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Four Reasons To Teach Psychology To Legal Writing Students

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FOUR REASONS TO TEACH PSYCHOLOGY TO LEGAL WRITING STUDENTS

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I. INTRODUCTION

In 2002, Daniel Kahneman, a psychologist then teaching at Princeton University, was awarded the Nobel Prize in Economics.[1] Much of his distinguished work was co-authored with his late colleague, Amos Tversky. Their seminal paper, *Judgment Under Uncertainty: Heuristics and Biases*,[2] has generated a huge progeny of work, underlying the field of behavioral economics, and, as applied to legal contexts, behavioral law and economics.[3] The fundamental premise is a simple one: people routinely use intellectual shortcuts to simulate the results of logical reasoning, saving time and reducing cognitive load.[4] But the speed with which we employ these rule-of-thumb approaches to everyday life, often called heuristics in the literature, comes with a price.

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[1] *The Sveriges Riskbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, NOBEL PRIZE, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/ (last visited Oct. 12, 2013).

[2] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

[3] A search of the legal database LEXIS shows more than 1,325 citations to this article in law journals as of July 11, 2013.

[4] Tversky & Kahneman, *supra* note 2.

Employing heuristics leads to systematic errors in judgment: Not so many errors that we have reason to abandon the strategies in the first place, but noticeable propensities to choose one approach over others that could yield better-reasoned outcomes.[5] These propensities are called biases, which are the side effects of the heuristics that we use so routinely and mostly to good ends.[6]

Both sides of the coin—the heuristics and the biases alike—come into play in legal reasoning. To take one well-studied example, "the endowment effect" has been demonstrated in a variety of circumstances to show that people tend to value what they have more than they value what they do not have but would like to have.[7] Thus, transactions, whether for goods, services, or the resolution of disputes by settlement, become harder in these circumstances. The person who must give something up is likely to assign greater value to what she has than does the other party to the deal. Understanding this bias, which is the flip side of the strategy of holding on to what you already have, can empower mediators and others to facilitate transactions, increasing efficiency in commerce, and reducing transaction costs.

What does this have to do with teaching or learning legal writing skills? To the extent that these heuristics and biases play themselves out in contexts that generate legal documents, it would be irresponsible for the writer not to adjust the content and style of what he says to take into account what will most likely influence the reader, while also overcoming his own propensity to reason and/or to present information ineffectively. Whether the audience is a judge, a client, a boss, or an opposing lawyer, maximum attention to what is likely to have persuasive force is the writer's goal. Add to these audiences the writer's own set of biases, which

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[5] *See id.*

[6] *Id.* Daniel Kahneman outlines the theory in an accessible way in his book. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[7] *See, e.g.*, Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorum*, 98 J. POL. ECON. 1325 (1990). Recent research suggests that this effect is not uniform across circumstances and may not be the result of a single preference. Thus, while it is a robust phenomenon, care must be taken not to overstate it or to oversimplify its explanation. *See* Gregory Klass & Kathryn Zieler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, UCLA L. REV. (forthcoming 2014).

should always be monitored closely, and it becomes clear that the writer has a lot of psychology to keep in mind.

Fortunately, some of this psychology is relatively intuitive and is already the subject of legal writing courses that never mention advances in cognitive and social psychology. For example, this essay later discusses the "confirmation bias," the propensity to seek out and value evidence that reinforces conclusions we have already reached.[8] Law students are already being taught to avoid this temptation and to make sure that they answer the other side's arguments, whether in an initial brief or in a rebuttal.[9] So why do legal writing students need to be explicitly instructed in overcoming this bias when they are being taught its substance without any mention of psychological literature? I suggest two answers to this question.

The first is purely pedagogical. Students are resistant to being bossed around. Legal writing classes can be emotionally trying as students are told quite specifically one thing after another that they need to change in order to become even adequate legal writers. As suggested below, teaching the psychology behind the command that they take the other side's arguments seriously helps to convert the instructor from a boss to a person sharing valuable information that can help the student.[10] This, in turn, depersonalizes subsequent criticism of the student's work since everyone is starting from the same baseline: the dangerous temptation to undervalue and thereby ignore opposing views that the reader may find convincing.

The second answer is that an understanding of these psychological processes adds a level of subtlety to the skills the students acquire. They are not the only ones who suffer from confirmation bias. We all do. Learning about this bias should motivate the student—and subsequently the lawyer, we hope—to scan the writing of others for signs that they, too, have failed to take seriously enough convincing arguments, and to exploit this failure to their clients' ends. Moreover, it is neither pleasant nor unusual to appear before a judge who simply does not like your

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[8] *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

[9] *See infra* notes 38–39 and accompanying text.

[10] *See infra* Part III.A.

case right from the beginning. This does not mean that the judge has made up his mind once and for all. It does mean, however, that you will have counter the judge's initial assessment in a manner that is especially salient. After all, judges are human too. By teaching students to understand the psychological phenomena that underlie some of the basic strategies of good legal writing, legal writing instructors may help students to internalize more of what they learn in legal writing classes. This will make it more likely that they will be able to transfer the skills to tasks performed in their legal careers.

Part II of this essay briefly examines some relevant advances in educational psychology and explores the benefits of teaching legal writing students about heuristics and biases. Part III analyzes four cognitive biases that grow out of strategies we use successfully in our everyday lives and argues that the description of each of them has a valuable place in the legal writing classroom. These are the four reasons to which the title of this essay refers. In order, they are: the bias toward concluding that people who write simply are smarter; the confirmation bias discussed above; the correspondence bias, which causes us to overstate the contribution of a person's character and to understate the context in which people act as explanations of people's actions; and the bias blind spot, which prevents us from taking our own biases as seriously as we do the biases of others. Part IV is a brief conclusion, which makes particular recommendations to educators for including some of the psychological research into their legal writing courses.

II. INTERNALLY MOTIVATED LEARNING

People tend to learn better when they are intrinsically motivated than when they learn for the sake of pleasing others in order to achieve external validation.[11] What does it mean to have learned "better?" Surely, if you tell a student that using simple, straightforward language is likely to be more effective than using

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[11] *See* Edward L. Deci et al., *Motivation and Education: The Self-Determination Perspective*, 26 EDUC. PSYCHOL. 325, 331–32 (1991); Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 54, 54–59 (2000).

gobbledygook, the student will understand the concept more or less regardless of how you convey it. That is an important first step. What legal educators really care about, however, is not only that students can take the directive and apply it to the writing assignments in the course, but that they will later transfer their success in completing the course assignments to the real world of legal practice, and become good legal writers. After all, creating good legal writers is why we care so much about having good legal writing programs in law schools in the first place.

Educational psychologists refer to the process of acquiring the skill that enables one to apply learned knowledge to new situations as the "transfer of learning."[12] It is the key to successful professional training. The key, in turn, to enabling the transfer is for students to "learn with understanding."[13] Psychologist John Bransford and his colleagues have shown that people are better able to transfer what they have learned when they understand both the concepts presented to them and the mechanisms that underlie the concepts they have acquired. Simply memorizing the facts does not effectively produce transfer.[14] To illustrate, Bransford and his colleague Daniel Schwartz found that university students were better able to apply knowledge that they learned in a lecture when, prior to the lecture, they had engaged in analyzing various contrasting cases, than when prior to the lecture they had merely read about the relevant phenomena.[15] This is not to say that educators should abandon teaching content in favor of how to find content. Rather, Bransford's point is that when people understand what it is they are trying to do and why, it becomes more likely that they will internalize the learning well enough to apply it to new situations, and thus maximize the benefits of the work they did learning the material in the first place.

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[12] NAT'L RESEARCH COUNCIL, COMM'N BEHAVIORAL & SOC. SCI., HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 51 (John Bransford et al. eds., 2d ed. 2000).

[13] *Id.* at 5, 16, 24.

[14] *See id.* at 55–56; *see also* John D. Bransford & Daniel L. Schwartz, *Rethinking Transfer: A Simple Proposal with Multiple Implications*, 24 REV. RES. EDUC. 61, 77 (1999).

[15] Daniel L. Schwartz & John D. Bransford, *A Time for Telling*, 16 COGNITION & INSTRUCTION 475 (1998).

Consistent with Bransford's work, other researchers have found that people learn better when they are internally motivated to learn than when they learn for the sake of earning rewards and avoiding punishment. Important among these psychological contributions is the Self-Determination Theory, developed principally by psychologists Edward L. Deci and Richard M. Ryan.[16] The concept is simple: "When intrinsically motivated a person is moved to act for the fun or challenge entailed rather than because of external prods, pressures, or rewards."[17] Studies conducted by Deci and his colleagues show that internal motivation produces better results not only in education, but in the workplace as well.[18] Research also focuses on the differences among external motivational factors, some of which may be more beneficial than others in learning environments,[19] and on ways of promoting the internalization of motivations that begin externally.[20] For example, fear of parental sanctions and a belief it will make a student more likely to launch a career successfully are both potential external motivations for doing one's homework. The latter motivation, though, is obviously more consistent with building autonomy and more susceptible to internalization.[21]

The value of independent motivation has been tested in research on legal education. Studies conducted by Kennon Sheldon (a psychology professor) and Lawrence Krieger (a law professor) demonstrate not only higher GPAs by first-year law students who show higher measures of self-determination, but also that engaging in activity because one is internally motivated to do so produces a greater sense of well-being than doing something in response to

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[16] *See* Deci et al., *supra* note 11, at 325; Ryan & Deci, *supra* note 11, at 55.

[17] Ryan & Deci, *supra* note 11, at 56.

[18] *See* Marylène Gagné & Edward L. Deci, *Self-Determination Theory and Work Motivation*, 26 J. ORGANIZATIONAL BEHAV. 331, 345–47 (2005) (reporting on studies showing that when supervisors are trained to give workers a greater sense of autonomy, the workers report greater job satisfaction and greater trust in the organization for which they work).

[19] Edward L. Deci, *Effects of Externally Mediated Rewards on Internal Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105 (1971).

[20] *Id.*

[21] Ryan & Deci, *supra* note 11, at 60.

external motivation.[22] Sheldon and Krieger find that law students begin their legal education with as good a sense of well-being and internal motivation as other college graduates.[23] However, both this sense of well-being and this measure of internal motivation deteriorate during the first year of law school[24] and more or less remain at this depressed level throughout the remainder of law school.[25]

Sheldon and Krieger's studies further demonstrate a strong negative correlation between the extent to which law students reflect a sense of self-determination, of which internal motivation plays a significant role, and the extent to which they demonstrate negative physical and psychological symptoms. Notably, the authors observe that this correlation "is consistent with much previous self-determination theory research, which indicates that people perform more persistently, flexibly, creatively, and effectively when they act for intrinsic and self-determined reasons."[26] The lessons from all of these studies are clear: When we have the sense that we are in control of our lives, we feel better; when our goals are more oriented toward promoting the values that are meaningful to us, we learn better.

In the next section, this essay will show how psychological research into heuristics and biases explains some basic tenets of good legal writing and legal advocacy more generally. Teaching the research that underlies these advocacy skills, even briefly, may well have the effect of helping students to internalize the lessons, making the students less resistant and more likely to apply what they learn in the classroom and beyond.

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[22] Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 261 (2004).

[23] *Id.* at 271.

[24] *Id.* at 272–74.

[25] *Id.* at 274.

[26] *Id.* at 281. Professor Emily Zimmerman makes reference to much of the literature cited here, using it to develop "vitality" as a measurable state of mind that produces more positive experience among law students. *Id.* For further discussion of these findings, see Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 884–92 (2009).

III. FOUR LESSONS OF PSYCHOLOGY TO TEACH TO LEGAL WRITING STUDENTS

A. Learning to Write Simply and Understanding Why It Is Important to Do So

One of the tasks of legal writing instruction is to convince students to write clearly using simple, straightforward language. In fact, Bryan Garner, a leading expert on legal writing and the editor of *Black's Law Dictionary*, goes so far as to call his text on legal writing, *Legal Writing in Plain English*.[27] There is no secret as to why one should write in language that is clear and simple enough to understand easily: Plain writing is more likely to accomplish the goal of persuading the reader of the writer's position. Legal writing texts say as much, and attempt to convince students of this fact.[28]

Students are more likely to internalize the strategy of simple, plain writing if they understand why they should employ that strategy than if they adopt the strategy merely to get a good grade. This pedagogical lesson follows directly from the literature described in the previous section and is part of the intuitive arsenal that effective teachers possess in any event. Yet students still need to be convinced that simple writing is better writing, especially when it comes down to small words being better than big ones. High school students preparing for the SAT are often taught to associate a large vocabulary with intelligence and success in school. This lesson runs counter to the preference for straightforward, simple writing. Prior to beginning their legal education, some students have learned good writing skills in

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[27] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2001).

[28] *See* RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 148 (2008); TERRILL POLLMAN ET AL., LEGAL WRITING: EXAMPLES & EXPLANATIONS 294–300 (2011); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 229–44 (5th ed. 2008) (advising students to use syntax that results in simple, straightforward sentence structure). Pollman et al. focus on making writing more concise, but virtually all of their advice to students is to shorten passages by making them simpler, both syntactically and with respect to vocabulary.

college, while others have not.

Telling students that simple writing is more effective takes us only part of the way toward internal motivation. It is far more effective than commanding, as a matter of fiat, that students write in a simple manner. But it still requires students to act because they trust their teacher's warning that a plain writing style will assist them some time in the future. There is nothing wrong with trusting one's teacher, or for that matter, trusting Bryan Garner. But by providing an introduction to the psychological mechanisms that lead to people appreciating plain writing, legal writing instructors can create a more direct link between the goal of training law students to write clearly and persuasively on the one hand, and the student's motivation for achieving that goal, on the other.

Moreover, the psychology of appreciating simple writing is interesting in its own right. Psychologist Daniel Oppenheimer has published studies that explain the phenomenon in terms of processing fluency.[29] When a passage is more difficult to process than we believe it should be, we react negatively to the author. In one of the studies, graduate students were given three versions of essays written for admission to the English Department graduate program at Stanford University: the original essay, that essay made more complex by substituting a longer word taken from a thesaurus for every third content word in the essay (moderate complexity), and the essay made even more complex by substituting a longer word for every content word in the essay (high complexity). A number of graduate school application essays were used in this study. Below is one of the essays in all three versions: I have highlighted the altered words in the moderate and high complexity versions.

Original:

> I want to go to Graduate School so that I can learn to know literature well. I want to explore the shape and the meaning of the novel and its literary

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[29] Daniel M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*, 20 APPLIED COGNITIVE PSYCHOL. 139 (2006).

> antecedents. I want to understand what the novel has meant in different literary periods, and what it is likely to become. I want to explore its different forms, realism, naturalism and other modes and the Victorian and Modernist consciousness as they are revealed.

Moderate complexity (every 3rd applicable word lengthened):

> I want to go to Graduate School so that I can learn to **recognize** literature well. I want to explore the **character** and the meaning of the novel and its literary antecedents. I **desire** to understand what the novel has **represented** in different literary periods, and what it is likely to become. I **desire** to explore its different **manners**, realism, naturalism and other modes, and the Victorian and Modernist consciousness as they are revealed.

High complexity (every applicable word lengthened):

> I **desire** to go to Graduate School so that I can learn to **recognize** literature **satisfactorily**. I want to **investigate** the **character** and the **connotation** of the **narrative** and its literary antecedents. I **desire** to **comprehend** what the **narrative** has **represented** in **numerous** literary periods, and what it is **expected** to **become**. I **desire** to **investigate** its **numerous manners**, realism, naturalism, and other **approaches**, and the Victorian and Modernist consciousness as they are **discovered**.[30]

Participants were asked to rate the comprehensibility of the passages (each participant received only one version), to make a judgment of admission (yes or no), and to indicate the level of confidence in the admission decision (1–7). Admission decisions

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[30] *Id.* at 154–55 (emphasis added).

were then scored as ranging from definitely reject (-7) to definitely accept (+7).[31]

The results are striking. Participants voted to accept the applicant who wrote the original essay significantly more often than the one who wrote the moderately complex essay, who was in turn considered more worthy of admission than the author of the highly complex version. Moreover, statistical analysis showed that comprehensibility mediated both complexity (original, moderately complex, highly complex) and decisions to admit or not admit. In other words, the harder it is to understand a passage, the less we think of the ability of the person writing it, and the more complex the passage turns out to be.[32] This, at least preliminarily, confirms the hypothesis that processing fluency affects our reaction to written texts.

These results were confirmed in another study in which participants were asked to rate the intelligence of Ph.D. students on a 1–7 scale based on the abstracts of their dissertations. They were also asked to rate the difficulty of the passage, also on a 1–7 scale. This time, however, instead of substituting complex language for more simple language, Oppenheimer substituted shorter words for longer words contained in the original abstract. Every word of nine letters or more was replaced by the second-shortest word in the Microsoft Word 2000 thesaurus listing for the longer word. The results were similar. Those reading the simpler version thought that the author was more intelligent (4.80 vs. 4.26).[33]

In yet another experiment, Oppenheimer presented participants with one of two translations of a meditation by René Descartes that they were not likely to have already seen. One was translated into relatively simple English, while the other used a lot of big words. Participants were asked to judge both the intelligence of the author on a 1–7 scale, and the difficulty of the passage on a 1–7 scale. Half the participants were told that the piece they read was written by Descartes, the other half told that it came from an anonymous author. The results: People rated the author of the simpler version as more intelligent, whether or not they knew in advance that

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[31] *Id.* at 141.

[32] *Id.* at 141–42.

[33] *Id.* at 147.

Descartes was the author.[34]

What are the lessons for legal writing students?

1. The experiment based on graduate school application essays shows that making language more complex leads to people thinking less of the writer. One may argue that the larger words, taken from the thesaurus, were not all used aptly; but
2. The experiment based on the dissertation abstracts shows that using simpler words makes the author seem more intelligent, even though this time, it was the simpler language that might not always be apt; and
3. Our opinions, even of famous people, rise and fall depending on whether their writing seems simple and straightforward.

One can argue that using small words is only part of plain, simple writing, and that is true.[35] But the larger message is clear enough: People do not like to be made to struggle with the language they read, and complex language reduces processing fluency, making them struggle. Moreover, these facts are the opposite of what we tend to believe. As Oppenheimer puts it:

> [It] seems that people's naive theories of fluency tend to lead them to negatively associate complexity and intelligence. This has some interesting ramifications. The most straightforward of these is that authors should avoid needless complexity. As reported in the introduction of this paper, a vast majority of Stanford students use a strategy of complexity when writing papers and this is

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[34] On the 1–7 scale, 6.5 vs. 5.6 for those who knew the author was Descartes, and 4.7 vs. 4.0 for those who were told that the author was an anonymous writer. *Id.* at 144.

[35] One may be concerned that the use of longer words is not an adequate proxy for excessively complex writing styles, which often include convoluted syntax and very lengthy sentences. The conclusion of this essay makes suggestions to legal writing instructors who would like to make Oppenheimer's point through examples that are complex in ways other than word length. *See infra* text accompanying notes 85–87.

> undoubtedly true at campuses and businesses across the country. However, this research shows that such strategies tend to backfire. This finding could be broadly applied to help people improve their writing, and receive more positive evaluations of their work.[36]

These lessons are not remote from what is taught right now. Nonetheless, the research into educational psychology discussed earlier in this essay suggests that legal writing students would benefit from being made aware of the mechanisms that underlie the mandate that they write simply. This would allow the students to internalize the principles more strongly, perform better, and have the satisfaction of learning for the sake of becoming part of a community of writers who know what it means to work in a world in which human frailty demands that we write clearly and straightforwardly if we wish our ideas to influence others.

B. Overcoming the Confirmation Bias

Consider this terrible mistake that lawyers sometimes make: Lawyers get so caught up in their clients' positions that they become unable to stand back and see what is reasonable in the opposition's argument. Then, when the lawyers finally see the merits of the other side (if they ever do), it is too late. The judge has ruled against their client for failure to rebut decent arguments from the other side. The tendency to fall into this trap is the result of our being biased in favor of confirming beliefs that we already hold. This is, sensibly enough, called *the confirmation bias.* Psychologist Raymond Nickerson describes it as follows:

> People tend to seek information that they consider supportive of favored hypotheses or existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs. Conversely, they tend not to seek and perhaps even to avoid information that would be considered counterindicative with respect to those hypotheses or beliefs and supportive of alternative

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[36] Oppenheimer, *supra* note 29, at 152.

possibilities.[37]

We all do this. We become overconfident that we are right once we take a stand, even if we were open-minded to begin with. That happens because we tend to close our minds to disconfirming evidence.

Of course, legal writing experts tell students and lawyers to take into account the position of the opposing party. Justice Antonin Scalia and Bryan Garner put it in military terms: "No general engages the enemy without a battle plan based in large part on what the enemy is expected to do. Your case must take into account the points the other side is likely to make."[38] A leading text on trial advocacy also discusses the strategy of blunting the opposition's case in opening argument.[39] This essay suggests that if students are made aware of the mechanisms that underlie the confirmation bias, they are likely to do a better job internalizing the lesson they are taught and to transfer this knowledge to situations beyond what they learn in the writing course.

Before discussing the likelihood of confirmation bias in confrontational situations, consider this classic demonstration of our propensity to focus on confirming evidence whether or not we have any emotional or intellectual ties to the result. The task was developed by British psychologist Peter Wason. Below is a presentation of the task from an article that Wason co-authored with his colleague Philip Johnson-Laird:[40]

> You are presented with four cards showing, respectively, "A," "D," "4," "7," and you know from previous experience that every card, of which these are a subset, has a letter on one side and a number on the other side. You are then given this rule about the four cards in front of you: If a card has a vowel on one side, then it has an even number on the other side. Next you are told: "Your task is to say which of the cards you need to turn over in

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[37] Nickerson, *supra* note 8, at 177 (citation omitted).

[38] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 10 (2008).

[39] *See* THOMAS A. MAUET, TRIAL TECHNIQUES (9th ed. 2013).

[40] P.N. Johnson-Laird & P.C. Wason, *A Theoretical Analysis of Insight into a Reasoning Task*, 1 COGNITIVE PSYCHOL. 134 (1970).

order to find out whether the rule is true or false."[41]

The correct answers are "A" and "7." But that is not how most people respond. Almost everyone gets the "A" right, but some people choose "4" in addition to "A" and others stop with "A."[42] The reason is that turning over the A can tell you either that the statement is true (if you get an even number) or false (if you get an odd one). But turning over the "7" can only falsify the statement if the other side contains a vowel. It cannot confirm the hypothesis with a consonant. People tend to miss reasoning that can falsify a theory but cannot confirm it.[43]

Now consider this experiment that more closely illustrates confirmation bias in real-life situations. John Darley and Padgett Gross video recorded a fourth-grade girl named Hannah seemingly taking a standardized academic test.[44] Before watching Hannah take the test, half of the experimental participants watched a sequence of her in a low-income urban area, while the other half watched a sequence of her in a middle-class suburban setting. A control group saw Hannah in one of these two settings but did not watch her take the test. The test-taking sequence showed her sometimes concentrating, sometimes distracted, and was intended to be interpretable in various ways. Participants were then asked, among other things, to assess Hannah's grade level on the various

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[41] *Id.* at 134–35 (emphasis omitted). The cards pictured here are downloaded from Google Images. The curious reader can see that there are many versions of the set online, suggesting that this experiment is indeed very famous.

[42] *Id.* at 136. Ninety percent of participants chose the "A," whether alone, or in combination with other letters.

[43] The "4" is a red herring. It looks like it can confirm the theory, but it really cannot do so, because there the theory will hold whether there is a vowel or a consonant on the other side.

[44] John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

subjects tested.

The results clearly demonstrate confirmation bias. The control group that saw Hannah in one of two milieus but did not see her take the test concluded that she was at a slightly higher grade level when she was portrayed as middle class. Those seeing her take the test, having been exposed to the middle-class Hannah, scored her a full grade-level ahead of the working-class Hannah that the other half of the participants watched.[45] Again, there was only one film of the test-taking. The results were a function of people confirming their hypotheses about the relationship between social class and educational achievement.

Confirmation bias has all kinds of legal ramifications, many of which have grabbed the attention of legal academics.[46] Below are three basic lessons for first-year legal writing students.

First, it is essential that students learn to take opposing arguments seriously and to counter them. This often requires them to fight the tendency to discount counterarguments as weak, a consequence of the confirmation bias.

Second, students being taught interviewing skills must learn to head off the confirmation bias right from the beginning. It is not that all clients are liars. Rather, it is that the client's narrative is often an incomplete and somewhat biased account of the facts, largely because the client also discounts evidence that tends to disconfirm the story.

Finally, just as confirmation bias leads to "groupthink" in business settings, it leads to "groupthink" in litigation settings.[47]

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[45] *Id.* at 24.

[46] *See, e.g.*, Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261 (2010) (antitrust); Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. (2009) (criminal procedure); Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Litigation*, 95 NW. U. L. REV. 133 (2000) (bias by auditors leading to securities fraud); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1 (2002) (scientific evidence). There are many others. This is just a small taste of the application of confirmation bias.

[47] *See* Brett McDonnell & Daniel Schwarz, *Adaptation and Resiliency in Legal Systems: Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1639 (2011)

Litigation teams feed on badmouthing the other side to one another, especially in a contentious litigation in which rude conduct has developed. This tendency can have very detrimental effects on the caliber of representation provided.

It is certainly not difficult to understand what it means to take opposing views seriously, with or without learning about the confirmation bias. But, consistent with the theme of this essay, exposing students to the psychological mechanisms that could inhibit effective writing (and advocacy more generally) may help them to internalize the point more fully, and to have a better chance of incorporating it into their sense of what it means to advocate well from a very early stage in their careers.

C. Controlling the Correspondence Bias

It is bad form in advocacy to replace substantive argument based on the facts and the law with ad hominem attacks on the opposing party. Consider this federal appellate court's reaction to a prosecutor's description of a pro se defendant as a "morally bankrupt criminal:"[48]

> That "argument" is, of course, neither relevant to our inquiry, nor does it qualify as legal argument. Rather, it is a gratuitous ad hominem attack that detracts from the persuasiveness of the government's argument as well as the professionalism of its presentation. We should not have to remind officers of the court that such personal comments have little place in an appellate brief.[49]

The reporters are full of statements in which judges express their irritation at this tactic. Whether or not they affect the result of an individual case, judges routinely chastise lawyers for engaging in such conduct.[50] Yet there is something intuitively right about the

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(noting that groupthink "can interact with and intensify confirmation bias" by regulators).

[48] Pazden v. Maurer, 424 F.3d 303, 317 n.16 (3d Cir. 2005).

[49] *Id.*

[50] For a few recent examples, see Sabella v. Sec'y of Dep't of Health & Human Servs., 86 Fed. Cl. 201 (2009); State v. Whitby, 365 S.W.3d 609, 614

notion that people will tend to think that a person acts in conformity with his character, so that a bad person is more likely to do the bad things he is accused of having done than is a good person. Psychologists call the tendency to overemphasize the extent to which conduct emanates from a person's character and underemphasize the effect of circumstances on conduct *the correspondence bias*.[51]

In a classic experiment, psychologists Edward E. Jones and Victor Harris showed participants an essay that either supported or opposed then-Cuban president Fidel Castro.[52] Half the participants were told that the authors could take whichever position they wished, the other half were told that the authors were assigned positions by a debating coach. Both groups of subjects believed that the authors' true attitudes toward Castro were reflected in the substance of the essay, although the effect was stronger when the participants believed that the author had a choice in the matter.[53] The message conveyed in the essays was that people who support Castro do so because they personally approve of him, and people who oppose Castro do so because they do not personally approve of him, even when they are told that the positions taken in the essays were assigned and had nothing to do with the authors' attitudes.

Over the years, many studies have confirmed this phenomenon, which, at one time, was called "the fundamental attribution error."[54] The earlier name reflects the observation that people often erroneously attribute behavior to the personality of the individual and ignore the circumstances in which the behavior occurred.

(Mo. Ct. App. 2012); State v. McDaniel, 777 N.W.2d 739, 752 (Minn. 2010); Hildebrandt v. Veneman, 233 F.R.D 183, 183 (D.D.C. 2005); Mapp v. Burnham, 800 N.Y.S.2d 137, 147 (App. Div. 1st Dep't 2005).

[51] *See* Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21 (1995).

[52] Edward. E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967).

[53] *Id.* at 6.

[54] Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 183 (Leonard Berkowitz ed., 1977); Gilbert & Malone, *supra* note 51, at 24–25.

Much social psychological research over almost half a century has pointed toward the fact that people behave differently in different social contexts without being aware that they do so. For example, Darley and Latané's 1968 studies examined the circumstances in which a bystander is likely to rescue a person in distress.[55] A participant sat alone in a room with a headset and microphone, having been informed that she was participating in a study of how students react to the stress of college in an urban environment. The experimenter told the participant that she and others would speak in turn through their microphones and that they were isolated to enable them to remain anonymous. In reality, however, there were no other people, only tape recordings of others. In one condition,[56] participants were told that five other individuals would be involved in the discussion. In another, the lone participant was told that he would be speaking with only one other person. A third group was told that three individuals would be participating.

During the experiment, the participant heard a recording of a person represented to be one of the other participants having a simulated seizure. When participants thought they were part of a group of six, only thirty-one percent of them left the room to tell the experimenter of the seizure while it was still occurring. But when they thought that the only other participant was the person having the seizure, they attempted to intervene eighty-five percent of the time.[57] Those who thought they were one of three performed in the middle.

Thus, the likelihood of rescue is largely a function of the number of available rescuers. The more potential rescuers there are the less the likelihood that any particular individual will come forward. The situation drives our behavior. Yet if someone told me that I would not likely step forward to help if I were in a room hearing a person suffer a seizure, I would find that hard to believe. I would believe that my character would drive me to, at the very

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[55] John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968).

[56] Professors John Darley and Bibb Latané conducted a great deal of work on the question of bystander intervention, much of which would serve to illustrate the point I make here. *See* BIBB LATANÉ & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? (1970).

[57] *Id.* at 380.

least, ask for assistance. In other words, like just about everyone else, I am subject to the correspondence bias. Similarly, in judging others, only after the significance of the circumstances in which they acted is explained to me can I replace my default assumption that the participants' character traits explain their behavior in these studies, or what my own behavior would be in real life.

Like the confirmation bias, the correspondence bias has not escaped legal writers. It has been used as an explanation for the treatment of falsely convicted criminal defendants,[58] cultural differences that limit successful mediation,[59] causation judgment in tort law,[60] and judgment about state of mind in securities fraud litigation.[61] Professor Jon Hanson and his colleagues have written a series of articles to explain social phenomena ranging from obesity to pornography.[62]

Why should legal writing students be taught about all of this? The correspondence bias is pervasive and it affects the way one interprets a piece of writing. Legal writing students should be taught about the workings of the correspondence bias and how both to stave it off and to take advantage of it within ethical bounds. That is, students should understand that when they tell the story of a legally relevant event, readers cannot help but care about the character of the characters. Students need not straddle the line between making inappropriate ad hominem remarks on the one

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[58] Adina M. Thompson et al., *After Exoneration: An Investigation of Stigma and Wrongfully-Convicted Persons*, 35 ALB. L. REV. 1373 (2012).

[59] Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281 (2006).

[60] Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61 (1995).

[61] Victor D. Quintanilla, *(Mis)Judging Intent: The Fundamental Attribution Error in Federal Securities Law*, 7 N.Y.U. J.L. & BUS. 195 (2010).

[62] *See, e.g.*, Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Jon Hanson and David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Anima*, 93 GEO. L.J. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

hand and ignoring human nature on the other. What they must learn to do is to bring the characters in their narratives to life based on how they frame the facts. In doing so, students must stay within the record, while exploiting their readers' tendencies to attribute behavior to individual personality and character traits. Similar strategies can be used to counteract opposing narratives intended to exploit the correspondence bias to their clients' disadvantage.

All of this has a bit of an odor. Is it unfair to take advantage of one's knowledge of human psychology to gain an advantage in the litigation arena? Consider the criminal defense lawyer who attempts to create reasonable doubt by using a false defense—the creation of a narrative that the lawyer believes to be false, but that is consistent with the evidence.[63] Is it proper for lawyers to take advantage of cognitive biases to create such a false narrative? These are hard questions. Thus, discussion of the correspondence bias should not only give students an opportunity to develop subtle decision making in their writing but it should also create a very useful place in the curriculum to discuss the relationship between advocacy, candor, truth-seeking, and legal ethics.

D. We Are All Human, We Are All Biased

Students should be taught that no matter what their self-impression may be, we are all subject to these biases. There is a very interesting psychological literature on how we tend to acknowledge cognitive biases in others but are blind to them in ourselves. A few lessons from these writings would serve students well.

In a series of studies, psychologist Emily Pronin and her colleagues have demonstrated that people recognize the biases discussed in this essay, but think that they are largely immune from them or at least more immune from them than the average

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[63] For different perspectives on this practice, see Lawrence M. Solan, *Lawyers as Insincere (But Truthful) Actors*," 36 J. LEGAL PROF. 487 (2012). *See also* MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 48 (1975); Carl Selinger, *The "Law" on Lawyer Efforts to Discredit Truthful Testimony*, 46 OKLA. L. REV. 99 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1717–19 (1993).

person.[64] Consider the following statement, which should resonate with students and faculty alike:

> Psychologists have claimed that people show a "self-serving" tendency in the way they view their academic or job performance. That is, they tend to take credit for success but deny responsibility for failure; they see their successes as the result of personal qualities, like drive or ability, but their failures as the result of external factors, like unreasonable work requirements or inadequate instruction.[65]

Students who participated in this study acknowledged their susceptibility to this bias, but believed that they were less susceptible than the average American,[66] and less susceptible than their classmates.[67] Thus, we acknowledge our weaknesses, but still conclude that each of us is above average when it comes to overcoming cognitive bias.[68]

Why do we underestimate the extent of our bias blind spot? Emily Pronin and Matthew Kugler explain it in part by referring to "the introspection illusion."[69] When we think of the conduct of others, we evaluate what they have done. But when we think of our own conduct, we evaluate the history of the thinking that led us to behave as we did. Harvard undergraduates participating in Pronin and Kugler's study first replicated the task of the study just

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[64] *See* Emily Pronin et al., *The Bias Blind Spot: Perception of Bias in Self and Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002) [hereinafter Pronin et al., *The Bias Blind Spot*].

[65] *Id.* at 370 (citation omitted).

[66] *Id.* at 371.

[67] *See id.* at 371–72.

[68] The "Better than Average Effect" is not simply an artifact of Garrison Keeler's fictional Lake Woebegone. It is actually a widely studied phenomenon. *See, e.g.*, Mark D. Alicke et al., *Personal Contact, Individuation, and the Better-than-Average Effect*, 69 J. PERSONALITY & SOC. PSYCHOL. 804 (1995); Jonathan D. Brown, *Understanding the Better-than-Average Effect: Motives Still Matter*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 209 (2012).

[69] Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 566 (2007).

described[70] and then were asked what information they used in assessing their own bias and that of classmates. Once again, the participants attributed more bias to others than to themselves, demonstrating the bias blind spot. Moreover, they reported using different information depending on whether they were explaining their own bias or the bias of others. With respect to understanding their own bias, the participants accepted the explanation "trying to 'get inside my head' . . . to find evidence of the sorts of thoughts and motives that could underlie this tendency."[71] In contrast, they explained the greater perceived bias of their classmates by "considering how well this description fits the way that people in general tend to behave."[72]

These results should not surprise us. Recall accounts of the financial scandals arising from the 2008 financial sector collapse. There was a huge gap between the statements of the insiders talking about their good intentions on the one hand and the public perception of what they actually did on the other.[73] That gap is the result of the self-serving bias and the introspection illusion reinforcing one another.[74] Moreover, this inability to judge one's own cognitive state has been applied directly to the difficulty of being self-aware about one's own writing. Bryan Garner writes that inexperienced lawyers, who have not yet developed their writing skills, are less likely to be aware of their deficits.[75] Garner refers to the work of psychologists Justin Kruger and David Dunning, who put it this way:

> [W]hen people are incompetent in the strategies

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[70] *See* Pronin et al., *The Bias Blind Spot*, *supra* note 64.

[71] Pronin & Kugler, *supra* note 69, at 567–68.

[72] *Id.*

[73] For a good description, see MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010).

[74] I have, for purposes of this essay, not described the full range of mechanisms that psychologists propose to explain these and related phenomena. The reader interested in pursuing further analysis might turn to the excellent discussion of the relevant literature in Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 782–87 (2004).

[75] *See* Bryan A. Garner, *Why Lawyers Can't Write*, A.B.A. JOURNAL, Mar. 1, 2013, *available at* http://www.abajournal.com/magazine/article/why_lawyers_cant_write/.

> they adopt to achieve success and satisfaction, they suffer a dual burden: Not only do they reach erroneous conclusions and make unfortunate choices, but their incompetence robs them of the ability to realize it.[76]

That is, not being good at a particular task often implies not knowing how bad we are at that task. The experimental results are dramatic. In one study, participants (undergraduate students at Cornell) answered questions from the logical reasoning section of an LSAT preparation guide. They then predicted how well they had done in comparison with other people taking the same test. Those in the bottom quartile, with an average of being in the 12th percentile, predicted as a group a mean of being in the 68th percentile.[77]

This lack of awareness applies to writing skills as well. As Kruger and Dunning describe:

> The skills that enable one to construct a grammatical sentence are the same skills necessary to recognize a grammatical sentence, and thus are the same skills necessary to determine if a grammatical mistake has been made. In short, the same knowledge that underlies the ability to produce correct judgment is also the knowledge that underlies the ability to recognize correct judgment. To lack the former is to be deficient in the latter.[78]

Thus, in one of their studies, Kruger and Dunning tested participants on grammatical knowledge using twenty questions taken from a National Teacher Examination preparation guide. The results were the same as in the study discussed above: those participants who scored in the bottom quartile overestimated how well they did compared to others. Although they scored in the 10th percentile on the average, they assessed themselves as being in the 61st percentile.[79] Subsequent experimentation showed this low-

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[76] Justin Kruger & David Dunning, *Unskilled and Unaware of it: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1121 (1999).

[77] *Id.* at 1125.

[78] *Id.* at 1121–22.

[79] *Id.* at 1125–26.

scoring group to be especially unable to reassess their skills even after looking at the performance of others.[80]

This essay does not suggest that legal writing students must go through an exercise in demoralization by learning that their lack of skill is matched only by their lack of self-awareness. However, it is important that students be taught the ease with which we tend to underestimate the shortcomings in our reasoning and skills reflected in the biases discussed earlier in this essay.

IV. CONCLUSION

I have described in this essay the reasons to expect legal writing students to benefit from learning about the psychological processes that underlie basic legal writing skills. This knowledge is apt to help students to internalize what they learn, creating a greater likelihood that they will be able to transfer the skills to situations outside the writing class itself. I have then described four psychological lessons worth learning, and have explained why this is so. What I have not done, however, is to make specific suggestions about how to go about this. That is the subject of this brief Conclusion.

Before doing so, however, I wish to note that the four lessons from psychology discussed here are by no means the only ones from which legal writing students may benefit. Surely legally relevant psychological discoveries extend beyond these. For example, the self-serving bias, discussed earlier in connection with Pronin and Kugler's experiments on the bias blind spot, should be of interest to lawyers and to law students learning how to write persuasively. Daniel Medwed's essay in this volume illustrates this point well.[81] The hindsight bias is another good candidate for integration into the legal writing curriculum. This widely discussed phenomenon[82] is defined as "the tendency for people considering a

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[80] *See id.* at 1126–27.

[81] *See* Daniel S. Medwed, *The Good Fight: The Egocentric Bias, the Aversion to Cognitive Dissonance and American Criminal Law*, 22 J.L. & POL'Y 137 (2014) (discussing how self-serving bias applies in legal educational and professional settings).

[82] *See, e.g.*, Jay J.J Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis*, 48 ORGANIZATIONAL BEHAV. & HUM.

past event to overestimate their likelihood of having predicted its occurrence."[83] This, too, has made its way to discussion by legal academics.[84] Like the correspondence bias, it is a pitfall that students should learn to avoid.

In my experience, students are very engaged when they themselves participate in surveys, the results of which are then discussed in class. Clickers work well for me.[85] Students are required to "click in" their answer to a multiple choice question projected in the classroom on a Power Point slide. Each student's answer is anonymous, but the students are required to answer the question. Once they have responded, the distribution of responses is projected in the form of a bar graph. Discussion follows. Clickers are not necessary, but for some of the tasks described in this essay, some means of projecting the problems in the classroom probably is.

Without devoting too much classroom time, it should be both useful and strategic to do the following:

1. Present students with examples from the Oppenheimer study on what makes writers appear to be smarter.[86] Get their reactions and share them with the class. Then, compare what they say to what Oppenheimer found, and

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DECISION PROCESSES 147 (1991); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 104 J. EXPERIMENTAL PSYCHOL. HUM. PERCEPTION & PERFORMANCE, 288–99 (1975).

[83] Hal R. Arkes et al., *Eliminating the Hindsight Bias*, 73 J. APPLIED PSYCHOL. 305, 305 (1988).

[84] For an excellent example of this discussion, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

[85] There is a substantial literature on the use of clickers in the classroom, both in legal education and more generally in higher education. *See, e.g.*, Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 559–61 (2004) (discussing use of handheld wireless transmitters to foster active learning in law school classes); Richard E. Mayer et al., *Clickers in College Classrooms: Fostering Learning with Questioning Methods in Large Classrooms*, 34 CONTEMP. EDUC. PSYCHOL. 51 (2009) (discussing the usefulness of handheld wireless transmitters in large lecture courses).

[86] *See supra* notes 29–36 and accompanying text.

discuss. It is possible, of course, to substitute materials from legal writing texts that contain before and after examples.[87] Those instructors who would rather use materials in which the complexity involves syntax as well as word selection may especially wish to do so.

2. Present students with the Wason card task.[88] Have them respond and discuss their results in terms of what it shows about the confirmation bias. Then describe to them the Darley and Gross study and discuss their reaction. Ask the students about instances in which they have been unreasonable in rejecting evidence that does not seem to support their views on say, politics.
3. Present students with Darley and Latiné's results in the experiment in which the participant thought she was one of six people hearing a seizure and did not go to the victim's rescue.[89] Ask them what they think of that participant. Then tell them about the other groups and ask them what they think of her then. Finally, discuss with the students how the correspondence bias can be used for and against unsympathetic parties, raising ethical issues about using such knowledge about psychology.
4. Present students with Pronin et al.'s studies about the self-serving bias and the bias blind spot.[90] Present them with the range of their responses and discuss the difficulty we have in recognizing in ourselves what we criticize in

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[87] *See, e.g.*, GARNER, *supra* note 27, at 17–45 (presenting many examples of unnecessarily complex language); POLLMAN ET AL., *supra* note 28, at 294–305 (presenting examples directed at making writing more concise).

[88] *See supra* notes 38–41 and accompanying text.

[89] *See supra* notes 55–57 and accompanying text. It is not necessary to show a video, as the original experimenters did. One can find appropriate images by looking at "girl taking an exam" on Google Images, for example.

[90] *See supra* notes 62–67 and accompanying text.

others. Apply this to the legal contexts in which the biases discussed above have legal relevance, especially the confirmation bias, through which lawyers are apt not to take opposing views seriously enough to be effective advocates.

5. Develop materials, either in addition to or instead of the above suggestions, based on other psychological phenomena, such as the self-serving bias or the hindsight bias.

All of this can be done in course segments that last 15–30 minutes apiece. It should be well worth the time.