Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications

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I. Introduction

Legal writing programs have made significant strides in using writing to help students discover meaning, create knowledge, and enter into the legal discourse community. Complaints about the quality of students' writing continue, however, even in light of law schools adding advanced legal writing courses to their curricula. Indeed, a recent study assessing the writing skills of new lawyers published in the *Journal of Legal Education* concluded that "most lawyers, including most new lawyers, do not write well."[1] Part of the problem is that law schools offer few opportunities for students to practice and hone the newly acquired skills learned in their first year legal writing courses.[2] But the burden of teaching "good legal writing" — that is, the author competently researches and analyzes the legal issues, effectively communicates that analysis in the appropriate rhetorical context, accurately quotes and cites sources, and correctly follows formal conventions — must be shared within the wider law school community. As one commentator has observed, "[W]e cannot really

1. Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80, 91 (2003).
2. *Id.* at 96-97; *see also* Sam Wineburg & Laurel Currie Oates, *Education's Promise*, 3 Leg. Writing 1, 17 (1997).

succeed as teachers of writing unless our work is supported and extended by those who are not teachers of writing . . . ."[3]

Not surprisingly, legal educators have begun to borrow from the writing-across-the-curriculum movement[4] to provide students with a more "systematic exposure" to legal writing.[5] And legal writing scholarship on writing across the curriculum has begun to emerge.[6] Interestingly, however, legal writing scholarship seems to have been influenced most heavily by the *"writing-to-learn"* approach of the writing-across-the-curriculum movement.[7] In writing to learn, which is often closely associated with the work of Janet Emig,[8] "writing is viewed as a means, as a tool, for learning more information, or for coming to a more confident understanding of ideas that are still in development."[9] In law school curricula, this has led to suggestions, for example, that professors in doctrinal courses could provide more take-home examinations, ungraded short writing exercises, ungraded first drafts,[10] focused questions on assigned readings, and "three-minute thesis" papers.[11] In addition to providing writing-to-learn experiences for students, several of

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3.   James Marshall, Presentation, *Writing Across the Curriculum: Two or Three Things We Know for Sure* 3 (AALS Annual Meeting, Wash., D.C., Jan. 8, 2000) (hard copy of paper on file with authors).

4.   For a useful history, see David R. Russell, *American Origins of the Writing-across-the-Curriculum Movement*, in *Landmark Essays on Writing Across the Curriculum* 3 (Charles Bazerman & David R. Russell eds., Hermagoras Press 1994) [hereinafter *Landmark Essays*].

5.   One of the earliest efforts was *Legal Writing Throughout the Law School Curriculum*, (AALS Mini Workshop, Annual Meeting, Wash., D.C., Jan. 3, 1991) (copy of pamphlet on file with authors).

6.   Most notably, Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need it and How to Achieve It*, 76 Neb. L. Rev. 561 (1997); see also Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 John Marshall L. Rev. 303 (2000); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 Vand. L. Rev. 135 (1987).

7.   This is by no means a criticism. Apparently, this has also been true of the writing-across-the-curriculum movement in general. *See* Robert Jones & Joseph J. Comprone, *When Do We Go Next in Writing Across the Curriculum?*, 44 C. Composition & Commun., 59, 63 (1993) (explaining that WAC literature has been dominated by the writing-to-learn and expressive-writing techniques).

8.   Janet Emig authored a highly influential and often-cited essay, *Writing as a Mode of Learning*, 28 C. Composition & Commun. 122 (1977) (reprinted in *Landmark Essays, supra* n. 4, at 89).

9.   Marshall, *supra* n. 3, at 5-6. Professor Oates has demonstrated that while the theorists have argued that writing facilitates learning, the research has not supported this conclusively. Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Leg. Writing 1, 7 (2000). While most writing assignments do promote some level of learning, there are types of assignments that do not: those where the writer is merely "presenting information that he or she knows well" and those where "the writing task interferes with the type of learning being sought." *Id.* at 20.

10.   *See* Kissam, *supra* n. 6, at 158-71.

11.   *See* Parker, *supra* n. 6, at 575-78.

these types of exercises have the added benefit of providing professors with feedback on how well their students are absorbing the material.[12]

There is a second approach to writing across the curriculum — *learning to write in the discipline* — that has received less attention.[13] This approach uses the features of written communication in a specific discipline to teach students to enter that discipline's discourse community.[14]   It differs significantly from the writing-to-learn approach:

> Writing to learn involves displacing the conventional genres, audiences, and purposes of writing, jarring students loose from old habits of thought, so they can approach new material in new ways. But writing within the disciplines . . . involves *embracing* the conventional genres, audiences, and purposes of writing in a particular discipline, involves the student's entry into a discourse community not yet her own, learning its language, its customs, its forms of life. If writing to learn involves students' consumption of new information, in this second version of writing across the curriculum, the student is, in a way, herself consumed by the disciplinary community, and thus becomes a part of that community — an anthropologist, an historian, a lawyer.[15]

Writing in the discipline, this second approach to writing across the curriculum, has strong potential for law school curricula because it is supported by common themes among various learning theories.   Those themes are as follows:

> Instruction should begin at a point within a student's current understanding, requiring that instructors start with the basics within the subject and then introduce increasingly complex material.

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12. This type of feedback is called classroom-assessment techniques, or CATS.   For a discussion of these techniques, see Thomas Angelo & K. Patricia Cross, *Classroom Assessment Techniques* (2d ed., Jossey-Bass 1993).

13. Professor Parker, in her important article, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It, supra* n. 6, at 584-89, addresses the importance of teaching students to create effective documents — a goal consistent with the writing-in-the-discipline movement.   Our thesis is that writing in the discipline should be the primary focus of a comprehensive writing-across-the-curriculum program in law schools.   Professors Busharis and Rowe have also observed the need for law schools to incorporate writing-in-the-discipline principles into law school curricula. Busharis & Rowe, *supra* n. 6, at 314-16.

14. Busharis & Rowe, *supra* n. 6, at 315. " '[C]onventions of discourse' refers to those patterns and ways of communicating (written and oral) that are the accepted norm in a given community of expertise.   It includes such norms as methods of organizing information, deciding what information needs to be included in the communication, and using particular terms of art." Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, 338 n. 61 (1997).

15. Marshall, *supra* n. 3, at 9-10.

Students should be exposed to a variety of teaching methods.

Students should apply what they are learning and receive feedback on this application because they will develop a better understanding of the material.

Students should be taught to become autonomous learners.

Moreover, this approach to writing across the curriculum reconciles various compositional theories:[16] while legal writing programs are, and should be, informed by the process and social-constructivist approaches, there is a need to incorporate more of the product approach in overall legal education — i.e., in the non-legal writing curriculum.[17] This can most effectively and efficiently be accomplished in doctrinal courses, because students will have already learned the process of legal writing and can apply that process to new writing experiences where evaluation focuses on the final product.

This article first describes several well-known learning theories and synthesizes their common themes. It then briefly reviews composition theories and their role in the law school curricula. Lastly, the article concludes with a proposal for a writing-across-the-**law-school**-curriculum program that can enhance students' learning and better prepare them to enter the legal profession.

II. Learning Theories: A Historical Review

Law schools have seemingly eschewed learning theories in developing their curricula. This is surprising in light of the central mission of the legal academy — to provide students with the necessary knowledge to competently

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16. Professor Parker has also noted the need for law school curricula to provide students with opportunities to use various compositional theories — namely, the product (instrumental), process, and social context approaches. Parker, *supra* n. 6, at 565-67.

17. One legal writing scholar has alluded to the importance of legal writing professors not just moving between and among various composition theories, but continuing to be informed about the research that supports these theories. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context,* 49 J. Leg. Educ. 155, 168 (1999). See *infra* part IV for a brief explanation of the composition theories that have influenced legal writing programs.

enter the legal profession.[18] Learning theories[19] can and should influence law school pedagogy and curricular decisions. One reason for the absence of attention may be that the legal academy has a subtle disdain for such theories.[20] Another reason may be that application is difficult because there are numerous, changing, conflicting learning theories.[21] Yet, these learning theories have much to contribute to how law school curricula can be designed to facilitate learning. This article provides a proposal for their incorporation into the curriculum. Section II is a historical review, describing the chronological development of the three broad theories — behaviorism, cognitivism, and constructivism. Within the behaviorism and cognitivism sections, several learning theories are discussed.[22] These learning theories generally subscribe to the underlying rationale of the broad theory, either behaviorism or cognitivism, within which they are presented.

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18. Or, in other words, to " ' hit the ground jogging' " as opposed to "strolling" or "just standing." Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ALWD 91, 103 n. 43 (Pamela Lysaght, Amy E. Sloan & Bradley G. Clary eds., 2002) (crediting Dean Harbaugh with the phrase "hit the ground jogging"). For a provocative article on the purpose of law schools, see Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. Leg. Educ. 48 (2003). *See also* Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. Leg. Educ. 57, 62-66 (1992) (discussing the need for more integration between skills and doctrine and noting that law schools are not adequately preparing their graduates to meet the realities of law practice).

19. "A learning theory . . . should explain the results associated with learning and predict the conditions under which learning will occur again." Marcy P. Driscoll, *Psychology of Learning for Instruction* 6-7 (2d ed., Allyn and Bacon 2000). "Learning theory evolves from the study of how students learn." Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 Alb. L. Rev. 213, 214 (1998).

20. · "Law professors have long believed that educational theorists, professors of education or educational psholog[ists], are either charlatans or primitives." Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. Leg. Educ. 528, 529 (1985).

21. As one author stated,

> I also found numerous theories, points of view, dogmas[,] and disagreements among the experts about how people learn. . . . [T]here was no consistent body of expert advice or opinion. I was overwhelmed by the breadth and diversity of theory from which I could choose. I was further struck by that [sic] fact that no single theory seemed complete enough. Each subset of theories seemed to offer something useful about how to maximize learning for my students. And still others seemed in conflict.

Alice M. Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 Widener L. Symp. J. 49, 74 (2000) (footnotes omitted).

22. The discussion of Benjamin Bloom's Taxonomy of Educational Objectives and his support of mastery learning is included within the behaviorism discussion because Bloom's Taxonomy was created, and his support of mastery learning first occurred, during the reign of behaviorism in the United States.

A. Behaviorism

Behaviorism is often associated with Ivan Petrovich Pavlov, a behaviorist, known for his work with dogs and his conditioning the dogs' response based on the external stimulus of ringing a bell.[23]   Behaviorism, as it relates to students, can involve conditioning students through instruction to exhibit certain responses to external stimuli.[24]   Behaviorists believe that change in behavior, due to associations formed between stimuli and response, evidences learning.[25]   The student can be taught the proper behavior by continued exposure to specific stimuli, whereby the correct response to the specific stimulus is rewarded and the improper response is not.[26]   Fundamental to behaviorism is the belief that understanding learning as a behavior can be done wholly independent of the cognitive workings of the mind.[27]

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23.   Specifically, dogs salivate when anticipating food. Pavlov conditioned the dog to salivate when a bell was rung by ringing the bell and then immediately providing the dog food. The dog salivated when the bell was rung even if no food was provided. Raymond E. Fancher, *Pioneers of Psychology* 305-08 (W. W. Norton & Co. 1979). Robert M. Gagne, in his book, *The Conditions of Learning,* described the bell as a buzzer and further explained, "Whereas the salivation at the sight of food could be considered a natural (or unconditioned) response, salivation to a buzzer had to be acquired as a conditioned response. This learning occurred when the new signal (the buzzer) was presented together with the food in a number of trials." Robert M. Gagne, *The Conditions of Learning* 10 (3d ed., Holt, Rinehart & Winston 1977).

24.   Dale H. Schunk, *Learning Theories: An Educational Perspective* 23 (Merrill Prentice Hall 2000); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching,* 38 San Diego L. Rev. 347, 367 (2001). Where a certain behavior is desired, "the reinforcement is made contingent upon the occurrence of the behavior to be learned. In simple terms, this means that learning conditions must be so arranged that some reinforcing activity follows closely the occurrence of the desired receptive behavior." Gagne, *supra* n. 23, at 89. "When a bit of behavior has the kind of consequence called reinforcing, it is more likely to occur again." B. F. Skinner, *About Behaviorism* 46 (Alfred A. Knopf 1974).

25.   Driscoll, *supra* n. 19, at 37; Schunk, *supra* n. 24, at 23; *see also* Thomas, *supra* n. 21, at 103.

26.   Schunk, *supra* n. 24, at 23. Over time, the behavior change will be made permanent, not by constant reinforcement, but by periodic reinforcement. Driscoll, *supra* n. 19, at 51. According to B. F. Skinner,

> [t]o modify behavior, someone merely has to find something that is rewarding for the organism whose behavior he wishes to modify, wait until the desired behavior occurs, and immediately reward the organism when it does. When this is done, the rate with which the desired response occurs goes up. When the behavior next occurs, it is again rewarded, and the rate of responding goes up even more. Any behavior that the organism is capable of performing can be manipulated in this manner.

B.R. Hergenhahn, *An Introduction to Theories of Learning* 87 (Prentice-Hall, Inc. 1976) (quoting B.F. Skinner).

27.   John Broadus Watson, a founder of behaviorism, stated the following in advocating behaviorism:

Behaviorism had widespread support in the United States until the 1960s, and certain ideas are still prevalent in education today.[28]   Specifically, behaviorists support beginning the course by providing the educational objectives.[29] In addition, teachers should begin with material that is within the learner's capabilities and then move to more complex material when the learner is ready.[30] Lastly, the material and corresponding objectives should be divided into manageable units to enable the teacher to provide structured feedback.[31]

From a behaviorist point of view, the lecture format, the dominant instruction form in legal education, is not effective because it does not allow for structured feedback. During the lecture, it is difficult to determine on an individual basis "when learning is taking place or when to administer rewards."[32]

1. Bloom's Taxonomy of Educational Objectives

During the prominence of behaviorism, Dr. Benjamin Bloom headed a group of educational psychologists, who at the 1948 Convention of the American Psychological Association, created a tool widely used in education today known as Bloom's Taxonomy of Educational Objectives.[33] It classifies

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Psychology as the behaviorist views it is a purely objective experimental branch of natural science. Its theoretical goal is the prediction and control of behavior. Introspection forms no essential part of its methods, nor is the scientific value of its data dependent upon the readiness with which they lend themselves to interpretation in terms of consciousness.

Clarence J. Karier, *Scientists of the Mind: Intellectual Founders of Modern Psychology* 128 (U. of Ill. Press 1986). B. F. Skinner stated, "Thinking is behaving. The mistake is in allocating the behavior to the mind." Skinner, *supra* n. 24, at 104.

28.   Schwartz, *supra* n. 24, at 368.   "[A]cross all levels of education, teachers assess learning according to the behavioral model by requiring the learners to produce an observable response (an answer) to a stimulus (the exam question)." *Id.*

29.   Driscoll, *supra* n. 19, at 60-61. An instructor should set goals of clear and observable behavior students will display as a result of instruction. *Id.* at 60. Without such educational objectives that specify observable behavior, an instructor cannot determine if the goals have been met. *Id.*; Hergenhahn, *supra* n. 26, at 350.

30.   Hergenhahn, *supra* n. 26, at 112, 350 (quoting B. F. Skinner's description of the benefits of a teaching machine that Skinner created); Schwartz, *supra* n. 24, at 368.

31.   Schunk, *supra* n. 24, at 23-24.

32.   Hergenhahn, *supra* n. 26, at 351.

33.   Virginia S. Lee, *Creating a Blueprint for the Constructivist Classroom,* 8 The Natl. Teaching & Learning Forum, 4 (1999), http://www.stanford.edu/dept/CTL/teach/NTLF/v8n4/blueprint.htm. Benjamin Bloom believed that "humans' learned capabilities comprised three major domains; cognitive, affective, and psychomotor." Driscoll, *supra* n. 19, at 348. The Taxonomy of Affected Outcomes and Taxonomy of Psychomotor Outcomes were later created. *Id.* at 349.

intellectual behavior into increasingly complex levels and explains how learning occurs within each level.[34]

The six levels of Bloom's Taxonomy are knowledge, comprehension, application, analysis, synthesis, and evaluation.[35]   The levels proceed from simple to more complex. The more complex levels are dependent upon and subsume the basic levels, requiring a teacher to "build an information base at lower levels before proceeding to higher ones."[36]

The first and most basic level is *knowledge*.   This level involves remembering information that has been previously learned, such as facts, principles, and theories.[37] *Comprehension* is the processing of knowledge that shows understanding of the meaning and involves translating the knowledge into different forms, such as paraphrasing.[38] *Application* involves using information that has been previously learned and applying it to a new situation.[39] *Analysis* requires the understanding of a complex phenomena based on an understanding of how the interrelated parts of the phenomena compose it.[40] *Synthesis* is the process of creatively applying prior knowledge or skills to produce a unique product.[41] *Evaluation* involves personal judgments of the merit of an·object or work by establishing and applying a criterion.[42]

Accordingly, under Bloom's Taxonomy, there are levels of learning of which acquiring knowledge is·just the basic one. It demonstrates the need to have learning objectives in law school other than rote memorization of

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34. Lee, *supra* n. 33. The group organized to create "a classification of the goals of education . . . because educational objectives are 'the basis for building curricula and tests.' " Elliot W. Eisner, *Benjamin Bloom 1913-99*, 30 Prospects 3 (Sept. 2000), http://www.ibe.unesco .org; *select* Databanks, *select* IBE Bibliographic Catalogue, *enter* "Eisner" in personal name, *select* search, *select* IBEDOCS-18541 in pdf. They were seeking to define intellectual behavior such that one could determine by testing if a student's behavior was progressing from one level to the next. *Id.* Professor Eisner was a former student of Bloom's, *id.*, and is the Lee Jacks Professor of Education and a Professor of Art at Stanford. Stan. U., *Faculty Index*, http://ed .stanford.edu/suse/contents/elliot_w_eisner.html (2004).

35. Donald P. Kauchak & Paul D. Eggen, *Learning and Teaching: Research Based Methods* 177-79 (4th ed., Allyn & Bacon 2003). Robert Gagne also proposed a Taxonomy of Learning Outcomes. His Taxonomy incorporates Bloom's Taxonomy of Educational Objectives, the Taxonomy of Affected Outcomes, and the Taxonomy of Psychomotor Outcomes. Gagne's Taxonomy of Learning Outcomes categories are: Verbal Information, Intellectual Skills, Cognitive Strategies, Attitudes, and Motor Skills. See Driscoll, *supra* n. 19, chapter 10 for a complete discussion of Gagne's theory of instruction.

36. Kauchak & Eggen, *supra* n. 35, at 177.

37. *Id.*; Kurt M. Saunders & Linda Levine,·*Learning to Think Like a Lawyer*, 29 U.S.F. L. Rev. 121, 134 (1994).

38. Saunders & Levine, *supra* n. 37, at 135; Kauchak & Eggen, *supra* n. 35, at 177.

39. Saunders & Levine, *supra* n. 37, at 135; Kauchak & Eggen, *supra* n. 35, at 177.

40. Saunders & Levine, *supra* n. 37, at 135; Kauchak & Eggen, *supra* n. 35, at 178.

41. Saunders & Levine, *supra* n. 37, at 135; Kauchak & Eggen, *supra* n. 35, at 178.

42. *Id.* As applied to law school, one scholar has stated that "[t]he last four levels are the integral aspects of legal analysis: the need to synthesize the law from binding authorities to create an analytical framework, to apply it, and to evaluate the strengths and weaknesses of that application." M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 Seattle U.L. Rev. 139, 143 n. 10 (2001).

information. It shows the importance of providing instruction and exercises that will teach, test, and provide feedback regarding a student's skill in the higher levels of learning that are required to become competent new attorneys.

2. Mastery learning

Dr. Bloom is also known for his support of the theory of mastery learning.[43] This theory provides that while students may learn with different styles and at different paces, students have the potential to master any subject when instruction is "individualized to each student's needs."[44]   Mastery learning focuses on ensuring that students have the instruction and the time needed to meet the teacher's educational goals.[45] Under this theory, teachers should focus on having the students achieve the course educational goals, as opposed to categorizing students with a normal grade distribution.[46]

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43. Benjamin S. Bloom, *Mastery Learning*, in *Mastery Learning: Theory and Practice* 47-63 (James H. Block, ed., Holt, Rinehart and Winston, Inc. 1971).

44. Saunders & Levine, *supra* n. 37, at 133; Bloom, *supra* n. 43, at 49-50.   Mastery learning, although used some in the 1920s, resurfaced in the late 1950s with B. F. Skinner's idea of programmed instruction and his teaching machine. James H. Block, *Introduction to Mastery Learning: Theory and Practice* in *Mastery Learning, Theory and Practice* 2, 4 (James H. Block ed., Holt, Rinehart and Winston 1971). As one author described it,

> A basic idea underlying programmed instruction was that the learning of any behavior, no matter how complex, rested upon the learning of a sequence of less-complex component behaviors. Theoretically, therefore, by breaking a complex behavior down into a chain of component behaviors and by ensuring student mastery of each link in the chain, it would be possible for any student to master even the most complex skills.

Id. at 4. "Programmed instruction worked very well for some students, especially those who required small learning steps, drill, and frequent reinforcement, but it was not effective for all or almost all students." *Id.* at 5.

45. Saunders & Levine, *supra* n. 37, at 133-34; Feinman & Feldman, *supra* n. 20, at 534. Professor Elliot W. Eisner wrote:

> Goal attainment rather than student comparison was what was important. . . . It made no pedagogical sense to expect all students to take the same amount of time to achieve the same objectives. There were individual differences among students, and the important thing was to accommodate those differences in order to promote learning rather than to hold time constant and to expect some students to fail.

Eisner, *supra* n. 34.

46. Dr. Bloom pointed out:

> The normal curve is not sacred. It describes the outcome of a random process. Since education is a purposeful activity in which we seek to have students learn what we teach, the achievement distribution should be very different from the normal curve if our instruction is effective. In fact, our educational efforts may be said to be *unsuccessful* to the extent that student achievement is normally distributed.

Underlying mastery learning is the idea that students enter a curriculum with a pre-existing knowledge base, and the adequacy or inadequacy of that knowledge base will greatly influence a student's success in learning new information.[47] Students should be given the time and the instruction needed to make the connection between their pre-existing knowledge base and the new information.[48]

Such instruction includes providing students sequenced feedback by monitoring their progress toward the defined course objectives.[49] Continued evaluation is foundational to mastery learning.[50]   If the evaluation demonstrates that a student has not reached the educational objectives, the teacher should provide "alternative learning resources to enable the student to learn better or to relearn."[51] Teachers can do this by using a variety of teaching methods.[52] The variety in instruction has the added benefit of helping students become aware of the methods by which they best learn,

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Bloom, *supra* n. 43, at 49. Professor Elliot W. Eisner stated:

> The assumption was that there would always be a normal distribution among students and that this distribution and the students' location within it should determine their rewards—rewards distributed in the form of grades. Bloom looked at the matter differently. . . . [H]e recognized that what was important in education was not that students should be compared, but that they should be helped to achieve the goals of the curriculum they were studying.

Eisner, *supra* n. 34.

47.   Saunders & Levine, *supra* n. 37, at 133-34; Bloom, *supra* n. 43, at 49.

48.   Bloom, *supra* n. 43, at 52-55.   Here, instruction would also include motivating students to perform well. High quality instruction can increase motivation. *Id.* at 54.

49.   Peter W. Airasian, *The Role of Evaluation in Mastery Learning,* in *Mastery Learning: Theory and Practice* 77, 77 (James H. Block, ed., Holt, Rinehart and Winston, Inc. 1971). "[I]nstruction is individualized within the context of regular group instruction by means of on-going, specific feedback about each student's learning progress, coupled with a variety of corrective instructional modes to help the pupil learn material unmastered during group instruction." *Id.*

50.   Airasian, *supra* n. 49, at 77. "[E]vidence gathering is a crucial and integral aspect of the instructional process itself. Without constant information to identify weaknesses in student learning, there can be no effective strategy." *Id.* Airasian discussed two types of evaluation. First, summative evaluation, which would be a final examination. "[T]he primary purpose of summative evaluation is to grade students according to their achievement of the course aims." *Id.* at 78. On the other hand, "formative evaluation seeks to identify learning weaknesses prior to the completion of instruction . . . . The aim is to foster learning mastery by providing data which can direct subsequent or corrective teaching and learning." *Id.* at 79.

51.   Feinman & Feldman, *supra* n. 20, at 534; Bloom, *supra* n. 43, at 72. The teacher may need to re-teach the material in a different way to the whole class or provide materials or assignment to individual students. Feinman & Feldman, *supra* n. 20, at 534 n. 16. Bloom suggests teaching from alternative textbooks, or reaching students using audio and visual materials, or academic games or puzzles as alternative learning resources. Bloom, *supra* n. 43, at 72.

52.   Feinman & Feldman, *supra* n. 20, at 534. Such teaching methods would include using a straight lecture, question and answer sessions, small group work, "focused or unfocused, in class or out, supervised by a teacher or teaching assistants or unsupervised . . . ." *Id.* at 534 n. 16.

which enhances "their awareness and ability as autonomous learners."[53] The idea is to provide each student instruction that includes sequenced feedback, and time that the student needs, with the goal of having all students reach the educational objectives.

Jay Feinman and Marc Feldman advocate adoption of mastery learning in law school education.[54] An often-quoted passage from their article on mastery learning emphasizes the ideal behind the theory.

> This concept of widely distributed intelligence is evil and false. It is evil because it supports social institutions that prevent the full development of human potential and freedom by convincing people of their own inadequacy. It is false because it is inconsistent with a large body of research and years of experience demonstrating that widely distributed learning outcomes are more a product of ineffective schooling than of the abilities of the students.[55]

Feinman and Feldman assert that what students need is "an educational environment that provides [them] with the resources and the situations with which they can best learn."[56] They reason that students entering law school generally possess a knowledge base sufficient to begin learning and are motivated to learn — two critical factors to mastery learning. Then, "[w]hen [also] given appropriate instruction, nearly all law students can achieve mastery — not minimum competence, but mastery — of the skills of the novice lawyer."[57]

B. Cognitivism

Whereas behaviorism denounced the influence of cognitive activities in the mind and focused on observable external response to unbiased environmental stimulus, cognitivists have focused on how the mind processes information as opposed to the ultimate external response.[58] In the United States, beginning in the 1960s, the cognitivist movement relegated behaviorism to a secondary position.[59] In part, behaviorism's decline can be attributed to its restrictive and over-simplified stance that learning can be

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53. *Id.* at 534. "Much of what lawyers need to know they have to learn in practice, and law school prepares students for practice better if it makes them attentive to their own learning." *Id.*

54. Feinman & Feldman, *supra* n. 20, at 528.

55. *Id.* at 531.

56. *Id.*

57. *Id.* Instruction would include alternative teaching methods to help students learn or re-learn. *Id.* at 534. Additionally, it would include formative evaluation. *Id.* at 532. "Successful final evaluation depends on its not being the only evaluation students receive." *Id.* at 533.

58. Gagne, *supra* n. 23, at 16; Hergenhahn, supra n. 26, at 355; Schwartz, *supra* n. 24, at 372; Thomas, *supra* n. 21, at 104; John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education,* 39 J. Leg. Educ. 275, 277 (1989).

59. Schunk, *supra* n. 24, at 78; Schwartz, *supra* n. 24, at 371.

explained without reference to mental processes.[60] Particularly damaging was Noam Chomsky's argument that linguistic behavior cannot be a sole product of learned associations, highlighting a fundamental fact that our "behavioral capacities often surpass the limitations of our individual learning histories. Our history of reinforcement often is too impoverished to determine uniquely our behavior."[61]

Cognitivists generally believe that the mind attends to certain information, and an individual interprets that information by attempting to place it within the individual's existing knowledge structure.[62] Learning occurs when data is selected, processed, transformed into meaningful information, and stored in memory.[63] Thus, cognitivists are concerned with the process that occurs in the mind in between receipt of the information and the response to the information.[64]

The *information-processing approach,* a central theory within the cognitivist movement, uses the computer metaphor to explain how information is processed, stored, and retrieved through internal mental structures in the brain.[65] According to the doctrine of *schema theory,* these internal mental

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60.   Gagne, *supra* n. 23, at 11. Furthermore,

> [d]espite the widespread occurrence of conditional responses in our lives, the prototype remains unrepresentative of most learning situations. The learning of voluntary acts cannot adequately be represented by the pairing of conditioned and unconditioned stimuli. . . . There can be little doubt that Watson's idea that most forms of human learning can be accounted for as chains of conditioned responses is wildly incorrect, primarily because it is an overly simple conception of what is learned.

Id.; see also George Graham, *Behaviorism,* Stanford Encyclopedia of Philosophy (Fall 2002), http://plato.stanford.edu/entries/behaviorism (last updated Aug. 17, 2002). Behaviorism is not a completely defunct learning theory. However, "[i]t is generally agreed that behavioral principles cannot adequately explain the acquisition of higher level skills or those that require a greater depth of processing (e.g., language development, problem solving, inference generating, critical thinking)." Schwartz, *supra* n. 24, at 371.

61.   Graham, *supra* n. 60. Referring to B. F. Skinner's book, *Verbal Behavior,* Chomsky argued that conditioning cannot explain verbal behavior:

> Careful study of this book (and of the research on which it draws) reveals . . . the insights that have been achieved in the laboratories of the reinforcement theorist, though quite genuine, can be applied to complex human behavior only in the most gross and superficial way, and that speculative attempts to discuss linguistic behavior in these terms alone omit from consideration factors of fundamental importance that are no doubt, amenable to scientific study.

Schunk, *supra* n. 24, at 65.

62.   Margaret E. Gredler, *Learning and Instruction Theory into Practice* 170 (Merrill Prentice Hall 2001); Driscoll, *supra* n. 19, at 116; Schwartz, *supra* n. 24, at 372-73; Mitchell, *supra* n. 58, at 277.

63.   Gredler, *supra* n. 62, at 170; Schwartz, *supra* n. 24, at 372.

64.   Schwartz, *supra* n. 24, at 372; Driscoll, *supra* n. 19, at 76.

65.   Gredler, *supra* n. 62, at 169. Further explaining this model,

structures organize information into schema, or meaningful organizations of concepts.[66] It is the existence of developed schemata that create the distinction between experts and novice within a domain.[67] And teaching students to think about how they learn so as to encourage them to employ effective learning methods that will result in the development of schema is called *metacognition*.[68] Each of these aspects of cognitivism is discussed in more detail below.

1. Information-processing approach

Under the information-processing approach, information is processed through and retrieved from stages of memory.[69] Specifically, information is constantly reaching the senses. This constant flow of information is first registered in sensory memory.[70] The information that the brain addresses is then passed into short-term memory.[71] Only small amounts of information remain in short-term memory, and it only remains there for a short period of time.[72] It is theorized that the maximum capacity of short-term memory is five to nine chunks of information (seven, plus or minus two).[73] Critical to

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The information–processing model of learning has important implications for an understanding of instruction. The stimulating conditions that are brought to bear on the learners are not viewed simply as stimuli to which they "react." Instead, these external stimuli may be conceived as initiating, maintaining, or otherwise supporting several different kinds of ongoing internal processes involved in learning, remembering, and performing.

Gagne, *supra* n. 23, at 17; Swartz, *supra* n. 24, at 372-73.

66. Lustbader, *supra* n. 14, at 326 n. 23; Mitchell, *supra* n. 58, at 277.

67. Mitchell, *supra* n. 58, at 278-79; Margaret W. Matlin, *Cognition* 242 (4th ed., Harcourt Brace College Publishers 1998).

68. Driscoll, *supra* n. 19, at 92; Paul T. Wangerin, *Learning Strategies for Law Students*, 52 Albany L. Rev. 471, 476, 479 (1988).

69. Schunk, *supra* n. 24, at 119; Driscoll, *supra* n. 19, at 76. Information processing does not represent a single theory but is a generic name for theories that explain cognition using the computer metaphor to explain how the brain processes, stores, and retrieves information. Schunk, *supra* n. 24, at 120.

70. Schunk, *supra* n. 24, at 134; Swartz, supra n. 24, at 372. Studies have shown that "information from the various senses is 'registered' in more or less complete form for a few hundredth of a second." Gagne, *supra* n. 23, at 52; Gredler, *supra* n. 62, at 170-71 (retained for 0.5-2.0 seconds).

71. Schunk, *supra* n. 24, at 139; Gredler, *supra* n. 62, at 170; Swartz, *supra* n. 24, at 372. "Essentially, this process in known as *selective perception*, and depends upon the learner's ability to attend to certain features of the content of the sensory register, while ignoring others . . . . Attending therefore accomplishes a transformation which forms a new kind of input to the short-term memory." Gagne, *supra* n. 23, at 53 (references to sources omitted).

72. Schunk, *supra* n. 24, at 139. Information remains there for about twenty seconds. Gagne, *supra* n. 23, at 53. Information in short-term memory or working memory is either encoded to long-term memory or forgotten. *See* Gredler, *supra* n. 62, at 184. "[I]nformation is quickly lost if not learned well." Schunk, *supra* n. 24, at 140.

73. Gredler, *supra* n. 62, at 183; Schunk, *supra* n. 24, at 140; Swartz, *supra* n. 24, at 372-73. This theory that short-term memory holds seven plus or minus two chunks of information is

learning is the storage of information in long-term memory.[74] Encoding is a process by which information is transferred from short-term to long-term memory.[75]   Different methods of encoding — primary rehearsal and elaborative rehearsal — are available to facilitate storage of substantive concepts and doctrine in long-term memory. Primary rehearsal involves "reciting information over and over."[76] In doing so, the information is temporarily remembered but because it is not connected to any other known knowledge, it is soon forgotten.[77] Elaborate rehearsal can result in long-term retention where the new information is related to the learner's prior knowledge, or paired with other information to help a learner recall the information.[78] Elaborate rehearsal is believed effective because it creates connections and routes for later retrieval of the information.[79] The process of storing and recalling information in long-term memory involves what is known as schema theory.

2. Schema theory

According to schema theory, individuals store "substantive doctrines and concepts"[80] in long-term memory. Learning occurs when the learner modifies or creates new cognitive structures or schema for new information.[81] "Schemata assist encoding because they elaborate new material into a meaningful structure."[82] Jean Piaget, a Swiss biologist and psychologist, believed that all species have a tendency to "systematize and organize their processes," whether physical or psychological, into coherent systems.[83] Additionally, he believed that all organisms have a tendency to adapt to the

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attributed to George A. Miller. Paul Thagard, *Cognitive Science*, The Stanford Encyclopedia of Philosophy (Winter 2002), http://plato.stanford.edu/entries/cognitive-science.

74. Gagne, *supra* n. 23, at 54. It is theorized that long-term memory is capable of having an infinite amount of information that is never truly lost. Driscoll, *supra* n. 19, at 77.

75. Gredler, *supra* n. 62, at 183, 187; Gagne, *supra* n. 23, at 54.

76. Gredler, *supra* n. 62, at 184; Schunk, *supra* n. 24, at 145.

77. Gredler, *supra* n. 62, at 184; Schunk, *supra* n. 24, at 145.

78. Gredler, *supra* n. 62, at 184; Schunk, *supra* n. 24, at 145.

79. Gredler, *supra* n. 62, at 184. "These additional connections to materials already learned and additional cues to aid in recall lead to the construction of elaborate structures in memory." *Id.*

80. Lustbader, *supra* n. 14, at 326. The information is stored as concepts and is meaningfully organized, as opposed to just being collected. Gagne, *supra* n. 23, at 54-55. "These generalized kinds of knowledge about situations and events are called schema. . . . Schema theories propose that people encode this 'generic' information in memory and use it to understand and remember new examples of the schema." Matlin, *supra* n. 67, at 242.

81. Herbert P. Ginsburg & Sylvia Opper, *Piaget's Theory of Intellectual Development*, 243 (3d ed., Prentice Hall 1988). Schema refers to "an 'active organization of past reactions' which is assumed always to be operating in an individual's response." Gredler, *supra* n. 62, at 178 (reference to sources omitted). "A *schema* is a structure that organizes large amounts of information into a meaningful system." Schunk, *supra* n. 24, at 145.

82. Schunk, *supra* n. 24, at 146; Matlin, *supra* n. 67, at 242.

83. Ginsburg & Opper, *supra* n. 81, at 17.

environment.[84]   Piaget theorized that intellectual adaptation occurs through assimilation and accommodation.   First, where an experience fits within an existing schema, it is called "assimilation."[85]   Second, where an experience modifies an existing schema or creates a new schema, it is called "accommodation."[86] Because organisms tend toward equilibrium or a balance with the environment,[87] according to Piaget, individuals attempt to assimilate or accommodate new information until structures develop that effectively respond to the requirements of the new situation.[88]

Thus, cognitivists believe that students will have a unique set of cognitive structures that form their pre-existing knowledge base.[89]   A teacher should work with students to make new information meaningful.[90]   This would include starting with general, yet familiar, introductory material so as to encourage students to make connections between previously learned information and new information.[91]

A teacher can then facilitate learning by helping students to encode new information and create or modify existing schema. A teacher can use many different examples in different contexts when introducing these new concepts. "In this way, students will have many cues available to assist in encoding that maybe used for later recall."[92] Also, cognitivists have adopted the behaviorist idea of both providing exercises that test student learning and providing feedback on those exercises so as to give the teacher and the student information regarding the student's learning progress, because this principle also "facilitate[s] the learners' appropriate encoding" of the information.[93]

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84. *Id.* at 18.

85. *Id.* at 19; Mitchell, *supra* n. 58, at 287.

86. Ginsburg & Opper, *supra* n. 81, at 19; Mitchell, *supra* n. 58, at 287. "In the process of organizing his activities the individual assimilates novel events into preexisting structures, and at the same time accommodates preexisting structures to meet the demands of the new situation." Ginsburg & Opper, *supra* n. 81, at 23.

87. Ginsburg & Opper, *supra* n. 81, at 23. "Equilibrium is the set of processes that maintains cognitive organization during the learner's changes in thinking." Gredler, *supra* n. 62, at 250.

88. Ginsburg & Opper, *supra* n. 81, at 23. Balance occurs when an individual's schemas are developed such that little effort is needed to assimilate or accommodate the task at hand. *Id.* Learning due to changes in existing schemata is also referred to as accretion, tuning and restructuring. Driscoll, *supra* n. 19, at 137-38. Accretion is where incoming information matches existing information within a schema. *Id.* Tuning occurs when incoming information is new and/or contradictory, and minor modification of the schema occurs. *Id.* Restructuring is developing of a new schema that may replace or incorporate the existing one. *Id.*

89. Driscoll, *supra* n. 19, at 138; Lustbader, *supra* n. 14, at 326; Swartz, *supra* n. 24, at 373.

90. Schunk, *supra* n. 24, at 143.

91. Driscoll, *supra* n. 19, at 145-46; Schunk, *supra* n. 24, at 24, 173. This approach is also emphasized in Meaningful Reception Learning created by David Ausubel, wherein "meaningful learning refers to the process of relating potentially meaningful information to what the learner already knows in a nonarbitrary and substantive way." Driscoll, *supra* n. 19, at 117. "*Meaningful learning* refers to the learning of ideas, concepts, and principles by relating new information to knowledge in memory." Schunk, *supra* n. 24, at 173 (reference to sources omitted).

92. Driscoll, *supra* n. 19, at 103; *see also* Gredler, *supra* n. 62, at 184.

93. Schwartz, *supra* n. 24, at 375; *see also* Schunk, *supra* n. 24, at 24, 26.

Lastly, encouraging students to be active in the learning process enhances learning.[94]

Schema theory also addresses the distinction between experts and novices within a subject area. It is the organization and existence of cognitive structures or schema that create the difference between expert and novice within a domain.[95] An expert will possess cognitive structures on the subject while the novice's cognitive structures will not be organized specifically for that subject.[96] "Novices in a particular domain can learn and recall terms, structures, and rules, but they do not know how to easily organize and apply this knowledge. Usually, an expert can access a storehouse of schemas to assist in solving a problem."[97] Thus, experts will have cognitive structures concerning the conventions of a particular discourse, whereas the novice will not.[98] Accordingly, experts are able to more quickly access their knowledge and more effectively apply that knowledge in a particular domain.[99]

This distinction between expert and novice understanding of a particular discourse relates back to an initial premise. Law professors share a common goal: to teach students to competently enter the profession, which inherently requires familiarity with legal discourse. Put another way, "[t]o participate meaningfully within a legal community requires legal 'literacy.' . . . [E]xpertise in law is not just knowledge of the law — it requires competence in the

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94. "Genuinely active learning can lead to more solid and long-lasting understanding." Ginsburg & Opper, *supra* n. 81, at 240. "Active learning is important for one fundamental reason: active involvement enhances learning. Researchers and leaders in postsecondary pedagogy agree that students learn better when they are actively involved in the learning process." Gerald F. Hess, *Seven Principles for Good Practice in Legal Education, Principle 3: Good Practice Encourages Active Learning,* 49 J. Leg. Educ. 401, 402 (1999); *see also* Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student,* 81 U. Det. Mercy L. Rev. 1 (2003). Professor Boyle's article thoroughly discusses employing active learning strategies in law school, providing numerous supporting authorities.

95. Driscoll, *supra* n. 19, at 136; Lustbader, *supra* n. 14, at 326-27; Mitchell, *supra* n. 58, at 278-79, 291.

96. Mitchell, *supra* n. 58, at 278-79; Matlin, *supra* n. 67, at 153, 364. Interestingly, experts in a particular domain, for example, expert chess players, are not necessarily exemplary in other domains or generally exemplary in cognitive abilities. *Id.* at 151-52.

97. Saunders & Levine, *supra* n. 37, at 141. "Novice thinking is elemental and structured around concrete pieces of knowledge in a domain, while expert thinking is global and relates to abstract, higher order principles and procedures." *Id.* "The knowledge of experts is organized in ways that permit the expert to recognize patterns that are entirely invisible to novices in complex situations." Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory,* 45 J. Leg. Educ. 313, 318 (1995).

98. Lustbader, *supra* n. 14 , at 327. "Experts also internalize and organize the conventions of a particular discourse according to specific patterns of thought. . . . Without such schemata, a novice, who may understand the specifics of a substantive area, will be unable to use her knowledge effectively because she will not know the structure of the discourse, the order in which to present ideas, when to empathize different concepts, and what information she needs to make explicit versus what information is understood implicitly." *Id.* Matlin, *supra* n. 67, at 153; Driscoll, *supra* n. 19, at 136.

99. Matlin, *supra* n. 67, at 153, 366; Gredler, *supra* n. 62, at 225.

norms, conventions[,] and contexts of writing that constitute legal literacy."[100] Thus, instruction regarding aspects of legal discourse is necessary to prepare students to enter the legal field.[101]

3. Metacognition

Cognitivists also emphasize the importance of teaching students to be cognizant of how they learn.[102] Metacognition involves an individual's continuous recognition of, and reflection on, how that individual learns. Basically, "metacognition involves thinking about thinking."[103] It is a skill at which experts tend to be proficient.[104] The premise is if students understand how they learn, they will be able to employ effective study methods.[105] Accordingly, first, students should be taught how different study methods produce different results.[106] Second, students should individually discover which study methods work best for them for the type of learning required.[107] Third, students should continually monitor their learning progress and modify learning methods as needed.[108]

In the law school context, a similar skill is needed to transform a fledgling law student to a practicing attorney: "autonomous learning, the ability to learn what needs to be learned to cope with a novel situation. . . . [B]y helping the student discover how she learns, (as differentiated from providing her with simply 'what to learn'), a teaching institution produces a better law student and a much better lawyer."[109] Because metacognition is a needed skill for a

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100. Dean Bell & Penelope Pether, *Re/Writing Skills Training in Law Schools — Legal Literacy Revisited,* 9 L. Educ. R. 113, 116 (1998).

101. *See* Saunders & Levine, *supra* n. 37, at 142.

102. Schwartz, *supra* n. 24, at 376. Further, learners develop their own encoding strategies and some learners will not benefit from other strategies imposed by an instructor. Driscoll, *supra* n. 19, at 92. "For this reason, there has been considerable interest in determining how learners may be taught to develop and use their own strategies effectively." *Id.* Mastery learning also emphasizes the importance of metacognition. *See supra* n. 53 and accompanying text.

103. Saunders & Levine, *supra* n. 37, at 141.

104. *Id.* Experts "test and monitor their strategies" throughout a problem solving process and will "check and crosscheck their emerging deductions . . . ." Gredler, *supra* n. 62, at 225.

105. Wangerin, *supra* n. 68, at 476, 479.

106. *Id.* at 476. "Three of the cognitive activities — memorization, selection, and integration — lead directly to specific study outcomes. Memorization leads to verbatim knowledge. Selection, which involves differentiating between and within sources of information, produces interpreted knowledge. Integration, which involves the study of new material in light of previously studied material, leads to constructed knowledge." Nancy Millich, *Building Blocks of Analysis: Using Simple "Sesame Street Skills" and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing,* 34 Santa Clara L. Rev. 1127, 1151 (1994) (footnotes omitted).

107. Lustbader, *supra* n. 14, at 324; Wangerin, *supra* n. 68, at 476, 479.

108. Lustbader, *supra* n. 14, at 325; Wangerin, *supra* n. 68, at 476-77, 479.

109. Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy,* 36 Ariz. L. Rev. 667, 683 (1994) (footnote omitted).

competent new attorney,[110] teachers should encourage students to actively think about their learning process to become proficient at metacognition.[111]

C. Constructivism

Constructivism, the third broad category of learning theories, differs from both behaviorism and cognitivism because it disavows the idea of absolute truth.[112] Its premise is that "knowledge is always knowledge that a person constructs."[113] Piaget was a founder within the cognitivist movement but was ultimately a constructivist.[114] Constructivists agree with cognitivists that learning occurs in the mind, but they do not believe that students assimilate instruction intact.[115] Instead, constructivists believe that learners create knowledge from their own interpretation of instruction in light of their experiences and the social environment in which they learn.[116]

There are four general characteristics of constructivism. First, learners construct their own understanding, "rather than having understanding delivered to them in already organized forms."[117] Constructivism, like cognitivism, is based on the idea that learning occurs through the change in cognitive structures, the difference is that instruction is not delivered intact to students so as to be synthesized with the students' knowledge base.[118] Instead,

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110. *Id.*

111. Schwartz, *supra* n. 24, at 376-78; Schunk, *supra* n. 24, at 184.

112. Schwartz, *supra* n. 24, at 379-80.

113. Marie Larochelle & Nadine Bednarz, *Construction and Education: Beyond Epistemological Correctness*, in *Constructivism and Education* 3, 3 (Marie Larochelle, Nadine Bednarz & Jim Garrison eds., Cambridge U. Press 1998).

114. Piaget is quoted as stating, "I am a constructivist. I think that growth in knowledge is a matter of continual new construction as a result of interaction with reality, and is not pre-formed. There is continual creativity of the mind." Bernie Poole, Donna Hendry & Rebecca Randall, *Motivational Quotations for Teachers*, http://www.pitt.edu/~poole/ARCHIVE3 .html (last updated Nov. 24, 2003) (located within the section providing quotations by Bernard John Poole). Radical constructivists "believe that no reality exists outside of the individual's mental world." Schunk, *supra* n. 24, at 230. On the other hand, constructivists such as Piaget believe that mental schema develop to reflect reality. Gredler, *supra* n. 62, at 72.

115. Swartz, *supra* n. 24, at 380; Larochelle & Bednarz, *supra* n. 113, at 8. "Knowledge cannot be transmitted; it cannot be neutral either. Instead, it is constructed, negotiated, propelled by a project, and perpetuated for as long as it enables its creators to organize their reality in a viable fashion." *Id.*

116. Schunk, *supra* n. 24, at 229; Schwartz, *supra* n. 24 , at 380.

117. Kauchak & Eggen, *supra* n. 35, at 230; Gredler, *supra* n. 62, at 72. "Learners, therefore, are not empty vessels waiting to be filled, but rather active organisms seeking meaning. Regardless of what is being learned, constructive processes operate and learners form, elaborate, and test candidate mental structures until a satisfactory one emerges." Driscoll, *supra* n. 19, at 376 (reference to sources omitted).

118. Driscoll, *supra* n. 19, at 376; George W. Gagnon, Jr., & Michelle Collay, *Designing for Learning: Six Elements in Constructivist Classrooms*, 25 (Corwin Press, Inc. 2001). "We think about knowledge as the *patterns of action* constructed personally by students who make their own meaning. We do not think about knowledge as *objects* that can be transmitted in neat little packages from teachers to students." *Id.*

students create and construct understanding from their interpretation of the instruction based on their experiences.[119]

Closely related to this idea is the second characteristic — new learning depends on current understanding.[120] To constructivists, students interpret new information "in the immediate context of students' current understanding, not learned first as isolated information that is later related to existing knowledge."[121] Constructivists recommend "[r]evisiting the same material, at different times, in rearranged contexts, for different purposes, and from different conceptual perspectives"[122] to aid students in constructing information. By presenting the same information in several different formats, even using different senses, such as visual, auditory or tactile, the instruction is more likely to establish a link to students' current understanding, making the ideas meaningful to the student.[123]

Third, constructivists emphasize the need for social interaction among students to enable students to refine their ideas in light of other students' understanding.[124] "[C]ollaboration enables insights and solutions to arise synergistically . . . that would not otherwise come about."[125] Social discourse between the teacher and the students provides the teacher feedback as to the students' understanding of the material.[126] Additionally, social interaction provides feedback to the student. Students can assess whether their viewpoint is valid in comparison to the teacher's and other students' viewpoints, providing "them with additional information that helps them continue to construct and reconstruct their understanding."[127]

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119. Driscoll, *supra* n. 19, at 376; Swartz, *supra* n. 24, at 380; Kauchak & Eggen, *supra* n. 35, at 230, 232. "As learners, we don't behave like tape recorders. Rather than recording and storing exact copies of what we hear or read, we modify the information so that it makes sense to us. So what we store in our memories is the result of our own efforts to understand what we've experienced." *Id.* at 230.

120. Kauchak & Eggen, *supra* n. 35, at 231, 233. "New experiences are perceived through the lenses of old knowledge, so individuals will make different meaning from the same event based on their prior knowledge." Gagnon, Jr., & Collay, *supra* n. 118, at 58. " 'Learning is not discovering more but interpreting through a different scheme or structure.' " Jacqueline Grennon Brooks & Martin G. Brooks, *In Search of Understanding: The Case for Constructivist Classrooms* 5 (Assoc. for Supervision & Curriculum Dev. 1993) (reference to quoted source omitted).

121. Kauchak & Eggen, *supra* n. 35, at 233; Driscoll, *supra* n. 19, at 376-77.

122. Driscoll, *supra* n. 19, at 387. "In fact, many law professors already strive to develop multiple arguments with respect to legal issues and have found that the process seems to enhance students' understanding of the materials." Schwartz, *supra* n. 24, at 382.

123. Kauchak & Eggen, *supra* n. 35, at 238; Driscoll, *supra* n. 19, at 387-88. This idea is consistent with the information processing theory. *Id.*

124. Kauchak & Eggen, *supra* n. 35, at 233; Driscoll, *supra* n. 19, at 385.

125. Driscoll, *supra* n. 19, at 385 (reference to source omitted); Schwartz, *supra* n. 24, at 381. "Small groups are necessary for students to move from personal meaning to shared meaning in the social construction of knowledge." Gagnon, Jr., & Collay, *supra* n. 118, at 36.

126. Kauchak & Eggen, *supra* n. 35, at 237.

127. *Id.* at 240; Driscoll, *supra* n. 19, at 385.

Fourth, constructivists believe that teachers should use authentic learning tasks to help students understand the complexities that arise in actuality.[128] Constructivists emphasize instruction that uses a problem-based approach, focusing on real-world situations.[129]   These complex problems should challenge students' current understanding, forcing students to construct new understanding to solve the problems, thus better preparing them for tasks they will face.[130]

As applied to law school education, a clinical and externship experience would provide a variation in instruction and allow students to construct an understanding of legal doctrine and skills through work on real problems for real clients in a social context.[131] Yet a clinical or externship experience may not be available to all students. And more important, it need not be the sole method for providing constructivist instruction. A broad exposure to writing exercises that require drafting documents actually used within that legal discipline to solve simulated real-world problems can provide a realistic learning situation.[132]

III. Common Themes in Learning Theory

Several themes emerge from this review of learning theories. First, instruction should begin at a point within a student's current understanding, requiring that teachers start with the basics within a subject and then

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128. Driscoll, *supra* n. 19, at 383; Schwartz, *supra* n. 24, at 380; Kauchak & Eggen, *supra* n. 35, at 233-34.

129. Kauchak & Eggen, *supra* n. 35, at 242; Driscoll, *supra* n. 19, at 383; Schwartz, *supra* n. 24, at 380. "[A] situation should relate to a 'real-world' context as much as conditions of the learning episode permit." Gagnon, Jr., & Collay, *supra* n. 118, at 18.

130. Kauchak & Eggen, *supra* n. 35, at 242; Driscoll, *supra* n. 19, at 383-84.

131. *See* Schwartz, *supra* n. 24, at 380-81. Because clinical experiences come after the first year, it is hoped that the students will have learned information needed as a basis for doing the work.

132. It has been asserted that to incorporate a real-world setting, students must, for example, in a contracts class work on "real problems raised by real clients with respect to real contracts." Schwartz, *supra* n. 24, at 381. And it has been said that "aside from less far-reaching proposals to include simulations[,] . . . this aspect of the constructivist approach seems unlikely ever to be adopted in substantive law courses." *Id.* Although such an idea perhaps is a pure form of the constructivist idea, such a pure form need not be the only form. Professors can create complex, multi-layered problems that simulated the real-world. Having students draft documents that practitioners would use within several legal disciplines provides a real-world experience far beyond a typical law school examination and thus is true to the constructivist ideal. Further, constructivism is applicable to all levels of education, and this fourth factor has been described, not as a mandate for a real-world setting, but that "[m]eaningful learning occurs within authentic learning tasks," or "realistic learning situations." Kauchak & Eggen, *supra* n. 35, at 231, 233. These terms have been defined as "a learning activity that requires understanding similar to the understanding required in the real world." *Id.* at 234. Further, the authors point out that "in an ideal world, learners would be able to use these natural processes to construct functional understandings of their world. Since this isn't realistic and doesn't always occur, teachers can capitalize on these same processes by bringing representations of the world into the classroom for students." *Id.* at 238

introduce increasingly complex material, involving increasingly complex cognitive skills. Starting in behaviorism with B.F. Skinner, it has been advocated that instruction begin with introductory materials within the student's learning capabilities and move to more complex material only when the student is ready.[133] Bloom's Taxonomy of Educational Objectives also demonstrates that students must start with basic knowledge before proceeding to more complex levels of thinking.[134] And a basis of mastery learning, cognitivism, and constructivism is that students begin a curriculum with a pre-existing knowledge base.[135] Whether these theorists view learning as mastery of the subject, creation or modification of schema, or creation of understanding, they all agree that teachers must start with information within the student's pre-existing knowledge base and work towards the student's learning more complex materials that require more complex levels of thinking.[136]

A second theme is that students should be exposed to a variety of teaching methods. Related to the belief that each student begins with an individualized knowledge base, mastery learning, cognitivism, and constructivism advocate a variety of teaching methods to ensure that the instruction is linked to each student's knowledge base. Specifically, mastery learning advocates a variety of teaching methods to aid students who need to learn better or relearn the material.[137] Cognitivists believe that a variety of teaching methods, including those that encourage active student involvement, will increase or facilitate cognitive activity concerning the information whereby students will better encode the information.[138] Constructivists believe that exposure to different teaching methods will help students construct an understanding of the material, especially when the method incorporates social interaction.[139] Additionally, students' exposure to a variety of teaching methods aids them in understanding how they learn best so that they can become proficient at metacognition.[140]

A third theme is that students should apply what they are learning and receive feedback because they will develop a more thorough understanding of the material. This theme also began in behaviorism and has continued through subsequent emerging learning theories. Behaviorists believe that practice and feedback ensure that the students will learn because they will change their behavior and provide the desired response to the stimulus.[141]

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133. *See supra* n. 30 and accompanying text. Skinner would have disagreed that there are complex cognitive skills to be learned. He would have argued that any behavior is simply a chain of certain component behaviors. *Supra* n. 44.

134. *See supra* nn. 35-37 and accompanying text.

135. *See supra* nn. 47-48, 89-91, 120-123 and accompanying text.

136. *See supra* nn. 47-48, 89-91, 120-123 and accompanying text.

137. *See supra* nn. 51-52 and accompanying text.

138. *See supra* nn. 92-94 and accompanying text.

139. *See supra* nn. 122-127 and accompanying text.

140. *See supra* nn. 52-53 and accompanying text.

141. *See supra* nn. 31-32 and accompanying text.

Bloom's Taxonomy, by definition, provides that application is necessary to more complex forms of learning.[142]   And monitoring student progress and providing feedback is a critical component for a student's mastery learning because it allows for better learning or relearning if necessary during the course.[143]   Cognitivists believe that applying the information and receiving feedback will help students retain the information in long-term memory by facilitating the learner's appropriate encoding.[144]   Further, constructivist principles support the use of authentic learning tasks as a form of applying information. Learning occurs through the teacher's feedback on the student's performance of the task.[145]   It is inherent in all these theories that the feedback occur during the course, and that this feedback is something quite different from a final evaluation.[146]

The final theme is that students should be taught to be autonomous learners. Metacognition suggests that students will enhance their learning by being conscious of how they learn. Metacognition as a theory did not begin to impact learning theory until after behaviorism's decline in popularity. In fact, metacognition is incongruent with the behaviorist idea that the teacher controls the learning environment.[147]   Metacognition, however, facilitates mastery learning,[148] and cognitivists believe that experts have more developed schemata within a domain because they are proficient at metacognition.[149]

These four themes, when viewed in conjunction with compositional theories, establish a theoretical foundation for curricular revision and the basis of our proposal for writing-across-the-law-school curriculum.

IV. The Role of Composition Theories in the Law School Curriculum

While law schools have in general been slow to incorporate learning theories into curricular design, legal writing professors have embraced composition theories, which are often based on learning theories, in developing legal writing programs.   There is a body of legal writing scholarship that comprehensively charts the paradigmatic shift in legal writing programs from an emphasis on the written product to an emphasis on the writing process and social discourse.[150]   This section will briefly summarize the major compositional influences on legal writing programs.[151] The final

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142. *See supra* nn. 36-39 and accompanying text.
143. *See supra* nn. 49-52 and accompanying text.
144. *See supra* n. 93 and accompanying text.
145. *See supra* nn. 128-130 and accompanying text.
146. *See e.g. supra* n. 57.
147. *See* Thomas, *supra* n. 21, at 103.
148. *See supra* n. 53 and accompanying text.
149. *See supra* n. 104 and accompanying text.
150. A paradigmatic shift was first discussed in the context of teaching writing in Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing,* 33 C. Composition & Commun. 76 (1982).
151. There are several excellent sources that more fully develop how legal writing programs have been influenced by the composition theories discussed in this section. We

section of the article will explain how the proposed writing-across-the–law-school-curriculum program provides for incorporation of both learning and compositional theories in the upper-level curriculum.

A. Emphasizing the finished product

Initially, legal writing programs emphasized the finished product — e.g., the final draft of an office memorandum or appellate brief.[152]   This composition theory is known by several names: formalism, current-traditional model, and instrumentalism.[153]   It has been characterized in the literature mostly by its deficiencies, not the least of which is a seemingly incompatibility with subsequent compositional studies that emphasize the process of writing and the creation of knowledge and meaning.[154]

The product approach to writing focuses on document format and the formal requirements of writing, especially those leading to "good writing."[155] Students are often given documents to imitate in drafting their own, which subtly suggests that writing is a linear, rather than recursive, process: simply follow the format and create each section of the document in order.[156] The result is the erroneous impression that the writing process is separate from the thinking process[157] and divorced from the analytical process.[158] Moreover, with the instructional focus on the end product, professors' remarks on their

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provide only a brief overview. Readers wanting more information should consult the articles cited in this section, as well as the extensive sources cited in those articles. It would probably be folly, however, to assume there is a unified approach to composition studies among the theorists:

> In an influential study called *Composition-Rhetoric: Backgrounds, Theory, and Pedagogy* (University of Pittsburgh Press), the late Robert J. Connors, a professor of English at the University of New Hampshire, describes a field defined by seething hostilities: "Social constructionists criticize cognitivists. Marxists deride expressivists. . . . Philosophers feel ignored by empiricists, experimenters resent the criticisms of rhetoricians, and teachers feel despised by everybody."

Scott McLemee, *Deconstructing Composition*, Chron. Higher Educ. A16 (March 21, 2003).

152. Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 896 (2002).

153. *Id.* at 896. One scholar has referred to it as the "bad old days." Anne Ruggles Gere, *Narratives of Composition Studies*, 3 Leg. Writing 51, 52 (1997).

154. *See e.g.* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 50 (1994); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719, 720 (1997). For an engaging discussion of the political preference for the process approach, which emerged during the 1960s and '70s, because it was seen as reformist, see James D. Marshall, *"Of What Does Skill in Writing Really Consist?" The Political Life of the Writing Process Movement*, in *Taking Stock: The Writing Process Movement in the '90s* 45 (Lad Tobriner & Thomas Newkirk eds., Boynton/Cook Publishers 1994).

155. Wineburg & Oates, *Education's Promise*, *supra* n. 2, at 16 (noting also that the product approach has its roots in behaviorism).

156. Rideout & Ramsfield, *supra* n. 154, at 50.

157. Durako et al., *supra* n. 154, at 721.

158. Busharis & Rowe, *supra* n. 6, at 309.

students' papers may be more geared towards justifying the grade given rather than providing insight and guidance on how to improve the next writing assignment.[159]

The product approach, however, is not without redeeming qualities. Indeed, under the product approach, the finished product is judged by its ability to communicate with clarity and accuracy, which are hallmarks of good legal writing.[160] Several legal writing scholars have remarked on the need for some emphasis on the finished product.[161] But while most legal writing programs contain some elements of the product-based approach, the principal focus of many programs has shifted to the process and social discourse approaches. The challenge, however, is to reconcile all these approaches in the context of learning theories and to design the law school curricula so as to meet the primary objective of law schools — to train new lawyers.

B. Emphasizing the process

The shift from a compositional model that emphasizes the finished product to one that emphasizes the process — especially in legal writing programs — is rooted heavily in the cognitivist movement.[162] Rather than focusing on the final product, legal writing professors routinely intervene in the composing process — requiring multiple drafts, rewrites, and conferences.[163] More fundamentally, professors identify the steps taken as a writer moves from initial thesis to completed document.[164] The typical composing process involves at least four stages: pre-writing, drafting, revising, and polishing.[165] At each stage, the legal writing professor may intervene, acting as a writing coach, not just an evaluator. Further, through their writing, students construct knowledge and meaning.[166] In other words, the process of taking an idea or theory and developing it through writing provides multiple opportunities for students to create meaning, as well as develop judgment about how to communicate. One way this may occur is through encouraging students to engage in an internal dialogue — between

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159. Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57, 63 (2000).

160. Rideout & Ramsfield, *supra* n. 154, at 50.

161. *See e.g.* Parker, *supra* n. 6, at 565; Pollman, *supra* n. 152, at 897-98; Rideout & Ramsfield, *supra* n. 154, at 50.

162. Rideout & Ramsfield, *supra* n. 154, at 51.

163. Wineburg & Oates, *supra* n. 2, at 16-17.

164. Susan J. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489, 501 (2002).

165. Jessie C. Grearson, *Teaching the Transitions*, 4 Leg. Writing 57, 62 (1998); Wineburg & Oates, *supra* n. 2, at 16.

166. This view, that writing generates knowledge and meaning, has also been characterized as the "epistemic view." Rideout & Ramsfield, *supra* n. 154, at 55.

writer and reader — so as to move from a text that is writer-focused to one that is reader or audience-focused.[167]

Although there is no one, comprehensive "process" approach,[168] there are specific tenets identified as belonging to it:

[1] Teachers should take individual student's writing backgrounds, histories, and abilities into account when teaching writing.

[2] Writing is a way of thinking and learning, not just a means of recording thought or testing students' abilities.

[3] Writers use writing at different times for different purposes and move from writer-based prose (writing used to explore and explain ideas to the self) to reader-based prose (writing used to communicate ideas to the reader).

[4] Writing should be taught with some attention to the process writers engage in, not just to the documents that are produced.

[5] Students' best writing comes from topics students are interested in.

[6] Students' best writing contains a strong sense of individual voice.

[7] Writing is [a] collaborative — not a competitive — act. [169]

As influential as process theories have been to the teaching of writing, critics complain that they ignore the role that social context plays in composing and constructing knowledge and meaning.[170] In other words, process alone is inadequate for training expert writers, because socialization, particularly into a particular discourse community, is lacking. "The process of becoming an expert is at least as much a social process as an exercise of individual effort and intellect."[171]

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167. *See generally* Berger, *supra* n. 17 (providing an in-depth examination of New Rhetoric as a process for constructing thought and communicating).

168. Rideout & Ramsfield, *supra* n. 154, at 52. Some legal writing scholars have discussed the shift from formalism to process and social context under the term "New Rhetoric." *See e.g.* Berger, *supra* n. 17 (explaining the theoretical bases of New Rhetoric, discussing the compositional research supporting various strands of New Rhetoric, and providing numerous suggestions for implementing New Rhetoric in law school curricula); Pollman, *supra* n. 152, at 902-10.

169. Grearson, *supra* n. 165, at 62 (internal citations omitted).

170. *Id.* at 67; Rideout & Ramsfield, *supra* n. 154, at 57.

171. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 Leg. Writing 1, 13 (1991)

C. Emphasizing the discourse community

While the process approach often focuses on the individual student, the social discourse theory, while incorporating aspects of the process approach, "acknowledge[s] the social contexts within which writing takes place and, [therefore,] the ways in which writing generates meanings that are shaped and constrained by those contexts."[172] For writers to mature, especially in a particular field, they need to work with others who have expertise in that particular discourse community.[173] This is because "expertise cannot exist independently of a community of knowledge."[174] Thus, under this social-constructivist approach, as opposed to the cognitivist-constructivist or process approach,[175] the legal writing professor recognizes that students enter the legal discourse community as "novices" and assists them in mastering the linguistic conventions and strategies of that community.[176] Seen from this perspective, the professor's "task is not only to convey information but also to transform students' whole world view."[177]

As with the process approach, there are certain tenets common to the social-construction theory:

[1] Writers write within and are influenced by the sometimes unarticulated rules of the discourse communities they enter.

[2] Many problems students encounter are temporary and arise because students are confused about (or lack . . . knowledge about) the new rules and conventions of an unfamiliar discourse community.

[3] Expertise in writing *per se* is a myth; expertise exists within and in relation to a particular discourse community and what that community values.

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172. Rideout & Ramsfield, *supra* n. 154, at 56-57. For an influential article on the implications of the discourse model for legal writing programs, see Williams, *supra* n. 171. For a discussion of how the social context approach is an outgrowth of New Rhetoric, which divided into two schools — inner directed and outer directed — and how the social context approach is related to the latter, see Berger, *supra* n. 159, at 73-74; *see also* Berger, *supra* n. 17, at 157-59. For an in-depth discussion of these inner-directed and outer-directed schools, and their theoretical bases, see Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need to Know about Writing,* 3 PRE/TEXT 213 (1982).

173. Williams, *supra* n. 171, at 9.

174. *Id.* at 13.

175. *See* Pollman, *supra* n. 152, at 902-03 (discussing and comparing both movements).

176. Rideout & Ramsfield, *supra* n. 154, at 57-59.

177. Bizzell, *supra* n. 172, at 213. The author is "[u]ltimately . . . calling for the inspection of what some curriculum theorists have called the 'hidden curriculum': the project of initiating students into a particular world view that gives rise to the daily classroom tasks without being consciously examined by teachers or students." *Id.* at 237. She further explains that "[t]he kind of pedagogy that would foster responsible inspection of the politically loaded hidden curriculum in composition class is discourse analysis." *Id.* at 238.

[4] Writers are "written" by culture and context; writers making "individual" choices is a myth.

[5] Individual voice is a myth.

[6] Students best learn to write within a new discourse community by critiquing and reading "skeptically" texts produced within that community in order to see how each writer is written by culture and context.[178]

Legal writing scholars, while acknowledging that the social context approach arose as a reaction to the process approach, have successfully argued that the former enhances the latter.[179] Indeed, legal writing professors increasingly incorporate more social context into their legal writing courses in various ways, including creating "law firms" so that students can collaborate as members of a law firm, developing more realistic writing problems that force students to work with documents and records, and holding simulated conferences with the "senior partner."

As legal writing professors have become knowledgeable about how writers compose and construct meaning, and legal writing programs have become routinely informed and influenced by various composition theories, legal writing has begun to emerge as an academic discipline.[180]

Yet problems with students' writing persist. If law schools are serious about their central mission, to educate competent new lawyers, then curricular design must be informed by learning and composition theories.

A comprehensive writing-across-the-curriculum program in the law school context — writing in the discipline — offers a solution. The following proposal draws upon learning and composition theories, as well as well-known methodologies for teaching doctrinal law. It has the added advantage of integrating more skills into the curriculum — a subject that has received

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178. Grearson, *supra* n. 165, at 68.

179. Rideout & Ramsfield, *supra* n. 154, at 57-60. *See also* Grearson, *supra* n. 165, 67-73. Professor Grearson suggests that the social construction view can be polarizing to students and argues that the process and social contexts theories are best used in relation to one another — "one reminding us of the individual in the community, the other reminding us that communities are [made up] of individuals . . . ." *Id.* at 74

180. This is not to suggest that the legal academy has embraced legal writing as a discipline. Legal writing professors often face serious status issues, which is especially problematic because women predominate the legal writing field. Thus, there is a question of gender discrimination. *See generally* Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing* 50 J. Leg. Educ. 562 (2000); Jan M. Levine & Kathryn Stanchi, *Women, Writing, & Wages: Breaking the Last Taboo*, 7 Wm. & Mary J. Women & L. 551 (2001); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Leg. Educ. 313 (2000); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 Berkeley Women's L. J. 3 (2001). For a discussion of the various "castes" in the legal academy, see Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ALWD, *supra* n. 18, at 12.

considerable attention in legal scholarship.[181] It is meant to supplement legal writing and research programs, not supplant them, because legal writing "requires a pedagogy of its own,"[182] one that requires legal writing professors to keep abreast of compositional studies, as well as the various doctrinal subjects that form the bases of their writing assignments.

V. The Elements of a Writing-Across-the-Law-School-Curriculum Program

A comprehensive writing-across-the-law-school-curriculum program would increase writing in the doctrinal courses. It should require students to resolve legal problems and prepare legal documents, provide students with critical evaluations of and credit for the assignments, and offer students a breadth and depth of writing experiences. Each of these elements is more fully considered below.

A. Requiring students to resolve legal problems and prepare legal documents

Law students should be required to resolve legal problems within various legal disciplines and prepare documents common to those subject areas. This element does not require doctrinal faculty to "teach writing." It requires students to apply concepts they are learning in their doctrinal courses in the context of resolving problems and preparing documents. The assignment would become a "pedagogical partner,"[183] enhancing a student's doctrinal understanding of the subject while promoting the development of a student's communication skills.[184] Moreover, the assignments will add variety to the

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181. One of the more recent additions to the growing body of literature on the need to provide more skills training is volume 1 of the *Journal of the Association of Legal Writing Directors,* J. ALWD, which contains the proceedings from the *Erasing Lines: Integrating the Law School Curriculum Conference* that was jointly held by the Association of Legal Writing Directors, University of Minnesota Law School, and West in 2001 at the University of Minnesota Law School. For a thoughtful discussion on the benefits of, as well as the potential problems in, integrating the curriculum, see Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education,* 1 J. ALWD, *supra* n. 18, at 51.

182. Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of its Own,* 29 New Eng. L. Rev. 883, 896 (1995).

183. The term "pedagogical partner" is from Sossin, *id.* at 895.

184. Judge Harry Edwards, in a well-known essay, defined a "doctrinal education" as follows:

> [T]he law student should acquire a capacity to use cases, statutes, and other legal texts. The person who has this capacity knows the full range of legal concepts: the concepts of property law, and procedural law, and constitutional law, and so on. This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally this person can communicate the interpretive understanding, both orally and in writing.

lecture-based instruction of doctrinal courses, which learning theory shows has limitations, and will engage the students, increasing the likelihood that the information is made meaningful to the student and will be retained in long-term memory.

Specifically, as the students work to solve a challenging problem and provide their answers within a discipline-specific document, the students, so engaged, will be involved in "elaborative rehearsal," as that term is used in cognitivism. The students will necessarily link new information with existing information, creating or modifying cognitive structures to solve the problem and draft the document. This practical application of the doctrinal concept will help students to encode the information in long-term memory, creating a better chance that the students will retain and later be able to recall the information. Such thought process is not guaranteed in a traditional lecture format.

Requiring students to place the doctrinal concept in context while working on a concrete legal problem, as opposed to the students' trying to understand the concept alone, helps students who may not have understood the concept in isolation. Further, students who thought they understood the concept may not have realized the intricacies involved until they attempted to apply the concept to a concrete legal problem. Having completed the document, the students have a better understanding of the doctrine — learning is enhanced.

A well-designed assignment also teaches a methodology for analyzing a problem in that subject matter, and exposes students to a range of resources.[185] This is an important feature of a writing-across-the-curriculum program that seeks to assist students in entering the legal discourse community. Effective writing assignments that assist students in acquiring additional discipline-specific knowledge necessarily require immersing students in the resources and methodologies within various legal subjects. One does not approach a tax problem the same way one approaches a constitutional issue, torts issue, or corporations issue — to name just a few. Therefore, an assignment should help students learn how to articulate the issue so as to define the scope of their research and to interpret their facts in light of the fruits of their research. Moreover, students need more exposure to preparing various legal documents. Students, having been introduced into the legal discourse community and to higher levels of learning beyond rote memorization of knowledge in their legal writing courses, will be prepared for more complex assignments in doctrinal courses that also require higher-level thinking. In other words, the first-year writing course establishes a prior knowledge base from which students can progress into additional discipline-

185. This approach draws from the problem-based method of teaching law. For a useful discussion of this methodology, see Suzanne Kurtz, Michael Wylie & Neil Gold, *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 Dalhousie L. J. 797 (1990).

specific knowledge. Therefore, the vehicle that communicates that knowledge can and should be of a type encountered in that subject.

Assignments replicating legal practice issues are a key component of the constructivist view that authentic learning tasks are necessary to help students understand the complexities of real issues.[186] Thus, professors should go beyond having students draft memorandum on a subject within the doctrinal class. Instead, students should draft documents unique to that subject area. Legislation, jury instructions, divorce settlement agreements, condominium documents, deeds, and administrative regulations are just a few of numerous possible examples.[187]   Students should be given ill-structured problems, meaning those that, to the extent possible within the learning environment, mimic the multi-dimensional problems students will face in practice where there is often not an easy answer. Such problems will challenge students to use higher-level thinking and create new cognitive structures and understanding to creatively solve the problem. By drafting discipline-specific documents, students acquire more skills and knowledge, and have a better understanding of the legal discourse community.

The required document — the end product — can follow a more product-based approach, unless the professor chooses to incorporate a process-based pedagogy for the writing assignment. In this way, writing assignments in doctrinal courses may supplement and enhance a school's writing program.   Students need opportunities to apply the processes of writing-to-learn and composing that they learned in their legal writing courses. They need to become proficient in applying these and other skills they have learned to new situations. Moreover, they must learn that, ultimately, they have to take responsibility for the product they produce and that there are consequences to submitting a less-than-final draft. As one practitioner has noted:

> Lawyers in practice are generally judged by the final product they produce: the written, negotiated text. Clearly, in my firm, the first thing new lawyers will be judged upon is their writing. The fastest way to get ahead as a new lawyer is to be an able writer. The fastest way to fail is to be a poor writer.[188]

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186. *See supra* nn. 128-32 and accompanying text.

187. One of the authors had students in a professional responsibility course draft a request for an ethics opinion from the ethics committee of the State Bar of Michigan. Although a similar analysis could have been presented in a memorandum format, it was the author's opinion that the learning experience was enhanced because the students needed to think beyond the memorandum format and consider the governing procedures regarding drafting and submitting such a document.

188. Bryn Vaaler, *Compositional Practice: A Comment on "A Liberal Education in Law,"* 1 J. ALWD, *supra* n. 18, at 148, 149 (commenting as a practitioner).

B. Providing students with critical evaluations of and credit for their assignments

Professors should evaluate student performance and give credit on individual writing assignments. This element departs from the traditional view expressed by those who argue for more writing in the curriculum.[189] Students generally benefit from the efforts of doctrinal faculty seeking to incorporate more writing into their individual courses, but who do not necessarily want the burden of evaluating their students' assignments. Some doctrinal faculty may successfully use self-editing and peer-review as a way to provide evaluation. But a curriculum seeking to better prepare students to enter the profession should include an evaluation of whether students meet standards of professional competency. Furthermore, this evaluation by the professor should be part of the overall assessment of each student's performance for the course.

Evaluating a writing assignment is an accurate way of assessing students' knowledge and skills in a doctrinal area — it may in fact be more effective than the traditional examination. Each learning theory advocates as critical to student learning evaluative feedback during the course, as opposed to final evaluation.[190] Where a final examination is the only feedback provided to a student, opportunities have been forgone to enhance learning. If the pedagogical goal is to prepare students to competently enter the legal profession, then no excuse can be offered against educating students regarding their performance during a law school course. It is logical, and in the behaviorist tradition to which law schools still subscribe given the prevalence of the final exam, to require some performance during the course for the professor to monitor. This performance should be in line with the cognitivist theories, requiring higher-level thinking skills, such as application, analysis, synthesis, and evaluation, because more than rote memorization of acquired knowledge is required of newly admitted attorneys. Certainly, an examination during the course can require this higher level of thinking. But performance during the course in the form of solving a challenging problem and providing the answer in a document common within that legal discipline will allow a professor to monitor, and provide the student substantive feedback regarding, the student's progress not only as to the doctrinal concepts within the course, but also the student's progress in understanding the legal discourse community. As an alternative teaching method, such feedback, during the course, can provide instruction, illuminating connections with prior material, and provide alternative ways to learn or relearn the information. Although still very distant from the mastery learning ideal, it is a step toward the pedagogical goal.

Additionally, feedback from a professor helps students learn standards of professional competency and determine whether they have helped or harmed

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189. *See e.g.* Kissam, *supra* n. 6, at 164; Parker, *supra* n. 6, at 576.
190. *See supra* nn. 141-146 and accompanying text.

their client. Students also learn better how to adapt their writing for different purposes and audiences. Moreover, giving credit for the assignment provides sufficient conditions to ensure maximum effort. Students, therefore, take the assignment more seriously. This helps them get used to writing documents that count — reinforcing the fact that in practice, their written work, especially the final product, has consequences. Finally, providing evaluation helps to debunk the notion among some students that writing only matters to their legal writing professors, because when the only credit students receive for writing assignments is in their writing and seminar courses, a subtle, yet ultimately false, message is communicated that writing does not really matter in their doctrinal courses.

C. Offering students a breadth and depth of writing experiences

A curriculum that requires writing in doctrinal courses is best served by an institutional commitment to providing a coordinated and comprehensive program. There are two principal ways to institutionalize this commitment. First, the faculty can decide that all upper-level doctrinal courses will include a writing assignment. Second, the curriculum committee can identify a range of courses that students typically take, or are required to take, that lend themselves — as a package — to a variety of writing assignments.

1. *All upper-level courses*

This model is relatively easy to coordinate and ensures that students get a breadth of writing assignments. The sheer number of doctrinal courses will likely provide exposure to a wide variety of legal documents and a range of skills. A potential, but not highly likely, problem is all faculty deciding to have their assignments due at the same time. A faculty committee can act as a clearinghouse to inform faculty when assignments are due. If a substantial number of courses that students take in any given semester all have similar due dates, then some faculty may be willing to make adjustments. But some overlap of due dates is desirable. Students have to learn how to balance a number of client files. They need opportunities to learn how to manage their time.

2. *Selected doctrinal courses*

In this model, students could be required to take a set number of credits in doctrinal courses that require a writing assignment. For example, under this model, a school could determine that all upper-level required courses would include a writing assignment. Or a school could determine that writing assignments would be required in all the upper-level required courses, as well as those upper-level courses in specific practice areas where there are documents unique to that practice area, such as immigration law. There are

numerous possibilities given the variety of curriculum structures at law schools across the country. Considerations, however, should include providing a balance between litigation and transactional problems and exposure to a range of research sources and a variety of documents. While this model provides less flexibility to faculty involved in the program, it may lessen the necessity for on-going coordination: part of the planning could include the general timing of the assignments.

Both models, combined with a comprehensive legal writing and research program, provide a depth of writing experiences. Students will learn the methods that worked in resolving these problems, thus aiding the students in becoming autonomous learners and ultimately, competent attorneys. Even if a professor does not discuss specific metacognitive strategies available for completing the assignment, students will learn, by completing numerous writing assignments, the strategies that work best for them. Each assignment will ideally be within a different format, yet the student will employ global strategies applicable to each writing assignment. As they progress through the remainder of their law school tenure, they will drop unsuccessful strategies and retain those that produce successful results. Professors, as experts within their domain, can discuss how they approach these types of tasks and the strategies that are effective for them. Such specific examples will allow students to test and cultivate their own metacognitive abilities. Learning to approach, perform, and complete a challenging task within a discipline where the doctrinal concept is learned through practical application prepares students for the challenges that they will face in practice.

In selecting the doctrinal courses that will require a writing assignment, it could be decided that students will complete some of the assignments by working in small groups. Such collaboration, from a constructivist's viewpoint, allows for ideas to arise through social interaction that otherwise would not arise. Students learn from each other by sharing their knowledge of the material and jointly developing their understanding. Small groups have the added benefit of reducing the grading burden. Although this format brings the inevitable problems that arise when students must work together for a grade, the students will also acquire skills that may be needed in practice because legal work product is often the result of collaboration among colleagues.

Writing assignments in doctrinal courses also provide opportunities for collaboration between and among faculty. This collaboration could be mutually beneficial. Legal writing faculty can benefit from learning about the methodology for approaching a problem in a particular subject area. (How may of us really know what is involved in researching and resolving a tax problem?) Doctrinal faculty will find in legal writing faculty a rich resource in how to develop real-world writing problems and how to include, more generally, a skills agenda in a subject course.[191] The institution and the

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191. *See* Lisa Eichhorn, *The Role of Legal Writing Faculty in an Integrated Curriculum*, 1 J. ALWD, *supra* n. 18, at 86 (discussing legal writing faculty expertise in writing and analysis

profession benefit by breaking down the false dichotomy between substance and skills.[192]

VI. Concluding Thoughts on the Theoretical Justifications for Creating a Writing-Across-the-Law-School-Curriculum Program

Through the proposed writing-across-the-law-school-curriculum program, not only will law students gain a more meaningful understanding of certain doctrinal concepts and legal discourse, but they will also gain insight about how they learn. Having completed the first year, students will have a broader foundation of legal knowledge and will be able to address challenging, discipline-specific problems that simulate real legal issues. This variant in teaching method, and the students' active involvement in applying the doctrinal concepts to the facts of the problem, whether alone or in small groups, will improve students' understanding of the substantive doctrine, the legal discourse community, and of the complexities of legal issues that arise in practice. Over time, students will become aware of the processes they engaged to efficiently and effectively complete the assignments. This heightened awareness of how they learn, and the effective process they employed to solve problems simulating real legal issues, will better prepare them for the practice of law. Further, a professor's assessment of the student's written work product provides a necessary component to legal education. Evaluation of students' progress during a course is critical to students' learning. The proposed program begins to fill this gaping void in law school curricula.

The proposed writing-across-the-law-school-curriculum program is also consistent with, and reconciles, the role of composition theories in the legal academy. It provides students with repeated opportunities to apply what they have learned about the process of legal writing in their legal writing courses to new problems involving new rhetorical situations.[193] Further, it draws upon the benefits of the product approach by providing students with opportunities to create documents that conform to the formal conventions and expectations of the legal profession. Finally, and perhaps most important, it further facilitates students' entering the legal discourse community. The transition to this new professional discourse community is substantial and, at times,

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pedagogy); Suzanne E. Rowe & Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Integrate the Law School Curriculum*, 1 J. ALWD, *supra* n. 18, at 218, 222-24 (discussing the ways skills faculty can work with doctrinal faculty).

    192. *See* Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ALWD, *supra* n. 18, at 3, 3 (noting that doctrinal courses and skills courses actually share "as many similarities as they [do] differences").

    193. "A rhetorical situation is 'a complex of persons, events, objects, and relations presenting an actual or potential exigence, which can be removed or positively modified if discourse, introduced into the situation, can constrain human decision or action.' " Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861, 875 (1995) (quoting Lloyd Bitzer, *The Rhetorical Situation*, Phil & Rhetoric 1, 6 (1968) reprinted in *Contemporary Theories of Rhetoric* 381, 384 (Richard L. Johannesen ed., Harpercollins 1971).

overwhelming because it is so unfamiliar to them. This transition is further complicated because the writer's goals may be at odds with those of the intended reader.

> [The purpose of a new document] is communicative, to provide a succinct but complete analysis of a legal issue to someone else. That analysis is usually provided to a skeptical audience, trained to look for flaws, who must be persuaded that the analysis is accurate and valuable. The writer's job is to find what is required by "the law" often while trying to change, mold, avert[,] or diminish the impact of existing legal rules on the new situation.[194]

While legal writing faculty are indeed the experts in writing pedagogy, the goal of providing an education that prepares graduates to competently enter the profession must be shared by the entire faculty. Writing-across-the-curriculum pedagogy — or more specifically, writing in the discipline — offers a method for attaining that goal.

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194. DeJarnatt, *supra* n. 164, at 510.