

“ [F]ew ‘doctrinal’ teachers use materials that explicitly instruct students in the fundamentals of reading and writing the law that successfully learning the law requires. ”

LEGAL ANALYSIS: THE FUNDAMENTAL SKILL

BY DAVID S. ROMANTZ &
KATHLEEN ELLIOTT VINSON

CAROLINA ACADEMIC PRESS, 1998

PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES

BY MARGARET Z. JOHNS

CAROLINA ACADEMIC PRESS, 1998

REVIEWED BY PENELOPE PETHER

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I am both an experienced law teacher and a relative newcomer to the U.S. legal academy; this history is frequently productive of a double vision. The arrival of these new offerings in the field of fundamental legal skills produced an equally divided response in me. On the one hand, the U.S. market for substantial textbooks on the fundamental legal skills of reading and writing the law is crowded with excellent titles by Calleros,¹ Edwards,² Neumann,³ Oates, Enquist, and Kunsch,⁴ to name only a few. On the other hand, in this particular part of the common law world, members of law faculties exhibit a general tendency to separate “skills” and “doctrine,” leaving the former to clinicians and legal research and writing (LRW) teachers, and likewise consigning “theory” to upper-class optional specialties. This way of seeing the teaching and learning of law is often described by my former colleague Les McCrimmon, Director of Clinical Programs at the University of Sydney and an

innovative teacher of torts, evidence, and land law, as embodying the “Pericles and the plumber” dichotomy.

One result of this is that few “doctrinal” teachers use materials that explicitly instruct students in the fundamentals of reading and writing the law that successfully learning the law requires. These include the theories and practices of statutory interpretation or of common law analysis when one is faced with a real case, rather than a tidy casebook extract. They also include the analytical and writing skills necessary to perform well in typical law school assessment genres, such as the nationally ubiquitous problem question, or in the range of genres that now confront those seeking admission to practice. Given the emphasis placed on such transferable personal skills by recruiting partners, they are critical to success in a legal career beyond the law school’s doors.

Any law professor interested in enabling his or her students to learn the law effectively might welcome these concise new offerings, then, as providing potential materials of appropriate size to construct a course that integrated skills and doctrine, rapidly becoming the norm in Australian law schools.

My response to each text was also divided. Each contained material that teachers of beginning law students will find useful. Equally, they both spoke to a hazard of niche marketing: addressing a range of relatively narrow potential audiences can mean that none of them is served as well as it might be.

Legal Analysis: The Fundamental Skill by David Romantz and Kathleen Elliott Vinson promises to provide “an overview of the foundations of legal reasoning” and to teach “the different levels of critical thinking necessary to develop a sophisticated analysis of legal problems.” It aims to lay out methods to teach strong analytical and writing skills. And its table of contents looks promising. For example, it devotes significant space to analogical analysis, the thing that law students find the hardest to grasp as they become members of a specialized legal discourse community. It offers a manageably sized chapter on statutory analysis, and another on policy, something doctrinal teachers frequently emphasize, and which students find distinct difficulty in coming to grips with. Finally, it sets out in step-by-step detail an alternative to IRAC, seemingly a boon to those many first-year students who have difficulty in fathoming and delivering what their doctrinal examiners expect of them.

¹ Charles R. Calleros, *Legal Method and Writing* (3d ed. 1998).

² Linda Holdeman Edwards, *Legal Writing: Process, Analysis, and Organization* (2d ed. 1999).

³ Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (3d ed. 1998).

⁴ Laurel Currie Oates et al., *The Legal Writing Handbook: Research, Analysis, and Writing* (1998).

My reservations about this text derive from the feature that excited me most about it in prospect. This is its promise of critical pedagogy of the kind that some of the most interesting research on legal professionals suggests is the way to “micro-inject” at law school level the sophisticated understanding of the law characteristic of those with high-level legal expertise. There is a gap between this objective and some troubling oversimplification. For example, we are told that legal decisions flow logically from existing precedents; for another, “policy” is both simplified and separated from “analysis.”

Lest it be said that this criticism betrays an excessively theoretical perspective, let me note that I recently read a paper on judicial decision making delivered by Australian Chief Justice Murray Gleeson. Before his elevation to the bench, Gleeson was widely regarded as the best lawyer in the nation by aficionados of the law’s supposed “black letter” (they do not number your reviewer among them). However, having briefed him when I was a young solicitor and he an eminent Queen’s Counsel, this estimation is not one I would dispute. Gleeson’s account of what it is that judges do was much closer to that of Duncan Kennedy than John Finnis. All this is to say that, despite institutional and other pressures to simplify, there is much to be gained in treating 1Ls as the graduate students they are.

Despite its wide-ranging promise, then, this book may be potentially more useful to students who are really struggling with law school than to those in the mainstream whom we want at the outset to train in habits of critical thinking and sophisticated analysis. And given what we know about correlations of race and gender with underperformance in U.S. law schools, the assistance it offers struggling students has some structural limitations. That said, given current institutional norms, this is a helpful book that aims to address some fundamental gaps in the materials available to teach legal analysis. Many law teachers across a range of subjects and specialties will find *Legal Analysis* a useful tool.

Margaret Johns’ *Professional Writing for Lawyers: Skills and Responsibilities* takes up the MacCrane challenge: crafting the business of the professional subject formation of lawyers in such a way as to make ethical conduct inseparable from the exercising of legal skills and competencies. Its publisher makes considerable claims for it: that it will introduce

readers to the responsibilities attached to every document a lawyer authors, and “bridge the gap between law school and practice, stressing the need for civility and professionalism in the practice of law.”

Let it be said at the outset that the achievements of this text are considerable. Its layout is excellent: as each genre of document is introduced, Johns systematically addresses questions of its specific audience and the ethical issues that attach to it. In the cases of some genres, Johns works the reader through the process of rewriting the document so as to learn more about how to do it well. It is studded with useful and concisely expressed techniques for working through the acquisition of skills that beginning law students find difficult. The section on research strategy is a particular gem, and the rewriting checklists are thoughtful and to the point.

I can imagine this book being useful in a range of different contexts: this is at once a strength and the text’s only significant weakness. It often implies that it may be used by beginning lawyers making the transition between law school writing tasks and the demands of practice. At other points it seems to lay out part of a course in advanced legal writing. At still others it gives instructions on genres that are fundamentals of first-year LRW courses: office memoranda and appellate briefs.

Its coverage of this last group of genres formalizes rewriting and deals explicitly with relevant professional responsibility issues, and thus adds dimensions to what the group of much larger and more detailed legal writing texts offer. On the other hand, given the brevity of these sections, it cannot hope to introduce the skills of writing these documents with the thoroughness and incremental skills-building emphasis that is the strength of the texts that have the lion’s share of the legal writing skills market in the United States.

A similar criticism may be made of the sections that address new lawyers. These jar with the sections that teach how to rewrite in the law school context. Given enough class time, designers of a legal writing course can build structured reflection into the process. We all have pious hopes about inculcating the desire as well as the skills for lifelong learning in our students. But many of us remember beginning legal practice well enough to realize that for overworked young lawyers this apparent “no-brainer” is a relatively hard sell.

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How useful might it be to a lawyer in the first months of practice to have instruction on how to rewrite a document, after reflection and the production of subsequent documents involved in serving a client? Potentially very useful, but that potential is blunted in a text that at one point speaks to the beginning lawyer and the next to the beginning law student. Such a project would develop the lawyers' skills immeasurably; convincing them that the time involved is time well spent is another matter. After all, it would not generate billable hours; and the experience of having documents red-pencilled by a supervisor in law practice can reduce in retrospect the authority of law school learning of legal writing skills.

Johns rightly senses that beginning lawyers need transitional training that only a handful of forward-looking firms provide them with. A more explicit consideration of how different sections of the text might be used by different audiences would have added immeasurably to this innovative project.

With both these books, one is left with a sense of a good project that could have been an excellent one with more space, more time, and much more of the best kind of editorial assistance.

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