claims pose a threat to legal education, however, consistently go far beyond teaching such basic writing skills.

The teaching program in place at Iowa and proposed at a number of other schools involves the use of full-time faculty to supervise a broad range of academic work, some of it written, some oral, concentrated on the special set of intellectual skills every law student is expected to develop to a reasonably high degree of proficiency during his first year of law school. This battery of lawyer skills includes careful reading of legal materials, identifying relevant facts in complex transactions, research techniques, close analysis, formulation and manipulation of legal argumentation, and effective communication of the results of these processes. The ability to write effectively is of obvious importance to law students, but more as a vehicle to demonstrate progress in the development of other fundamental professional skills than for its own sake.

Thus, while Pedrick and I agree that good legal writing is no different than good nonlegal writing, except that it is about legal matters, we see different implications. To me, what is special about writing in law school is its utility as a tool for stimulating and evaluating students' progress in the development of the new skills unique to legal analysis. This important province of legal training is peculiarly appropriate for supervision by full-time law faculty and quite inappropriate for less qualified instructors. While I see no justification for hiring English professors to work with all first-year students on elementary writing, deployment of such personnel to tutor students needing remedial attention is clearly worthwhile.

Assuming Pedrick would recognize the difference between teaching elementary writing skills and supervising students in the learning of basic lawyer skills, our fifteen years of experience at Iowa suggest that his negative assessment of the costs of faculty-intensive basic-skills instruction deserves closer scrutiny. As he particularizes them, the costs are (1) an erosion in faculty self-image, (2) a reduction in the quality of teaching in traditional large courses caused by a diversion of time needed for effective class preparation; and (3) an overall loss in the scholarly productivity of the faculty.

I hesitate to dispute Ped's assertion that greater faculty involvement in law students' efforts to master basic lawyer skills imperils the formation of a proper self-image by young teachers. My fear is that Pedrick, long noted for his clever humor, is simply having fun with us on the theory that no sensible person could take such an argument seriously. Risking disclosure as a sucker, I will pick up the bait.

I was initially troubled by Pedrick's premise about the role of the law teacher, but it took two days of talking to aspiring law teachers at a recent AALS conference to crystallize my dissatisfaction. A high percentage of the interviewees expressed a strong desire to teach in our first-year, small-section program. They professed a real interest in personally assisting law students to acquire the essential professional skills and knowledge they needed to be successful lawyers. Most of these faculty candidates would have stared in disbelief if told that what law schools were really looking for were young Professor Kingsfields. Yet Pedrick apparently would have us accept this popular television character as the ideal modern law professor. Ped's prototypical law teacher is a procrustean figure who weekly presides over five or six hours of entertaining, though terrifying, theatre in the classroom and then retreats to the sanctuary of the law library. There he labors in solitude and brings forth great works of scholarship—scholarship that brings rewards of the highest order to the teacher, glory to the school, and honor to students who are allowed to say they have studied under the great scholar. But woe be to the student who knocks on the mentor's door in search of intellectual assistance or professional guidance. In Ped's view, it is clearly scholarly recognition, not teaching success, that motivates a faculty and propels a law school toward its ultimate destiny. While becoming an accomplished scholar is surely a high priority of every law teacher and achieving recognition for scholarly attainment is an essential goal of every law school, these activities should complement and not displace the teaching mission. Professor Kingsfield in his ivory tower is no more a valid role model for today's law teachers than Perry Mason in the courtroom was an accurate stereotype of yesterday's criminal lawyer.

A second cost identified by Pedrick is a reduction of time available for the effective teaching of conventional classroom courses. His concern seems tenable only if it is agreed that law teachers have inelastic time budgets for teaching or that the traditional law-school-staffing model is immutable. It is not my impression, however, that our colleagues are so carefully programmed that an increase in the time demands in one area inevitably leads to a slacking off in other areas or that student-faculty ratios remain so high in all schools as to preclude educational innovation. Implementation of the proposed first-year reforms affects the teaching assignments of only a small fraction of the faculty in any given year. Moreover, in the typical reform where basic-skills exercises are integrated

into substantive first-year courses taught in small sections, the timing of periods of intensive work is altered, but the total work load remains relatively constant. There is a clear trade-off between more individual contact with far fewer students and a pro-rata reduction in final exams to grade that should make the total commitment of teaching time over the course of the entire semester no greater than in the traditional large-class setting. This is particularly true in law schools where such time commitments are taken into specific account in setting teaching loads. At Iowa for example, a twenty-person first-year course in which research and advocacy skills are stressed meets three hours per week but carries five hours of instructional credit for the teacher, thus permitting the teacher to concentrate his efforts on that one course during the semester. Thus Ped's fear about a deterioration in the quality of conventional classroom instruction is justified only if it is assumed that a faculty's existing allocation of teaching time embodies Pareto optimality—that law schools will not make the type of sensible adjustments in overall teaching responsibilities that most schools now routinely make to reflect the added demands of closely supervising individual student work.

Pedrick's third projected cost, and the one he regards as the most serious, is an overall reduction in scholarship produced by a faculty whose productive energies are diverted to skills instruction. Again, Ped starts from the premise that law teachers have rigid time budgets and reasons that time spent teaching necessarily means less time for any other professional work, notably scholarship. As discussed above, the logic of this analysis is both suspect and speculative, particularly if schools make reasonable adjustments in work loads for added time required during periods of intensive supervision of skills exercises. A sound program should also include generous research and developmental leave plans to make up for any temporary imbalances caused by excessive commitments to teaching.

There is no obvious reason why the critical nexus between teaching and scholarship should be strained more by a commitment to excellence in teaching than to excellence in scholarship. As Ped's essay eloquently attests, the external incentives for scholarly achievement in our business are too diverse and powerful to be counteracted by a mere teaching reform. The type of dedicated legal scholars who produce the most valuable scholarship are the teachers least likely to be diverted from their labors by a modest rearrangement of their teaching duties. Our experience at Iowa has been that, although faculty members occasionally express concerns about their ability to maintain a high level of scholarly output while providing skills instruction, a close examination of actual performance reveals that scholarly production has increased significantly since our skills-training programs were introduced and no correlation is found between frequency of teaching skills-oriented courses and the rate of scholarly productivity.

It is in its obliviousness to the benefit side of the cost-benefit equation that Pedrick's essay is most seriously deficient. Ped would apparently have us believe that the only reason an increasing number of reputable law schools are adopting reforms in their first-year programs is because a handful of vocal lawyers and judges have intimidated a few schools and others have followed in response to some sort of herd instinct. I would propose a quite different hypothesis: that the growing interest in Iowa-type skills-training programs stems from a long-overdue recognition that law schools can and should do more to assure their graduates' competency in fundamental lawyer skills, coupled with a realization that the nature of the academic environment fostered by this program format better supports achievement of the law school's other educational objectives. And not beside the point, this type of teaching can produce a payoff in terms of professional gratification to the teacher that is not possible in the traditionally large, impersonal classroom experience. A teacher can actually monitor and play a direct role in individual student's development as a legal thinker and doer of lawyer's work. Under Iowa-type first-year programs the pleasures of law teaching are not limited to showcasing a theatrical talent in the classroom and publishing in the finest journals; if one has not done this kind of teaching, it is hard to imagine the degree of satisfaction experienced by a teacher who sees bright, lively minds grow under his personal tutelage.

The most obvious benefit from greater faculty participation in students' training in lawyer skills would be producing significantly more competent law graduates. If the conventional wisdom is true that law training is mainly concerned with acquiring a mental discipline (learning to think like a lawyer), mastering lawyers' moves (understanding the conventions of the branch of our culture which consists of the activity of law), developing a facility for making sound critical judgments (becoming an effective problem solver), and inculcating the traditions of the profession (embracing the attitude and the standards of a professional), then our teaching resources should be allocated in a manner best calculated to achieve these objectives efficiently. Deploying full-time teachers to instruct beginning law students in lawyer-skills areas most vital to their personal growth as professionals and to their taking full advantage of the rest of their legal training in law school and beyond certainly seems a rational curriculum plan. Assuming the inherent quality of the teaching remains constant, instruction offered on an individual basis in a carefully structured, career-oriented learning environment is more likely to be effective in accomplishing the objectives enumerated above than is instruction delivered through lecture, Socratic, or other impersonal, large-class teaching techniques.

The problem, of course, lies in proving empirically this theoretical verity. Pedrick is correct in asserting that no scientific evidence exists to prove or disprove this claim. The difficulty of constructing an educational

experiment to test this theory is so great we are likely to continue to be faced with a contest of arguments pro and con. Though founded only on anecdotal empiricism, it is hard to ignore the strong beliefs held by many experienced teachers at a number of schools that substantial educational gains are achieved through their direct involvement in first-year skills training. I also regard as noteworthy the fact that no law school which has experimented with the involvement of full-time faculty in working with first-year students in developing lawyer skills has abandoned or retreated from the commitment and that each year more schools are joining the club; ironically, one of the most recent initiates is Ped's own institution, Arizona State.

Even though it may be difficult to convince skeptics like Pedrick that a heavy faculty commitment to skills training in the first year produces tangible results in improved competence, it has been our experience at Iowa that such a reform clearly produces a dramatic improvement in the professional atmosphere within the law school. The tone of professionalism that is established from the first day of class when students are challenged individually by their regular teachers to perform the various intellectual tasks of the lawyer pervades their law-school careers. When students are presented with the proposition that their law training is to be a joint venture among themselves, their classmates, and their teachers, the very core of the educational transaction is altered.

For the first time in their academic careers many students are made personally accountable to their teacher for the content and quality of their thinking. They encounter their first professional role models who insist on care and precision in the formulation and expression of ideas, who enforce deadlines, and who take seriously matters of style and form. Repeated experience in personally testing their ideas and work products against a demanding critic instills in students an openness to constructive criticism that substantially heightens the quality of the professional preparation. Thus, self-learning, upon which so much of a successful legal education depends, is quickly started down correct paths and is monitored much more effectively than in the traditional large-class context. It is possible that early encouragement of this professionalization process is the greatest single benefit of a major involvement of full-time faculty in skills training in the first year.

In conclusion, I wish to concur with Pedrick's assessment that the sense of crisis in lawyer competency currently abroad is largely unjustified. I would go a step further and aver that today's law graduates are far better prepared than earlier generations. But for me, that is not the issue we should be addressing as educators. The question is not whether we are providing at least as high-quality legal training as we ourselves received; it is how we can provide our students with an education that is not only better than we received but better than we now provide. Pedrick's essay

presents a short catalog of the reasons for not trying an educational strategy that appears to many of us to produce better prepared law graduates. His arguments are unconvincing and I am confident that, just as subsequent research has demonstrated that some of the penmanship theories under which I was taught were unsound, the next few years of experimentation with faculty-supervised skills training in the nation's law schools will prove Pedrick's fears unfounded.

N. William Hines
Dean and Professor of Law
University of Iowa

For over ten years a significant part of the first-year legal curriculum at Duke University has been a two-unit, graded course in legal research and writing taught by full-time law faculty members. The typical class consists of twenty-two students, producing over the seven to eight months of the course approximately 70–100 pages of written work plus oral argument on at least one assignment. Each professor teaching the course has the assistance of two students from the second- and third-year classes. They do research to help the professor prepare the problems, and they may screen papers submitted by first-year students for errors in citation form. But it is a full-time faculty member who designs the original problems and grades the papers submitted by the students. Most importantly, the professor gives the students extensive feedback concerning their research and writing skills. (Sometimes the professor's critique notes are almost as lengthy as the paper being reviewed.)

The legal research and writing class is usually coupled with a small-section "substantive" class (e.g., torts, contracts, civil procedure) taught by the same professor. Through both classes the professor learns very much about the strengths and weaknesses of his twenty-two (or so) students as budding lawyers. A close relationship between professor and student sometimes develops.

Duke's strong commitment to instruction in legal research and writing has boosted its stature as an institution of legal education. The deans, faculty, and placement-office staff have repeatedly been advised by firms and agencies employing new lawyers that Duke students display an unusually high ability in solving research problems and drafting briefs and memoranda. We hear this particularly with respect to performance of Duke students on summer clerkships between the second and third years of law school. Increasingly our students are finding legal jobs for the summer between the first and second years of law school. Willard Pedrick's proposal to teach research and writing skills through seminars for third-year students would preclude students from utilizing the benefits

of such instruction during summer clerkships. Many of our recent graduates have praised the first-year legal research and writing program as an invaluable component of their legal education. Even a small boost in alumni goodwill on that basis is appreciated. Finally, our reputation as a law school with a valuable first-year program in research and writing appears to be spreading among law-school applicants (primarily undergraduates). Some very talented students have told us that this reputation influenced their decisions to attend Duke Law School.

The Duke faculty members who regularly teach first-year research and writing enjoy doing so. Most of us are in academics because we “like to teach”—to interact closely with our students. It is a pleasure to us to know that because of our efforts particular students have significantly increased their skills in legal analysis and advocacy. The personal attention we give each of our students often brings us sincere thanks for our efforts. This too is good for the ego.

Since our research and writing course is coupled with a first-year “substantive” course, the teaching is not (and cannot be viewed as) a period of servitude for “young law teachers.” Some veteran law professors (including one “giant” in his field) frequently teach the course.

The professors integrate the writing problems into the substantive first-year courses, often using the problems as a means of teaching areas of the law that the classroom substantive course lacks time to cover. The research and writing course is not one intended to “teach improvement in basic writing skills.” The admissions office is doing a good job in selecting a first-year class of persons who have “basic writing skills.” (Those who do not are encouraged to get a tutor from the English department.) Our focus is on legal analysis, organization based on legal logic and principles, the differences between analytical writing and advocacy, etc. The assignments are also structured to raise research problems, making the student more familiar with the resources of the law library.

It is a difficult course to teach. One must teach it several times to be proficient. An advanced law student or instructor from the English department rarely would have the abilities to do so.

The research and writing course does consume a lot of the professor’s time—probably more faculty time than teaching a “substantive” two-unit course (such as a specialized seminar). Critiquing the series of memos and briefs submitted by the students can readily take up 200 hours over two semesters. There is a bit of drudgery in teaching this class—one of the reasons the dean’s office tries to assure that every third or fourth year we have a teaching assignment without it.

Obviously, as Pedrick predicts, a program like Duke’s incurs a substantial cost. But it is not, as he suggests, in “productive scholarship.” Our legal-writing professors are quite well published. Instead the cost is about eight fewer seminars or other upper-division courses which the legal-

writing professors could be teaching instead. The dean's office is well aware of this cost and periodically has the faculty's curriculum committee produce a sort of cost-benefit analysis. To date that committee's report has always been to continue our heavy faculty commitment to first-year "skills" training.

Our students recognize that the first-year research and writing program is rigorous and that the considerable feedback they receive for their efforts comes from experienced, knowledgeable instructors. All of the professors have at one time or another practiced law themselves, which adds to their credibility.

One student commented, after a summer clerkship at a ninety-member Atlanta firm: "I arrived fully confident in my ability to perform at or exceed whatever standards were expected of me. However, those clerks who were products of programs administered by upperclassmen had great doubt as to whether they were adequately prepared to perform at a high level of sophistication." Another wrote me: "I am sure we take the legal writing course much more seriously because the teacher is a professor [rather than a third-year student or young practicing lawyer]. I wouldn't have spent nearly so much time on my papers if I weren't going to get the criticism of them from you." Another suggested I inquire of Pedrick: "If a third-year student with no practical experience and no training in writing and analysis by an experienced law professor is to teach a first-year student, who two years later teaches a new crop of law students, etc., where is the knowledge of what is good legal writing to come from?" Still another said, "It is important to me that at least one member of the faculty can evaluate my abilities as a lawyer. It makes the law school a lot less impersonal. Those whose grades are average have almost no other source for a job recommendation."

If Pedrick is correct that "writing is writing," a specialized course in legal writing cannot exist. At Duke we feel that legal writing does involve techniques of analysis, advocacy, and the like, to which our first-year students have not been exposed despite their brilliant achievement as undergraduates (many also have graduate degrees and job experience). It makes sense that only an instructor who fully appreciates such differences should be teaching the first-year research and writing course.

William A. Reppy, Jr.
Professor of Law
Duke University