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Citation: 1 Savannah L. Rev. 69 2014



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SAVANNAH LAW REVIEW

VOLUME 1 | NUMBER 1

TOWARD A DISCIPLINARY PEDAGOGY FOR LEGAL EDUCATION

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In the article, *Law Professors See the Damage Done by 'No Child Left Behind,'* Michele Goodwin discusses the effects of the No Child Left Behind Act¹ on law students.² Her article extends the musings of Kenneth Bernstein, a retired high school teacher, namely that No Child Left Behind creates a high school curriculum devoid of deep reading, critical thinking, and writing skills.³ Goodwin asserts that new law students are taught by the environment of testing created by No Child Left Behind to seek the answers while bypassing the processes to attain them.⁴ In reporting anecdotal evidence from the Association of American Law Schools annual meeting in January 2013, Goodwin posits that “[law] students’ writing skills are the worst [law professors] have ever encountered,” and

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¹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 115 Stat. 1425 (2002) (codified as amended in 20 U.S.C.), available at <http://www2.ed.gov/policy/elsec/leg/esea02/107-110.pdf>.

² Michele Goodwin, *Law Professors See the Damage Done by 'No Child Left Behind,'* CHRON. HIGHER EDUC. (Mar. 12, 2013, 11:40 AM), <http://chronicle.com/blogs/conversation/2013/03/12/law-professors-see-the-damage-done-by-no-child-left-behind>.

³ *Id.*

⁴ *Id.*

that “[t]he challenge of learning on their own is so overwhelming to some law students that it has become far more common for students to demand their professors’ notes.”⁵

Goodwin argues that No Child Left Behind is not solely to blame for students’ deficiencies in skills.⁶ Equally culpable are law schools that perpetuate the primacy of standardized testing by placing a disproportionate amount of weight on student scores from the Law School Admission Test (LSAT) in their admissions decisions.⁷ Almost since its inception, the LSAT has sustained critique that at best it is a predictor of how law students will do in their first year of law school.⁸ Regardless, its results reflect no deep measurement of the core skills students need for success as law students and practicing attorneys.⁹

Both Goodwin and Bernstein’s articles were published in the midst of the ongoing debate about law schools’ inability to prepare students for practice. However, before legal educators address the question of how to best prepare law students for lawyering there exists a preliminary one: if deep reading, critical thinking, and writing skills are the core skills needed to be both successful in law school and law practice, then how do we address these deficiencies in new law students? The inquiry begins not at creating practice ready lawyers, but at preparing law school ready students.

Preparing new students for the rigors of law school necessarily involves helping them to think about reading, critical thinking, and writing in a disciplinary context or discourse community. New law students move from the discourse communities formed around their undergraduate and graduate disciplines into a legal discourse community without context or explanation, which explains many of the frustrations they encounter throughout their legal education. As writing specialist Jessie Grearson wrote in her article *Teaching the Transitions*, “[w]e must not deny or exaggerate the differences in purpose, audience and context that arise among different disciplines and discourse communities. We must prepare students to expect those differences and to make transitions between dif-

⁵ Goodwin, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ See Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 LAW & PSYCHOL. REV. 57 (2009).

⁹ See Leah M. Christensen, *The Power of Skills: An Empirical Study of Lawyering Skills Grades as the Strongest Predictor of Law School Success (Or in Other Words, It’s Time for Legal Education to Get Serious About Integrating Skills Training Throughout the Law School Curriculum if We Care About How Our Students Learn)*, 83 ST. JOHN’S L. REV. 795 (2009).

ferent writing situations.”¹⁰ Law is a discipline consisting of two distinct discourse communities: the discourse community of the academy and the discourse community of practicing attorneys. Integration into any discourse community occurs primarily through reading and writing.¹¹ Without the ability to translate the reading and writing practices of their previous discourse communities into either legal discourse community, new law students are poised for excess struggle and, predictably, even failure in law school. Likewise, if law students are not thoroughly acquainted with the reading and writing conventions of the legal practice discourse community, they will continue to be unprepared for law practice.

Law schools are not alone in failing to provide content and explanation for students moving between discourse communities. Both legal educators and non-legal educators alike share and perpetuate the fallacy that writing exists outside of content and knowledge—outside of doctrine. Both are mistaken that writing is a “generalized” or “transparent” skill attained not through direct discipline-specific instruction, but “by a process of slow acculturation through various apprenticeship discourses.”¹² This rupture distinguishes writing in the disciplines from writing outside of the disciplines.¹³

Writing in the Disciplines (WID), a movement located within the larger Writing Across the Curriculum (WAC) movement, is a formal study of particularized reading and writing practices as they occur in academic disciplines.¹⁴ For WID scholars and adherents, writing and assimilating knowledge are linked; “writing [is] a way of knowing and learning” in the discipline.¹⁵ Because reading and writing serve as integration points for the study and practice of law, conceptualizing law in a disciplinary context requires legal writing to connect with the doctrine of WID. If writing is *the* core legal skill, then writing doctrine is the foundation of all legal knowledge and inquiry. The doctrine of WID is found in the study of rhetoric, more specifically, discourse and genre theory.

This Article explores WAC/WID and its application in legal educational contexts in six main parts. Part I is a brief history of the politics and pedagogy of disciplinary writing instruction in post-secondary education and in law schools. Part II places WAC/WID in its historical context at the University and in law schools, and investigates how efforts to

¹⁰ Jessie C. Grearson, *Teaching the Transitions*, 4 J. LEGAL WRITING INST. 57, 58 (1998).

¹¹ David R. Russell, *Writing Across the Curriculum in Historical Perspective: Toward a Social Interpretation*, 52 C. ENG. 52, 63 (1990).

¹² Michael Carter, *Ways of Knowing, Doing, and Writing in the Disciplines*, 58 C. COMPOSITION & COMM. 385, 385 (2007).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 387.

implement the same in law school curricula exacerbate the skills/knowledge divide. Part III is an introduction to discourse and genre theory and its potential to aid legal educators in creating a writing-centered, discipline-specific pedagogy in law schools. Part IV provides an example of a writing-centered, discipline-specific curricular model using WID pedagogy. Part V discusses how discourse and genre theory can help pre-law and new law students build bridges between legal and non-legal discourse communities—undergraduate disciplines, graduate disciplines, and the law. Lastly, Part VI provides a specific teaching example utilizing discourse and genre theory to demonstrate how to build those bridges between different discourse communities. This Article concludes with a brief discussion of the barriers and benefits to implementing a writing-centered curriculum in law schools.

I. *The Foundational Politics and Absent Pedagogy of Disciplinary Writing*

The most comprehensive history of writing at the university level is David Russell's *Writing in the Academic Disciplines: A Curricular History*.¹⁶ Russell's work traces the conflict inherent in resolving the following questions about writing instruction in post-secondary education:

Is writing a set of discrete mechanical skills or a function of maturing thought? Should students be able to generalize instruction in writing to a variety of situations, or do students need help in discerning the requirements imposed by different contexts? Should writing be regarded as transparent (an intrinsic skill), or should writing be highlighted as a powerful means of learning? Is writing something that the chosen few learn to do without being taught, or should writing instruction provide mobility within a democratic society?¹⁷

For Russell, both contextualizing and answering these questions requires examining the choices universities made in crafting a writing curriculum (or its absence) and the politics informing those choices.

The University, prior to 1870, existed without formal academic disciplines.¹⁸ Until that time, writing was largely a proxy for speaking, and formal writing instruction ended at the elementary school level.¹⁹ The formation of academic disciplines required different types of writing, also known as genres, used to communicate more than what a particu-

¹⁶ DAVID R. RUSSELL, *WRITING IN THE ACADEMIC DISCIPLINES: A CURRICULAR HISTORY* (2d ed. 2002).

¹⁷ Elaine P. Maimon, *Foreword* to DAVID R. RUSSELL, *WRITING IN THE ACADEMIC DISCIPLINES: A CURRICULAR HISTORY*, at ix (2d ed. 2002).

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 3.

lar person or group of people in a discipline had spoken.²⁰ Rather, the various genres that developed in disciplines expressed and critiqued the ideas of a community of thinkers.²¹ In this sense, the formation of disciplines marked the nascent formation of discourse communities. Within each community or discipline, linguistic rules necessary for inclusion and exclusion developed.²² Becoming salient in the rules for inclusion in a discipline or discourse community meant gaining literacy, which remains a prerequisite for becoming credentialed generally or as a professional participant in a particular discourse community.²³

As a general proposition, all disciplines have the following characteristics: “specialized vocabularies, conventions, styles, genres [types of writing]; criteria for judgment; uses for texts; and intertextual systems [a system of how the texts relate to each other], as well as forums [places where the members of the disciplines speak to one another] such as conferences and journals.”²⁴ Gaining literacy in a discipline requires mastery of its characteristics, which is usually a prerequisite for credentialing generally or as a professional in the discipline. For example, a college student majoring in Music Composition and Theory must understand the rules necessary for inclusion in the discipline—the rules necessary to become literate. She must learn the specialized vocabulary of the discipline; the conventions and styles necessary for creating theoretical and compositional forms; uses for theoretical and compositional forms in creating compositions for various genres; the relationship between theoretical and compositional forms in creating compositions for and across genres; the criteria by which the discipline judges the correctness and quality of compositions; and the places where people in the disciplines talk about compositions and compositional techniques. The level of literacy determines the type of credential for professionals in the discipline itself (Bachelor of Arts, Master of Arts, Doctor of Philosophy) or professionals who utilize various degrees of literacy in the disciplinary knowledge for entrance into a related profession (e.g., the level of disciplinary knowledge necessary for a career as a film composer).

The advent of academic disciplines in the post-1870 University carried forward no pedagogies for teaching students the rules for gaining

²⁰ Maimon, *supra* note 17, at 4-5.

²¹ *Id.*

²² Russell, *supra* note 11, at 53.

²³ *Id.*

²⁴ Charles Bazerman, *Writing in the Disciplines*, in *ENCYCLOPEDIA OF ENGLISH STUDIES AND LANGUAGE ARTS: A PROJECT OF THE NATIONAL COUNCIL OF TEACHERS OF ENGLISH: VOLUME II 1309, 1310* (Alan C. Purves et al. eds., 1994), available at <http://www.education.ucsb.edu/bazerman/chapters/chapters1.html>.

literacy in a particular discipline.²⁵ None existed.²⁶ As disciplines fractured the thought life of the University, the divide between writing skills and learning content in the disciplines widened.²⁷ Writing was viewed as a type of captured speech or observation, with consistent standards for production rooted in grammar, structure, and usage.²⁸ The assimilation of these mechanics for “good” writing was considered necessary but wholly unrelated to knowledge acquisition in a particular discipline.²⁹ The result for writing instruction was to remediate it; writing courses, like the ubiquitous freshman composition course, were considered the baseline for providing access to any discipline instead of being integral to learning within a discipline.³⁰ Thus, both writing and writing instruction became ancillary to the main purpose of the University—an almost anti-intellectual pursuit.

This phenomenon was not divorced from the changing demographics of the University.³¹ Universities in the nineteenth century were primarily comprised of wealthy, White male teachers and students.³² The turn of the century marked the inclusion of diverse groups (e.g., immigrant men and women, non-elite White males).³³ However, the inclusion of these groups did little to challenge the perceived normative nature of writing skills that existed in the pre-twentieth century homogeneous University.³⁴ Rather, their presence reified the marginalization of writing instruction; such instruction served a gate-keeping mechanism, an assurance that quality was not sacrificed in favor of access.³⁵ Perceptions about what writing skills did exist and should exist in “legitimate” members of the academy directly negated the notions that: writing is necessary for deep learning, writing can and should be taught, and writing is how new members of a discipline become literate in that discourse community.³⁶ In fact, academics and their institutions associated widespread access to

²⁵ RUSSELL, *supra* note 16, at 5.

²⁶ *Id.* at 3-5.

²⁷ *Id.* at 8-9, 20-21.

²⁸ *Id.* at 6-10.

²⁹ *Id.* at 5, 7-8.

³⁰ RUSSELL, *supra* note 16, at 7-9, 15.

³¹ *Id.* at 20-21.

³² *Id.*; see also William M. King, *The Triumphs of Tribalism: The Modern American University as a Reflection of Eurocentric Culture*, in *TOWARD THE MULTICULTURAL UNIVERSITY* 21, 28-29 (Benjamin P. Bowser, Terry Jones & Gale Auletta Young eds., 1995).

³³ King, *supra* note 32 at 28-29; RUSSELL, *supra* note 16, at 20-21.

³⁴ RUSSELL, *supra* note 16, at 26-28.

³⁵ *Id.* at 26-30.

³⁶ *Id.*

disciplinary knowledge with dilution and lowered standards, and with a discipline's eventual loss of status. Obfuscation of disciplinary norms ensured both the discipline's primacy and exclusivity.³⁷

The rise of the modern law school and its eventual inclusion of writing instruction followed the same path as the modern University. The appointment of Christopher Columbus Langdell as Dean of Harvard Law School in 1870 marked a shift in legal education that would change its delivery nationwide. Prior to 1870, law training progressed from Inns of Court, or education by the observation of lawyers in practice and discussion of their practices,³⁸ to an apprenticeship method where aspiring attorneys learned the law and its practice by reading secondary sources (treatises) and through apprenticeships under senior attorneys.³⁹ Formal legal education was virtually non-existent.⁴⁰ When Charles Eliot assumed the presidency of Harvard Law School in 1869, his main goal was to create systematic programs of study throughout the curriculum in fitting with modern trends.⁴¹ Harvard Law School was the immediate recipient of Eliot's reform.

The Harvard Law School of 1869 was loosely patterned on the apprenticeship model.⁴² There was no systematic study resulting in a credential certifying competence to practice law and no relationship between the law degree and admittance to a state bar.⁴³ Langdell's Deanship not only ushered in a systematic program of legal study leading to an advanced degree (the LLB, now the J.D.), but also substituted the case method of study for the examination of treatises.⁴⁴ The case method of study required students to examine a collection of appellate court cases on a

³⁷ RUSSELL, *supra* note 16, at 12.

³⁸ See Donald B. King, *Old and New Models of Legal Education: Proposals for Change*, in LEGAL EDUCATION FOR THE 21ST CENTURY, 5, 5-6 (Donald B. King ed., 1999); David D. Garner, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 308-09 (2000); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 601-02 (1981).

³⁹ See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 11-13 (1997); Garner, *supra* note 38, at 309-10; McManis, *supra* note 38, at 601-02.

⁴⁰ See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 KAN. L. REV. 105, 109-12 (mentioning forays into more formal legal education, such as apprenticeship programs founded by famous lawyers and judges or college-sponsored professorships in law).

⁴¹ HENRY JAMES, CHARLES W. ELIOT: PRESIDENT OF HARVARD UNIVERSITY 1869-1909: VOLUME ONE 239-40, 262-63 (1930).

⁴² *Id.* at 266-67.

⁴³ *Id.* at 266-68.

⁴⁴ *Id.* at 269.

particular legal subject area in order to derive legal rules from them.⁴⁵ The case method went hand-in-hand with the Socratic method for ordering class sessions: professors examined students' mastery of legal rules by requiring students to apply and discuss the rules in the context of the professor's shifting hypothetical situations.⁴⁶

Like its University counterpart, the law school had no writing pedagogy to bring forward into its modern era. While there existed informal opportunities to practice writing,⁴⁷ legal writing was not recognized as a subject by the Association of American Law Schools until 1947.⁴⁸ Although more than forty schools offered legal writing as a subject in their curricula by 1950, these legal writing courses focused on addressing student deficiencies in grammar, structure, and usage.⁴⁹ This incarnation of legal writing courses viewed writing as a mechanical skill, separate and distinct from the legal subject matter courses, controversially called "doctrinal" or "substantive" courses, utilizing both the case and Socratic methods. The skills/doctrinal split continues into the present day despite the development of legal writing courses beyond "remedial" grammar courses. This split reflects the falsehood that plagues writing courses at the university level: that writing is unrelated to knowledge acquisition and an anti-intellectual pursuit ancillary to the doctrinal study of law.

Not to be discounted in the curricular development of legal writing courses is the changing demographics of the law school. Before 1950, American law schools were comprised almost exclusively of White, wealthy, male students.⁵⁰ Despite important, yet modest, gains through Civil Rights litigation,⁵¹ this trend would continue into the 1960s and

⁴⁵ JAMES, *supra* note 41, at 269.

⁴⁶ See Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 523 (1920); Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 506 (1920).

⁴⁷ See Romantz, *supra* note 40, at 127 (referring to the Pow Wow Club at Harvard, an informal moot court program where students could practice writing in various legal genres and present arguments before a mock panel of judges).

⁴⁸ *Id.* at 130.

⁴⁹ *Id.* at 128, 130.

⁵⁰ William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 6 (2003) (stating that approximately ninety-nine percent of law schools were White before 1950).

⁵¹ See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (requiring admission of African Americans to the University of Texas Law School in the absence of a suitable separate but equal facility); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 632-33 (1948) (leading to the admittance of the first African American woman to an all-White Southern law school due to the absence of a separate but equal facility for African Americans); *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337, 352 (1938) (requiring admission of African Americans to the University of Missouri School of Law); *Pearson v. Murray*, 182 A. 590, 594 (Md.

1970s.⁵² Spikes in law school admissions during this time precipitated the need to rely more heavily on standardized testing to sort and measure applicants' aptitudes for law school.⁵³ As a result, the LSAT shifted from being a possible resource⁵⁴ to being the primary resource, along with undergraduate grade point average (UGPA), for determining law school admission.⁵⁵ Law schools' overdependence on the LSAT had dire consequences for applicants of color; it effectively served to block their admission to law schools in substantial numbers.⁵⁶

Some law schools' responses to low minority law school admissions was to develop nascent Academic Support Programs (ASPs) aimed at recruiting those students to legal careers.⁵⁷ Early ASPs were mostly summer programs, such as those at Harvard, Columbia, and Berkeley (Boalt Hall) in the mid-to-late 1960s.⁵⁸ At their beginning and in their present incarnation, ASPs "diversify the legal profession by helping more diverse students gain admission into, remain and excel in, and graduate from law

1936) (requiring admission of the first African American to the University of Maryland Law School).

⁵² Kidder, *supra* note 50, at 4-5.

⁵³ Of this phenomena, Kidder writes that "[a]pplications to ABA law schools increased sharply between 1960 and 1975, particularly between 1968 and 1973. . . . LSAT administrations, a close proxy for application trends, jumped from 23,800 in 1960 to 133,316 in 1975, a stunning increase of 460%." *Id.* at 14 (citations omitted).

⁵⁴ Prior to the application boom of the 1960s and 1970s, schools used the LSAT to block Black students' integration into law school. It is telling that before law school admissions spiked, only Southern law schools, such as University of Mississippi ("Ole Miss"), Tulane, and the University of Florida College of Law, placed primacy on LSAT results in making admissions decisions. *Id.* at 17.

⁵⁵ Kidder observes that "[b]y the late 1960s and early 1970s, the LSAT was firmly established as the most influential factor in law school admissions decisions." *Id.* at 18.

⁵⁶ The Law School Admission Council (LSAC) collected data for African American, Chicano, and White fall-semester applicants to ABA accredited law schools in 1976-1979 and 1985. The data indicates in part that from 1975-1976, the lowest rate of White students' admission to ABA accredited law schools was 59% in 1976, compared to the highest rate of African American acceptance at 55%. During the period the data was collected, the total acceptance rate for African Americans at ABA accredited law schools was roughly two-thirds the acceptance rate for White students at those schools. The Chicano acceptance rate at ABA accredited schools in 1985 (67%) was 12% higher than the African American acceptance rate but 11% lower than the White acceptance rate at those schools (78%). The total acceptance rates for each racial group for each of the five reporting years (1976-1979 and 1985) is as follows: African American (44.6%); Chicano (55.4%); and White (65.9%). *Id.* at 23-25.

⁵⁷ *Id.* at 11.

⁵⁸ Kidder, *supra* note 50, at 11-12.

schools, so they can pass a bar examination and gain entry into the legal profession.”⁵⁹ What is striking about ASPs from a curricular perspective is that their creation links access to success in law schools with the inclusion of minority students, rather than the integration of all students into a legal discourse community.

When viewed in their historical context as both precursors and supplements to formal, affirmative action programs, the existence of ASPs reifies the notion that efforts to integrate students into a discourse community serve a gate-keeping function rather than a pedagogical one. The oppositional stance of ASPs to traditional law school pedagogy reinforces the notion that legitimate members of the legal academy possess or have the ability to assimilate legal disciplinary knowledge requisite for law school success *on their own*. If forced to alter its pedagogy to integrate new students into a legal discourse community, legal institutions dilute legal knowledge and lower the standards of the profession. The rhetoric around Affirmative Action, namely that it allows law schools to admit “‘unqualified’ and ‘unprepared’ students and [leads] to the ‘general debasement of academic standards,’” is instructive, despite being disproved.⁶⁰

⁵⁹ Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 840 (1997); see also Judith J. Devine & Jennifer D. Odom, *Do Academic Support Programs Reduce the Attrition Rate of First-Year Law Students?*, 29 T. MARSHALL L. REV. 209 (2004); Leslie Yalof Garfield, *The Academic Support Student in the Year 2010*, 69 UMKC L. REV. 491 (2001); Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995); Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member’s Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489 (2008); Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself be Fundamentally Changed?*, 73 UMKC L. REV. 497 (2004).

⁶⁰ Kidder, *supra* note 50, at 19 (citing Lino A. Graglia, *Special Admission of the “Culturally Deprived” to Law School*, 119 U. PA. L. REV. 351, 353, 360 (1970)). Kidder asserts that

admission standards were relatively more relaxed during the 1950s and early 1960s, when White men maintained virtually total control over access to legal education. For instance, at the University of Michigan Law School, the students of color in the entering class of 1971 had equivalent index scores to Michigan’s White male-dominated class of 1957. Yet nationally, these White males of the 1950s and early 1960s, the majority of whom would have been denied access to an ABA education under the more extreme competition that was the norm by the early 1970s, apparently performed well enough as the judges, professors, government officials, and law firm partners of their generation.

Kidder, *supra* note 50, at 19 (footnote omitted); see also Taj’ullah Sky Lark, *The Desegregation of Higher Education, Race Conscious Admissions Policies and the Federal Constitution: Beyond Brown vs. Board and Beyond*, 5 THE J. OF PAN AFR. STUD. 29, 35 (2012) (arguing, in part, that so called race-neutral admis-

Paula Lustbader's article *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs* gives insight to how traditional law school pedagogy assumes a requisite level of legal disciplinary knowledge.⁶¹ Lustbader argues:

[I]ndicators [such as the LSAT] are predictive of academic performance in law schools because they measure an applicant's current ability to think in a linear, hierarchical, compartmentalized manner. They do not, however, measure an applicant's ability to learn these patterns of thought. Thus, relying on traditional indicators presumes that law school pedagogy only refines these skills and does not teach them.⁶²

Academic Support Programs, as access points to disciplinary knowledge, are the ultimate illustration of the knowledge/skills divide; teaching students how to acquire disciplinary knowledge is separate and distinct from acquiring the knowledge itself.

II. *WAC/WID—History, Implementation, and the Skills/Knowledge Divide*

At the same time ASPs began to develop as points of access to legal education, writing professors at the University began exploring new ways to share responsibilities for writing across the curriculum. Their impetus in this new era, the 1970s, was the reality of integration resulting from hard fought legal victories in the 1960s, open admissions practices, and increasing distress nationally over high illiteracy rates in the United States.⁶³ Merrill Sheils's article *Why Johnny Can't Write*, which appeared in a 1975 issue of *Newsweek*, illustrates the public pressure for universities to improve student writing.⁶⁴ Sheils reported:

If your children are attending college, the chances are that when they graduate they will be unable to write ordinary, expository English with any real degree of structure or lucidity. If they are in high school and planning to attend college, the chances are less than even that they will be able to write English at the minimal college level when they get there. If they are not planning to attend college, their skills in writing English may not even qualify them for secretarial or clerical work. And if they are attending

sions policies at Universities are rooted in White supremacist history), *available at* <http://www.jpanafrican.com/docs/vol5no5/5.5Desegregation.pdf>.

⁶¹ Lustbader, *supra* note 59, at 840.

⁶² *Id.* at 843; *see also* RUSSELL, *supra* note 16, at 8-9, 15 (providing an analogous critique of non-legal graduate education).

⁶³ RUSSELL, *supra* note 16, at 271.

⁶⁴ Merrill Sheils, *Why Johnny Can't Write*, *NEWSWEEK* (U.S. ED.), Dec. 8, 1975, at 58, 58-65, *available at* http://disdblog.com/wp-content/uploads/2012/12/sheils_johnnycantwrite.pdf.

elementary school, they are almost certainly not being given the kind of required reading material, much less writing instruction, that might make it possible for them eventually to write comprehensible English. Willy-nilly, the U.S. educational system is spawning a generation of semiliterates.

....

Increasingly, however, officials at graduate schools of law, business and journalism report gloomily that the products of even the best colleges have failed to master the skills of effective written communication so crucial to their fields. At Harvard, one economics instructor has been so disturbed at the inability of his students to write clearly that he now offers his own services to try to teach freshman how to write. Businessmen seeking secretaries who can spell and punctuate or junior executives who can produce intelligible written reports complain that college graduates no longer fill the bill. "Errors we once found commonly in applications from high-school graduates are now cropping up in forms from people with four-year college degrees," says a personnel official for the Bank of America. Even the Civil Service Commission, the Federal government's largest employer, has recently doubled its in-house writing programs in order to develop adequate civil servants.

....

The reading and writing skills of most Americans have never been remarkable, and the inability of the average high-school graduate to write three or four clear expository paragraphs has been the object of scornful criticism at least since the time of Mark Twain, when only 7 per cent [sic] of the population managed to earn high-school diplomas. What makes the new illiteracy so dismaying is precisely the fact that writing ability even among the best-educated young people seems to have fallen so far so fast.⁶⁵

Aside from its uncanny parallel to the Goodwin article *Law Professors See the Damage Done by 'No Child Left Behind'*,⁶⁶ the Sheils article illustrates the struggle of academics and laypersons to identify the source of students' writing difficulties, primarily, whether the deficiency was "mechanical" skills or something more elusive.⁶⁷ It also raised questions of whether the responsibility for student writing lay in the ubiquitous freshman composition course or elsewhere. University writing professors

⁶⁵ Sheils, *supra* note 64, at 58-59.

⁶⁶ See Goodwin, *supra* note 2.

⁶⁷ See generally Sheils, *supra* note 64.

began to develop new theories of learning that would answer these questions and provide solutions.

It is quite fitting that the nation that defined “empire” through its expertise in colonization would give its neighbors across the pond theoretical and pedagogical strategies to teach writing to a diverse group of people. University writing professors found their theoretical grounding in *The Bullock Report*⁶⁸ and *The Development of Writing Abilities (11-18)* to create concrete cross-curricular writing practices.⁶⁹ *The Bullock Report* was a report of The Committee of Enquiry, a committee appointed in 1972 by then Secretary of State for Education, Margaret Thatcher.⁷⁰ Its charge was

[t]o consider in relation to [elementary and secondary] schools: (a) all aspects of teaching the use of English, including reading, writing, and speech; (b) how present practice might be improved and the role that initial and in-service training might play; (c) to what extent arrangements for monitoring the general level of attainment in these skills can be introduced or improved; and to make recommendations.⁷¹

The Bullock Report made key findings in its examination of teaching writing, namely that writing is more than just a means to test students on what they have learned; writing is a process that is integral to learning, writing is dependent on context, and the writing process can and must be taught.⁷² *The Bullock Report* eschewed privileging the teaching of writing as “skills” or a mechanical practice in favor of exploring writing as a fluid response to the context and purpose in which it arises.⁷³ Most importantly, *The Bullock Report* introduced the concept of shared writing responsibility across the curriculum, including the role of writing in acquiring disciplinary knowledge.⁷⁴ *The Bullock Report* states:

To achieve [a comprehensive writing curriculum,] we must convince the teacher of history or of science, for example, that he has to understand the process by which his pupils take possession

⁶⁸ COMMITTEE OF ENQUIRY APPOINTED BY THE SECRETARY OF STATE FOR EDUCATION AND SCIENCE UNDER THE CHAIRMANSHIP OF SIR ALAN BULLOCK, *THE BULLOCK REPORT: A LANGUAGE FOR LIFE*, 1975, HMSO (U.K.), <http://www.educationengland.org.uk/documents/bullock> [hereinafter *THE BULLOCK REPORT*].

⁶⁹ JAMES BRITTON ET AL., *THE DEVELOPMENT OF WRITING ABILITIES (11-18)* (1975); RUSSELL, *supra* note 16, at 278.

⁷⁰ *THE BULLOCK REPORT*, *supra* note 68.

⁷¹ *Id.* at xxxi.

⁷² *Id.* at 163-64.

⁷³ *Id.* at 165-72.

⁷⁴ *Id.* at 188-91.

of the historical or scientific information that is offered them; and that such an understanding involves his paying particular attention to the part language plays in learning. The pupils' engagement with the subject may rely upon a linguistic process that his teaching procedures actually discourage.⁷⁵

Renowned educator James Britton, along with four other scholars, gave some pedagogical grounding to *The Bullock Report's* findings in their book, *The Development of Writing Abilities (11-18)*.⁷⁶ This study sought to develop a way to describe both the similarities and differences in common genres utilized in each of the academic disciplines,⁷⁷ and to develop a system to categorize and classify such discourse.⁷⁸

The influence of both *The Bullock Report* and *The Development of Writing Abilities (11-18)* is evident in the research and practices that came to define the WAC movement in the United States. Janet Emig's article *Writing as a Mode of Learning*,⁷⁹ regarded as foundational for WAC, explored a main tenet of *The Bullock Report*: that writing and learning were linked. In articulating her article's thesis, Emig wrote that, "[w]riting serves learning uniquely because writing as process-and-product possesses a cluster of attributes that correspond uniquely to certain powerful learning strategies."⁸⁰ Her work introduced U.S. writing professors to the cutting-edge scholarship on composition and cognition from the U.S. and abroad and pushed her colleagues to give the WAC movement its curricular and pedagogical legs.⁸¹ It is important to note that at its inception and practical implementation, WAC and Writing In the Disciplines (later the WID movement) were part and parcel of each other.⁸²

Writing Across the Curriculum's implementation at the University, both historically and in its present state, has found form in two main curricular models: "college writing proficiency requirement[s]"⁸³ satisfied

⁷⁵ THE BULLOCK REPORT, *supra* note 68, at 188.

⁷⁶ JAMES BRITTON, LANGUAGE AND LEARNING (2d ed. 1992) (articulating many of the ideas in the original 1970 book that would later influence the authors of THE BULLOCK REPORT).

⁷⁷ *Id.* at 9.

⁷⁸ RUSSELL, *supra* note 16, at 279.

⁷⁹ Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122 (1977).

⁸⁰ Emig, *supra* note 79, at 122.

⁸¹ RUSSELL, *supra* note 16, at 278.

⁸² The split between WAC and WID developed in the 1990s, primarily reflective of the split between general education and disciplinary education. WAC was seen as a product of general education and characterized as "writing to learn," while WID was seen as product of disciplinary education and characterized as "learning to write." *Id.* at 310-12.

⁸³ *Id.* at 283.

through Writing Intensive courses (WIs)⁸⁴ and writing added to courses across the curriculum, in core courses or otherwise.⁸⁵ Interdisciplinary discussions about writing, especially the various genres of writing produced in the disciplines, usually preceded curricular decisions about how best to integrate it.⁸⁶

Despite gaining some traction in the University,⁸⁷ these curricular models are not without flaws. Writing Intensive courses, by their very nature, are isolated to a group or cluster of classes for which only certain members of an academic community are responsible.⁸⁸ Likewise, faculty who use the additive model of WAC may relegate writing to the edges of their course coverage and even develop resentment over having to teach it at all.⁸⁹ While the inclusion of more writing in the curriculum is definitely an improvement, the absence of pedagogies that sequence information so that students must grapple with disciplinary literacy in developmental stages stalls our movement toward a writing-centered pedagogy for learning.⁹⁰ Simply, “meaningfully [integrating] discipline-specific learning activities to produce increasingly more sophisticated levels of understanding and writing performance,”⁹¹ remains a barrier to fully exploiting the cognitive relationship between writing and learning.

Legal education stands in an oppositional posture to WAC’s promise

⁸⁴ RUSSELL, *supra* note 16, at 288.

⁸⁵ *Id.* at 282-83, 286-88.

⁸⁶ *Id.* at 283, 285-86

⁸⁷ As of 1987, 20-50% of colleges and universities reported having a WAC program. *Id.* at 309.

⁸⁸ *Id.* at 297.

⁸⁹ RUSSELL, *supra* note 16, at 292-98.

⁹⁰ JEROME S. BRUNER, *TOWARDS A THEORY OF INSTRUCTION* 49 (1966). Bruner is a cognitive psychologist and a pioneer in modern learning theory. Of sequencing information for learning, he wrote:

Instruction consists of leading the learner through a sequence of statements and restatements of a problem or body of knowledge that increase the learner’s ability to grasp, transform, and transfer what he is learning. In short, the sequence in which a learner encounters materials within a domain of knowledge affects the difficulty he will have in achieving mastery.

There are usually various sequences that are equivalent in their ease and difficulty for learners. There is no unique sequence for all learners, and the optimum in any particular case will depend upon a variety of factors, including past learning, stage of development, nature of the material, and individual differences.

Id.; see also Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51 (2010).

⁹¹ RUSSELL, *supra* note 16, at 281.

of a writing-centered, discipline-specific pedagogy. First, Legal Writing practice and pedagogy remain on the penumbras of the legal academy.⁹² The overwhelming majority of ABA accredited law schools provide only one full year of Legal Writing in the first year and “one additional rigorous writing experience” in the second or third year of law school; the ABA accreditation standards for law schools require nothing more.⁹³ The traditional Legal Writing curriculum utilizes primarily two genres from legal practice to teach legal reasoning and analysis: the legal memorandum, an objective piece of writing used to inform the reader about a probable outcome or outcomes for a client’s legal problem; and the legal brief, a persuasive piece of writing used to advocate for a client’s position. These pieces of writing are taught in the context of a legal subject area (Torts, Constitutional Law, Property, Criminal Law, etc.) that the Legal Writing professor or the director of a Legal Writing program⁹⁴ chooses.

The majority of law schools do not integrate Legal Writing into the core courses taught in the first year (e.g., Civil Procedure, Contracts,

⁹² See Lisa Eichorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105 (1998) (arguing that legal writing pedagogy remains marginalized in the legal academy because it is a “dangerous supplement” to traditional teaching practices in law schools); see also Ass’n of Legal Writing Dirs. & Legal Writing Inst. *ALWD/LWI 2013 Survey Report* i, v (2013), <http://www.lwionline.org/uploads/FileUpload/2013SurveyReportfinal.pdf> [hereinafter *2013 ALWD/LWI Survey*]. The Association of Legal Writing Directors (ALWD) and The Legal Writing Institute (LWI) conduct an annual survey on legal writing programs, legal writing instruction, and legal writing faculty. One hundred eighty-nine U.S. law schools responded to the 2013 Survey (a 95% response rate), which reports findings for the 2012-2013 academic year. *Id.* at i. The respondents reported that 45% of law schools employ their law professors who teach legal writing as full-time non-tenure-track faculty members, 36% employ a mixture of tenure-track, adjunct, and full-time non tenure-track professors, and 8% employ only adjuncts. *Id.* at v. Only 10% of law schools solely employ tenure-track professors to teach legal writing. *Id.*

⁹³ Standard 302 of the ABA Standards and Rules of Procedure for Approval of Law Schools states that: “(a) A law school shall require that each student receive substantial instruction in: . . . (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.” AM. BAR ASS’N, 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19 (2012), [hereinafter ABA Standards], available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

⁹⁴ Because the majority of law professors who teach legal writing are non-tenure-track, they are primarily organized in a program structure under the leadership of a director. See *2013 ALWD/LWI Survey*, *supra* note 92, at v; see also Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (Or Teaching In) a First-Year Legal Writing Program*, 29 VALPARAISO L. REV. 557 (1995); but see Jan Levine, “You Can’t Please Everyone, So You’d Better Please Yourself”: *Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VALPARAISO L. REV. 611 (1995).

Property, Torts, Criminal Law, Constitutional Law), but rather offer Legal Writing in the first and second semester as stand-alone courses.⁹⁵ As for the rigorous writing component beyond the 1L year required by the ABA accreditation standards, most schools approach these as electives. Students have the option to satisfy these requirements by taking courses utilizing different genres in practice (a Wills Drafting course or a Litigation Drafting course, for example) or by producing a scholarly piece of writing through work on a law review or a seminar course. The most ubiquitous type of writing in which students participate is the law school exam. These exams are administered as a summative assessment of what a student has learned in the class and usually account for 100% of a student's grade in a required course or other courses in the curriculum tested on the bar exam.⁹⁶ By its very nature, this method of testing evaluates what students know by divorcing that knowledge and its acquisition from what lawyers do. Given that this type of writing is the type with which students are most concerned, it carries the highest stakes—after all, it should be of little surprise that the bench and bar have critiqued legal education as disconnected from the work of practicing attorneys.

As a result of how legal writing courses are structured and placed in the law school curriculum, WAC/WID implementation is either in its in-

⁹⁵ There are some exceptions. *See, e.g.*, Suzanne J. Schmidt & Alice M. Noble-Allgire, *Reinvigorating the 1L Curriculum: Sequenced "Writing Across the Curriculum" Assignments as the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U. L.J. 287 (2012); Susan Thrower, *Teaching Legal Writing Through Subject Matter Specialties: A Reconciliation of Writing Across the Curriculum*, 13 J. LEGAL WRITING INST. 3 (2007).

⁹⁶ Students take courses, such as BARBRI and Kaplan PMBR, to prepare them for state bar exams; each course is tailored to a bar exam as administered in individual states. *See* Jonathan D. Glater, *Are Lawyers Being Overbilled for Their Test Preparation?*, 31 THE MONT. LAWYER 22, 22-23 (2006) (reporting that plaintiffs in a lawsuit against BARBRI alleged that it "operated an illegal monopoly and has overcharged hundreds of thousands of students by an average of \$1,000 each—or, collectively, by hundreds of millions of dollars."); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 371 (1996) (stating that "bar review courses [as of 1994] constitute a \$50 million-a-year industry that serves more than 45,000 students"). Given the presence of ASPs and bar support courses both in and out of law school, perhaps it is time for law schools to review the content of their curricula and its gaps in preparing students for the profession. Likewise, it would be prudent to explore the ways that the bar exam is disconnected from the practice of law. *See* Charles H. Whitebread, *Making the Bar Review Fun*, 9 GREEN BAG 2d 263, 264 (2006) (stating that "[t]he concept of the modern bar review is a combination of accumulating substantive knowledge and practicing test-taking technique. Usually, the early part of these courses is largely devoted to our substantive lectures, and the latter part to test-taking technique. No matter how much substantive law a student may learn from us, there is no substitute for writing sample essays for grading and constantly practicing with simulated multiple-choice questions. In the end, what correlates with success on a test? Experience with that test.").

fancy in the legal academy or non-existent. To the extent that it has been written about and implemented, curricular models that implement WAC/WID in law schools suffer from the same flaws and lack of pedagogical strategies as their university counterparts,⁹⁷ as well as some additional ones. Law school curricula often implement WAC/WID in its additive form. The addition of writing usually means more practice for exam-taking in doctrinal courses, rather than incorporating the genres that lawyers employ as a means of acquiring subject-matter knowledge.⁹⁸ While this

⁹⁷ See, e.g., Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965 (1999) (focusing on the additive model of WAC but includes a brief discussion of writing to learn subject matter beyond the law school exam); Pamela Lysaght, *Writing Across the Law School Curriculum in Practice: Considerations for Casebook Faculty*, 12 J. LEGAL WRITING INST. 191 (2006) (discussing the additive model of WAC in the context of integrating writing assignments utilizing legal genres beyond those typically covered in first year legal writing courses (e.g., memos, briefs, and client letters)); Andrea McArdle, *Writing Across the Curriculum: Professional Communication and the Writing that Supports It*, 15 J. LEGAL WRITING INST. 241 (2009) (discussing WAC primarily in terms of “writing to learn” and in the context of non-transactional writing or writing that does need to communicate information (e.g., expressive or personal writing)); Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing*, 16 J. LEGAL WRITING INST. 463 (2010) (discussing the additive curricular implementation of WAC); Carol McCrehan Parker, *Writing Is Everybody's Business: Theoretical and Practical Justifications for Teaching Writing Across the Law School Curriculum*, 12 J. LEGAL WRITING INST. 175 (2006) (advocating for the additive model of WAC); Schmitz & Noble-Allgire, *supra* note 95 (describing Southern Illinois University Law School's WAC Program, which although based on the additive model, requires substantive writing assignments (e.g., examinations, traditional legal writing assignments, or other genres offered sequentially)). *But see* Timothy W. Floyd, Oren R. Griffin & Karen J. Sneddon, *Beyond Chalk and Talk: The Law School Classroom of the Future*, 38 OHIO N.U.L. REV. 257 (2011) (discussing writing genres beyond the traditional first-year writing curriculum as integral to students learning the subject matter of a course, all in the context of learning theory and cognitive psychology); Michael J. Madison, *Writing to Learn Law and Writing in Law: An Intellectual Property Illustration*, 52 ST. LOUIS U. L.J. 823 (2008) (sharing a positive anecdotal account of using the legal memo to teach intellectual property law); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997) (advocating for using genres from legal practice to aid students in learning legal subject-matter, but as a supplement to doctrinal teaching methods).

⁹⁸ See generally Lustbader, *supra* note 59 (describing ASPs' purpose to help students succeed in law school, particularly in preparing for and writing exams); see also Teree Foster, *The College of Law's Academic Support Program*, 9 W. VA. LAWYER 6 (1996); Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269 (2011); Adam G. Todd, *Academic Support Programs: Effective Support Through Systemic Approach*, 38 GONZ. L. REV. 187 (2003); see, e.g., Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987) (focusing on the writing

method of writing may well be sufficient to initiate law students into the legal academic discourse community, it is insufficient to initiate them into the legal practice discourse community, where the vast majority of law students endeavor to be employed. Last, a common misperception that legal subject areas (e.g. Civil Procedure, Torts, and Contracts) themselves are disciplines, rather than being located within law as a discipline, denies the conceptual framework of a discourse community into which new law students must be initiated.⁹⁹ Thus, attempts to implement WID in doctrinal courses construed as disciplines miss the link between how genres common to all legal subject matters operate within the dictates of the legal practice discourse community to create legal knowledge.

III. *Discourse Theory & Genre Theory—Teaching What Lawyers Know by Teaching What Lawyers Do*

The study of law discussed throughout this Article takes shape in two discourse communities: the academic discourse community (the legal academy) and the practical discourse community (legal practitioners). Discourse theory is a way to understand the function of these communities in a manner that suggests pedagogical strategies for linking communicative forms (discourse) with knowledge acquisition. Discourse theory is the study of written and spoken texts, conversations in the disciplines, and how they shape social identity, language, and power within a given discipline (a discrete discourse community). The basis for understanding written and spoken texts is located in the study of the five canons of rhetoric: *Inventio*, *Dispositio*, *Elocutio*, *Memoria*, and *Pronuntiatio*.

Inventio (invention or discovery) is the methodical or systematic search for arguments.¹⁰⁰ It includes *topoi*, described as both the source for those arguments, as well as a means of categorizing the information in those sources for the purpose of clarifying the connections between various ideas.¹⁰¹ The latter is an exploration of how to employ those ideas

to learn aspect of WAC, but in the limited universe of exam-taking in doctrinal courses).

⁹⁹ See Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRS. 73 (2004) (viewing doctrinal law courses as disciplines with specific accompanying texts; these courses serve as a place for more writing after a student has already learned the basics of legal writing in their legal writing courses); Thrower, *supra* note 95 (viewing doctrinal law courses as disciplines in describing DePaul Law School's Legal Writing program, which teaches Legal Writing imbedded in these courses, but follows a largely traditional Legal Writing curriculum).

¹⁰⁰ EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 17 (4th ed. 1999).

¹⁰¹ Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in *TEXTUAL DYNAMICS OF THE PROFESSIONS: HISTORICAL*

to create arguments in the service of a particular rhetorical situation.¹⁰² *Dispositio* (arrangement or organization) is the methodical or systemic organization of arguments into effective written or spoken discourse.¹⁰³ *Dispositio* requires an author to make choices in organizing the information that ultimately serves the purpose of the discourse, and the purpose of the parts of the discourse (rhetorical purpose).¹⁰⁴ *Elocutio* (style) refers to the conventions used in the arrangement of arguments. Style is genre-specific and audience dependent, although some (e.g. grammatical conventions) transcend both.¹⁰⁵ *Memoria* (memory) is memorization or oratory and is connected to *pronuntiatio* (delivery), or the way the oratory is delivered.¹⁰⁶

The study of discourse communities, specifically the written discourse they create, is located in *Inventio*, *Dispositio* and *Elocutio*. These three canons together propagate the following questions, which reveal how writing is constructed along disciplinary lines: (1) What are the possible sources for arguments?; (2) How do we categorize the information in those sources for the purpose of locating arguments?; (3) How does an author compose arguments appropriate to a particular discipline and its modes of written communication?; (4) By which system or method does an author organize arguments for effective written communication?; and (5) Once the arguments are ordered, how do we communicate them to a desired audience?¹⁰⁷ The answers to these questions, which are ultimately the expression of how disciplinary knowledge is formed, are communicated in the various genres that a discipline employs.¹⁰⁸

A genre¹⁰⁹ is a “typified rhetorical action[] based in recurrent

AND CONTEMPORARY STUDIES OF WRITING IN PROFESSIONAL COMMUNITIES 88-91 (Charles Bazerman & James Paradis eds., 1991). Although Fahnestock and Secor’s work is specifically rooted in the study of literary theory, their articulation of these concepts is a common one. See ROBERT GOLDBLATT, *TOPOI: THE CATEGORIAL ANALYSIS OF LOGIC I* (1984) (describing *topoi* as category theory within the discipline of mathematics).

¹⁰² CORBETT & CONNORS, *supra* note 100, at 19.

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *Id.* at 21-22.

¹⁰⁶ *Id.* at 22.

¹⁰⁷ JANICE M. LAUER, *INVENTION IN RHETORIC AND COMPOSITION* 2-4, 6-7, 76-84 (2004); SHARON CROWLEY & DEBRA HAWHEE, *ANCIENT RHETORICS FOR CONTEMPORARY STUDENTS* 20 (5th ed. 2011).

¹⁰⁸ Carter, *supra* note 12, at 391-92.

¹⁰⁹ The discussion of genre in this Article is primarily concerned with rhetorical genres rather than literary genres. See generally Amy J. Devitt, *Integrating Rhetorical and Literary Theories of Genre*, 62 C. ENG. 696 (2000) (discussing the

situations.”¹¹⁰ Simply, a genre is a pattern of doing in the disciplines expressed in writing. Because similar and recurring situations require similar and recurring responses, a genre is a fluid expression of knowledge in a particular context. For example, the legal memorandum is a common genre used by legal practitioners. Its form (whether formal or as an e-mail analysis) is a response to a particular and recurring situation, gathering and organizing client narratives of their legal problems and legal authorities relevant to those problems for the purpose of presenting possible solutions to those problems. As a genre, the memorandum has some distinct functions. It is a tool for its author to acquire the knowledge necessary to solve a client’s legal problem, a fluid expression of legal knowledge, and a participant in creating legal knowledge. In its latter function, the memorandum is part of a genre system, which is a conceptualization of how similar genres work together to organize the recurring responses of a discourse community.¹¹¹

The written discourse of practitioners (legal memoranda, legal briefs, pleadings, client letters, wills, contracts, legislation, rules, etc.) is a genre system. Centering their creation separately and how each functions as a group in teaching the law will help legal educators link what lawyers know to what lawyers do. Such a curricular restructuring and its pedagogical practices have the potential to significantly diminish, if not completely eradicate, the rift between what students learn in the legal academy and what they need to know for law practice.

IV. *A Writing-Centered Curricular Model: Strategies for the 1L Year Curriculum*

Developing a writing-centered curricular model requires a radical restructuring of law school curricula. It is important to note that the typical law school curriculum exists more as a result of tradition than as a result of deliberate pedagogical choices. The ABA, in its accreditation function, only requires that law schools provide a system of legal education. It does not prescribe which system or even provide a model one.¹¹² The courses

similarities and differences among various discourse disciplines in search of a unified theory of genre).

¹¹⁰ See, e.g., Carolyn R. Miller, *Genre as Social Action*, 70 Q.J. SPEECH 151, 159 (1984) (rooting the study of genre in common types of written discourse produced in a discourse community).

¹¹¹ See Charles Bazerman, *Systems of Genres and the Enactment of Social Intentions*, in *GENRE AND THE NEW RHETORIC* 79-101 (1995); Carter, *supra* note 12, at 392; David R. Russell, *Rethinking Genre in School and Society: An Activity Theory Analysis*, 14 WRITTEN COMM. 504, 513-15 (1997).

¹¹² ABA STANDARD 301, Objective (a) states: “A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.” ABA STANDARDS, *supra* note 93, at 17. STANDARD 302, Curriculum (a) states that: “A law school shall require that each student receive substantial instruction in:

most likely to be required in the law school curriculum—Contracts, Property, Torts, Civil Procedure, Criminal Law, Constitutional Law in the 1L year and a host of bar tested courses in the 2L and 3L years—are all constructs that can be reconstituted more effectively to deliver the same information. For example, it is quite possible that a Torts course could be taught in the context of Insurance Law, as this is how most personal injury cases arise and are litigated in practice. However, Torts is taught as a 1L course and Insurance Law as an upper-division (2L or 3L) course, if it is taught at all. From a practice perspective, teaching Insurance Law as an entrée to Torts has the benefit of acquainting law students to basic Torts concepts through drafting the documents most common to insurance litigation. It has the bonus of introducing students to regulatory practice (e.g., practice in administrative agencies concerning workers' compensation) and other fora where personal injury cases are litigated.

A first step in reconstituting the law school curricula is to start with legal genres, the most common legal genres that occur in practice. These will be the genres through which legal knowledge is taught. A second step would be to map those genres across the curriculum, giving ample thought to: (1) which genres fit best with a particular course, and (2) sequencing, integrating “discipline-specific learning activities to produce increasingly more sophisticated levels of understanding and writing performance.”¹¹³ A third step would be to determine how many courses should be offered in each semester or quarter. Given the depth of information and the need to integrate writing pedagogies (primarily multiple formative assessments), the length of time for obtaining a J.D. may need to be extended, and/or schools may make more comprehensive use of the 3L year. Additionally, casebooks would require reconfiguring to more closely resemble textbooks, in which the appropriate genres would be linked to the concepts (presented via case method or otherwise) that they were best able to teach. These steps are illustrated in tabular form below.¹¹⁴

(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession.” *Id.* at 19.

¹¹³ RUSSELL, *supra* note 16, at 281.

¹¹⁴ I have not included types of writing necessary for the record-keeping functions of law practice, such as billable hours time sheets, memoranda to client files (meant to update subsequent readers on the file status), and client intake forms. This list is largely culled from Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119, 124-25 (2004).

Genres Common to Legal Practice

Litigation Genres	Transactional Genres	Other
Retainer Agreements	General Contracts (to which the client is a party)	Judicial Opinion Writing
Entry of Appearance	Shrink-wrap/Click-wrap Agreements (and other Contracts of adhesion)	Legislative Drafting
Complaint	Purchase Sale Agreements	Rule-Making/Regulatory Drafting
Answer	Deeds	
Client Letters	Leases	
Letters to Opposing Counsel	Mortgages	
Requests for Production	Promissory Notes	
Interrogatories	Construction Contracts	
Affidavits	Easements	
Preservation of Evidence Notices	Restrictive Covenants	
Subpoenas (including Subpoenas Duces Tecum)	Bailment Contracts	
Deposition Questions	Bills of Sale	
Office Memoranda	Wills	
Demand letters	Trust Agreements	
Motions (pre and post trial)	Powers of Attorney	
Briefs (including Memoranda of Points and Authorities and Memoranda in Support of Motions)	Partnership Agreements	
Trial Notebooks	Joint Venture Agreements	
Jury Exhibit Notebooks	Franchise Agreements	
Voir Dire Examination Questions	Articles of Incorporation	
Direct & Cross-Examination Questions for Witnesses	Corporate Bylaws	
Proposed Jury Instructions		
Proposed Orders		
Coverage Opinions		
Settlement Documents		
Mediation & Arbitration Agreements		
Plea Agreements		

Mapping Genres Across the Curriculum (1L year)

Courses	Civil Procedure	Contracts	Torts
Integrated Genres	Entry of Appearance Complaint Answer Client Letters Letters to Opposing Counsel Requests for Production Interrogatories Affidavits Subpoenas Deposition Questions Office Memoranda Motions Briefs Trial Notebooks Jury Exhibit Notebooks Voir Dire Examination Questions Direct and Cross-Examination Questions for Witnesses Proposed Jury Instructions Proposed Orders	General Contracts Shrink-wrap & Click-wrap Agreements Promissory Notes Bills of Sale Complaint Answer Client Letters Letters to Opposing Counsel Requests for Production Interrogatories Affidavits Subpoenas Deposition Questions Office Memoranda Demand Letters Motions Briefs Settlement Documents Mediation & Arbitration Agreements	Retainer Agreements Entry of Appearance Complaint Answer Client Letters Letters to Opposing Counsel Requests for Production Interrogatories Affidavits Subpoenas Deposition Questions Office Memoranda Demand Letters Motions Briefs Trial Notebooks Jury Exhibit Notebooks Voir Dire Examination Questions Direct and Cross-Examination Questions for Witnesses Proposed Jury Instructions Proposed Orders Coverage Opinions Settlement Documents Mediation & Arbitration Agreements
Courses	Property	Criminal Law	Constitutional Law
Integrated Genres	Deeds Leases Mortgages Promissory Notes Construction Contracts Easements Restrictive Covenants Bailment Contracts Bills of Sale Wills (when estates and future interests are taught) Powers of Attorney Client Letters Letters to Opposing Counsel Office Memoranda Demand Letters Motions Briefs Proposed Orders Settlement Documents Mediation & Arbitration Agreements	Retainer Agreements Entry of Appearance Complaint Answer Client Letters Letters to Opposing Counsel Requests for Production Interrogatories Affidavits Preservation of Evidence Notices Subpoenas Deposition Questions Office Memoranda Motions Briefs Trial Notebooks Jury Exhibit Notebooks Voir Dire Examination Questions Direct and Cross-Examination Questions for Witnesses Proposed Jury Instructions Proposed Orders Plea Agreements	Judicial Opinions Legislative Drafting Rule-Making/Regulatory Drafting Motions Office Memoranda Briefs

V. *Building Bridges to Pre-Law and New Law Students*

While restructuring law curricula as writing-centered would significantly improve a law student's ability to learn and practice law, there still exists a gaping chasm between pre-law and legal education in its present form. Law school is one of the few, if not the only, graduate or professional programs of study that does not meet its new students at the point of their last, most significant, educational experience. Generally, students who enter graduate programs are deepening disciplinary knowledge that they gained while earning an undergraduate degree in the same or similar discipline. In contrast, law school encourages and accepts graduates from any discipline. As discussed in Part I of this Article, admission to law school is based primarily on LSAT performance and UGPA. Neither the LSAT nor UGPA as assessment tools measure a student's mastery over the rhetorical requirements of their disciplines, namely the reading and writing that is necessary for initiation into and deep learning in a discipline.

Research on initiating students into a writing research community, and certainly law school and law practice are writing research communities, shows that students "need a specialized literacy that consists of the ability to use discipline-specific rhetorical and linguistic conventions to serve their purposes as writers."¹¹⁵ Thus, without a point of comparison for how the rhetorical requirements of an undergraduate and/or graduate discourse community converge with and diverge from the rhetorical requirements of the legal practice discourse community, new law students have difficulty understanding how their previous knowledge aids their knowledge acquisition in their new (legal) discourse community. It is this failure of formal initiation into a discourse community rather than the failings of students' undergraduate or graduate education to teach writing skills that might well account for this difficulty.¹¹⁶

Discourse and genre theory provide insight as to how *Inventio*, *Dispositio*, and *Elocutio* are expressed and utilized in non-legal genres and provide a common language to discuss those differences across disci-

¹¹⁵ Carol Berkenkotter, Thomas N. Huckin & John Ackerman, *Social Context and Socially Constructed Texts: The Initiation of a Graduate Student into a Writing Research Community*, in *TEXTUAL DYNAMICS OF THE PROFESSIONS*, 191 (Charles Bazerman & James Paradis, eds., 1991) [hereinafter *The Berkenkotter Study*].

¹¹⁶ See also Douglas Downs & Elizabeth Wardle, *Teaching About Writing, Righting Misconceptions: (Re)Envisioning "First-Year Composition" as "Introduction to Writing Studies"*, 58 *C. COMPOSITION & COMM.* 552 (2007) (reconceptualizing the ubiquitous freshman composition course as a course to think about writing, rather than maintaining it as an ineffective anecdote for poor student writing); Anne J. Herrington, *Writing to Learn: Writing Across the Disciplines*, 43 *C. ENG.* 379 (1981) (centering writing instruction in the disciplines as a way to improve student knowledge and writing).

plines. By teaching and talking about knowledge acquisition and creation in terms of genre, legal educators set multiple access points for pre-law and new law students to translate genres common to their disciplines into genres common to the legal practice discourse community. Such translation requires students to grapple with the function of language in their undergraduate and/or graduate disciplines and serves as a bridge to the function of language in the legal practice discourse community.

Moving to a writing-centered pedagogy in legal education would allow legal educators to use genres common to undergraduate and graduate disciplines as the lowest common denominator for translation and initiation into the legal practice discourse community. Even if legal education does not adopt a disciplinary pedagogy, there is tremendous utility in helping students to understand the similarities and differences between genres common to their non-legal disciplines and the genres they will be asked to produce in legal practice. Simply, “[w]e must not only understand how a discipline constitutes its discourse but also understand how students learn the discourse of a discipline, how writing plays a role at various stages of their initiation into that community.”¹¹⁷

To review, all disciplines have the following characteristics: (1) specialized vocabulary; (2) writing styles; (3) genres (different types of writing); (4) conventions (ways of producing those types of writing); (5) uses for texts [how do we use cases, statutes, policy, etc.]; (6) intertextual systems (like the idea of a genre system¹¹⁸ — how do the texts in a discipline relate to one another?); (7) criteria for judgment (what makes a piece of writing effective); and (8) forums (where members of the discourse community, scholars and practitioners, share their writing contributions with each other).¹¹⁹ Utilizing these characteristics, all disciplines teach the following through their genres as expressions of *Inventio*, *Dispositio*, and *Elocutio*:

Reading (Inventio, Dispositio)—processing information according to topic, idea, and concept within the organizational structure of a piece of writing;

Note-taking Strategies (Inventio, Dispositio)—grouping and sorting information according to topic, idea and concept for the purpose of refining thought;

Organization Strategies (Dispositio)—grouping and sorting information according to topic, idea and concept for the purpose of organizing writing;

Building Analytical Frameworks (Inventio, Dispositio, Elocutio)—working with the authority in a field or discipline and developing criteria for evaluation;

¹¹⁷ RUSSELL, *supra* note 16, at 301.

¹¹⁸ See Russell, *supra* note 111.

¹¹⁹ See Bazerman, *supra* note 24, at 1310.

Utilizing Analytical Frameworks (Inventio, Dispositio, Elocutio)—using an analytical framework to evaluate the subject of study (facts, or other types of data); and

Communicating Analysis (Dispositio, Elocutio)—communicating the analysis in writing and drafting using the rhetorical moves appropriate to a genre or piece of writing.

Each of these categories gives insight into how information is structured in a discipline's genres. By analyzing the rhetorical purpose of a genre (its reason for existence), its parts, and the rhetorical purpose of each part (the reason a particular part of a genre exists in service to the entire document), legal educators can aid students in cross-disciplinary knowledge adaptation and acquisition. We can help students build frameworks for understanding how to use what their disciplines have taught them in a different context, rather than urging them to forget what they learned so that we can teach them anew, or worse yet, decry the "bad habits" they bring from their previous educational experiences.

As a first step, legal educators can use these broad disciplinary teaching categories to help shape their curricula and pedagogies through the following teaching strategies:

Reading (Inventio, Dispositio)—processing information according to topic, idea, and concept within the organizational structure of a piece of writing.

1. Familiarize students with the parts of common legal genres, how they will encounter those parts, and the rhetorical purpose of each of those parts.

2. Compare and contrast the rhetorical purpose of common legal genres and their parts to common genres from the students disciplines.

Note-taking Strategies (Inventio, Dispositio)—grouping and sorting information according to topic, idea and concept for the purpose of refining thought.

1. Present the case brief as one type of note-taking strategy. Consider how it follows the structure of a case and chart the rhetorical purpose of each part.

2. Discuss with students the need for additional note-taking strategies to understand how each part of a genre functions and the relationship between each part as it relates to the whole, both in legal and non-legal genres.

Organization Strategies (Dispositio)—grouping and sorting information according to topic, idea, and concept for the purpose of organizing writing.

1. Facilitate organizing the drafting process within the structure of the genre to meet the genre's rhetorical purpose.

2. Demonstrate how the organizational structures, with which students are most familiar from their graduate and undergraduate disciplines, are either appropriate or inappropriate for organizing a particular

legal genre.

Building Analytical Frameworks (Inventio, Dispositio, Elocutio)—working with the authority in a field or discipline and developing criteria for evaluation.

1. Compare and contrast appropriate sources of legal authority to appropriate sources of authority from the students' disciplines.

2. Demonstrate how to use the relevant sources of legal authority to draft an analytical framework sufficient to determine what the law is to sufficiently resolve a client's legal problems.

3. Help students use relevant sources of authority to draft an analytical framework sufficient to resolve the factual and legal issues in a client's case.

Utilizing Analytical Frameworks (Inventio, Dispositio, Elocutio)—using an analytical framework to evaluate the subject of study (facts, or other types of data).

1. Compare and contrast how students have used analytical frameworks as evaluative tools for subjects of inquiry within their disciplines.

2. Explore how the subject of inquiry (law and/or facts) meet or do not meet the requirements of the analytical framework.

Communicating Analysis (Dispositio, Elocutio)—communicating the analysis in writing and drafting using the rhetorical moves appropriate to a genre or piece of writing.

1. Determine which rhetorical moves¹²⁰ are necessary to draft the analytical framework and resulting analysis of the subject of inquiry, specific to legal genre.

2. Compare and contrast those rhetorical moves to the corresponding genre or genre part from the students' disciplines.

Next, legal educators must determine how these broad categories are implicated in the legal genres they choose to teach, and develop appropriate pedagogies for teaching them rooted in the disciplines.

VI. *Teaching Questions Presented in a Disciplinary Context: A Social Science*

Example

In 1987, John Swales and Hazem Najjar published their research findings for how introductions in science and social science research articles were actually drafted, in contrast to how disciplinary writing guides instructed students to draft them.¹²¹ Swales and Najjar's methodology involved reviewing the introductions to forty-eight research articles from physics (science) and educational psychology (social science)

¹²⁰ Generally, rhetorical moves are the content and sequence of particular information necessary to fulfill the rhetorical purpose for the genre as a whole or a specific part. See *The Berkenkotter Study*, *supra* note 115, at 195-96.

¹²¹ John Swales & Hazem Najjar, *Research on Introductions to Research Articles*, 4 WRITTEN COMM. 175 (1987).

to find drafting patterns, which they articulated as a series of rhetorical moves.¹²² In rhetorical Move I, an author of a research article introduction attempts to establish why her research is important.¹²³ In rhetorical Move II, the author contextualizes the research through summarizing previous research on the same or related topics.¹²⁴ Move III is where the author explains why her research is needed by highlighting gaps in previous research.¹²⁵ The author concludes with Move IV, where she presents her research as filling that gap.¹²⁶ Together, these moves constitute a schema or pattern for how to write an introduction to a social science or science research article.

Swales and Najjar's groundbreaking work serves as a foundation for exploring how students transition from one discourse community to another. For example, in their article, *Socially Constructed Texts: The Initiation of a Graduate Student Into A Writing Research Community*, Carol Berkenkotter, Thomas N. Huckin and John Ackerman present their research findings on how new students are initiated into written disciplinary discourse.¹²⁷ These authors charted how a new graduate student in the social sciences (Nate) utilized Swales and Najjar's drafting moves, and how increasing mastery over the moves demonstrated not only Nate's initiation into the social sciences, but also Nate's adaptation of his writing knowledge from the humanities, his foundational discourse community.¹²⁸

The Berkenkotter Study revealed that Nate's processes of adaptation, translation, and initiation (gaining disciplinary literacy) involved "a difficult passage from one academic culture to another" and "the ability to adapt [learned disciplinary genres] as the situation require[d]."¹²⁹ Gaining literacy required that Nate struggle with understanding the appropriate knowledge to use in constructing a research article introduction, and in distilling that knowledge in a manner necessary for the introduction to serve its overall purpose in the article.¹³⁰

Acquainting students from the sciences and social sciences with Swales and Najjar's rhetorical moves for drafting a research article introduction can help them better understand how to construct the parts of legal genres that are most correlative to the introduction and acquire

¹²² See Swales & Najjar, *supra* note 121, at 175-79.

¹²³ *Id.* at 179.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *The Berkenkotter Study*, *supra* note 115, at 191-211.

¹²⁸ *Id.*

¹²⁹ *Id.* at 211.

¹³⁰ *Id.* at 202-07.

subject-matter knowledge in the process. For example, heavily annotating social science research articles with the corresponding parts of a legal memorandum, and breaking down the parts of each by rhetorical purpose and drafting moves can help students adapt and translate their written discourse as appropriate for each situation. In the objective legal memorandum, the Question Presented correlates with the research article introduction.

*Corresponding Parts of an Introduction and Legal Memo*¹³¹

Parts of the Introduction	Parts of the Legal Memo
Establishes the field in which the study falls or explains the disciplinary context (Move I)	Question Presented: states the area of law that the case involves
Summarizes the relevant research for the subject of study (Move II)	Question Presented: states the particular legal question that the memo seeks to answer
Creates a space for the author's research by indicating the gaps in the relevant research or by raising questions about that research (Move III)	Question Presented: states the facts of the client's case that are important to resolving that question

Law professors who teach Legal Writing have used the ubiquitous *under/can-is-does/when* structure to teach the Question Presented: *under* states the area of law that the case involves, *can-is-does* states the particular legal question that the memo seeks to answer, and *when* states the facts of the client's case that are important to resolving that question. Even though this structure seems fairly straightforward, students struggle with constructing it for the same reasons Nate struggled with writing a research article introduction; gaining literacy in disciplinary discourse requires a struggle with understanding the appropriate knowledge to use in constructing a Question Presented and in distilling that knowledge for the Question Presented to serve its overall purpose in the memo.

Correlating the *under/can-is-does/when* structure to the rhetorical moves necessary to create its social science and science counterparts, the introduction helps students relate what they have done in a non-legal genre to a legal one. Specifically, a student begins to make connections between how framing a legal issue and determining legally important facts in a Question Presented involves analytic processes similar to contextualizing research and creating space for the discussion of that research. Students struggle with identifying and utilizing legally significant facts for Questions Presented because those facts are as much about creating a space for resolving the client's legal issue as Move III is about creating a space for a discussion of the author's research study. In both contexts, the genre parts that correlate (the Question Presented and Introduction)

¹³¹ Swales and Najjar's rhetorical moves are presented here as summarized in *The Berkenkotter Study*, *supra* note 115, at 196; TERI A. MCMURTRY-CHUBB, *LEGAL WRITING IN THE DISCIPLINES: A GUIDE TO LEGAL WRITING MASTERY* 57, 117 (2012).

require the student to comprehend the analytical framework and analysis that form the “meat” of the research article and legal memorandum.

This is only one example of how a part of a genre common to a non-legal discipline can be used for cross-disciplinary adaptation. A new legal writing textbook, *Legal Writing in the Disciplines: A Guide to Legal Writing Mastery*,¹³² uses the above techniques to relate the common genres in the social sciences, sciences, humanities, arts, and business (those disciplines most familiar to students entering law school) to the objective legal memo and the legal brief. The text is based on the author’s multiple-year study of graduate and undergraduate disciplinary writing, discourse and genre theory, and successful teaching strategies for adapting writing from pre-legal to legal contexts. It is innovative techniques such as these that can aid legal educators in building bridges from undergraduate and graduate schools to law schools, and ultimately from law schools to law practice.

Conclusion—Overcoming Barriers to Realize the Promise of a Writing-Centered Disciplinary Pedagogy

Literacy is about access. Law schools specialize in exclusion. This presents a host of barriers to implementing a discipline-specific writing-centered pedagogy for legal education. The first barrier is the admissions process. So long as law schools continue to depend on the LSAT as a tool for facilitating the admissions process, they will continue to exclude many qualified students who have the intelligence, tenacity, and resilience to succeed in law school and serve those communities who most need legal services.¹³³ However, to admit all students capable of practicing law means that law schools must be willing to actually teach their students, to familiarize them with the conventions of legal discourse, and to initiate them into its discourse communities.

The second barrier is how student performance is assessed in law school. Students who matriculate through ABA accredited law schools and obtain the J.D. degree do eventually learn the law and, for the most part, go on to pass the bar exam and practice law. But law schools do not reward students who eventually learn the law; they reward those students who learn it first. Hiring decisions at the top firms in the country—those firms who pay the most and carry the most prestige—are based on which law schools have the highest ranking in U.S. News and World Report,

¹³² MCMURTRY-CHUBB, *supra* note 131.

¹³³ See generally WATSON SCOTT SWAIL, KENNETH E. REDD & LAURA W. PERNA, *RETAINING MINORITY STUDENTS IN HIGHER EDUCATION: A FRAMEWORK FOR SUCCESS* (2003) (asserting that while minority enrollment in higher education has become more proportional, access rates at “selective institutions” remain inequitable).

a ranking primarily based on LSAT performance and UGPA.¹³⁴ In turn, students are selected for employment at these firms based on their class rankings, which are set by first year grades.¹³⁵ Because students' performances in the core 1L courses are assessed by one examination at the end of the semester, those students who somehow learn the conventions of law school testing *on their own* are disproportionately rewarded. After all, the very presence of students able to navigate law schools without help reinforces the notion that to provide access to students who are less successful, through ASPs or otherwise, dilutes legal education and diminishes the elite status of the profession.

The third barrier is in the hiring process for law professors. Law schools do not hire professors based on their knowledge and skill in teaching. Rather, law professors are hired based on their law school grades, despite years of experience and proven track records in practice, and on the national ranking of their law school in U.S. News and World Report. Scholars have written about how such hiring practices ensure that the legal professoriate is an elite group of people, hired not for their actual quality as educators, but based on a ranking system that sets up elite status as a proxy for excellence.¹³⁶

The last barrier is an enduring false dichotomy between skills and knowledge delivery in law schools. The legal academy has continued the caste system of faculty started by the University, where those who teach substantive or doctrinal law courses are awarded the highest status and salaries and those who teach skills courses have the lowest salaries and least job stability. Despite the call for more skills training from the bench and practicing bar, this hierarchy persists.

However, it seems that market forces, primarily the high cost of le-

¹³⁴ See generally William D. Henderson, *Law Firm Strategies for Human Capital: Past, Present, Future*, in 52 *STUDIES IN LAW, POLITICS, AND SOCIETY: LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE* 73-106 (Austin Sarat ed., 2010) (questioning the effectiveness of employee selection criteria at top law firms as historically based on law school prestige and rankings).

¹³⁵ *Id.*

¹³⁶ See Lucille Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1156 (2008); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 *WASH. L. REV.* 35, 88-89 (1994); see generally Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 *ST. JOHN'S L. REV.* 171 (asserting that hiring practices for law school professors, which statistically favor top-tier law school graduates regardless of other qualifications, inherently further a class-based caste system in the profession).

gal education¹³⁷ and the dearth of big law firm jobs,¹³⁸ necessitate some radical changes in legal education. It is in this turmoil that the greatest opportunity exists for legal institutions to remake themselves into something relevant and meaningful. The current economy requires that we consider whether we desire to operate as usual, reducing legal literacy to an expensive commodity only accessible to a few, to the detriment of ourselves, our students, and potential clients. It also presents an alternate consideration, whether we will dismantle our elite status in favor of access leading to the training and delivery of services that meet the requirements of the bench and practicing bar. The latter requires us to recognize that the work that lawyers do is grounded in writing, that writing has an established doctrine, and that writing doctrine is the foundation of all legal knowledge and inquiry. Perhaps then we will move toward a disciplinary pedagogy for legal education.

¹³⁷ See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (citing statistics on the cost of tuition approaching or above \$50,000 per year at some law schools).

¹³⁸ See Jordan Weissman, *The Death Spiral of America's Big Law Firms*, *THE ATLANTIC* (Apr. 19, 2012), <http://www.theatlantic.com/business/archive/2012/04/the-death-spiral-of-americas-big-law-firms/256124>.

