

THE GENRE DISCOVERY APPROACH: PREPARING LAW STUDENTS TO WRITE ANY LEGAL DOCUMENT

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ABSTRACT

Employers bemoan that new lawyers cannot write. Professors teaching upper-level law school courses wonder why students cannot apply their first-year (1L) legal writing skills. Law students worry that their legal writing courses have not prepared them to write all of the document types they will encounter in practice. In response to these complaints and fears, law school administrators push legal writing professors to squeeze more and more different document types into first-year legal writing courses.

I argue that the “more documents” strategy does not adequately prepare practice-ready legal writers. We cannot inoculate our students against every conceivable genre that they will encounter. Instead of teaching more and more legal document types—legal genres—we need to teach 1L students what to do when they encounter an unfamiliar genre.

Because a genre is a relatively stable communication type that has certain predictable conventions, we can teach our students what steps to take to deliberately discover new genres. This “genre discovery approach” to legal writing pedagogy builds upon current teaching trends, borrowing crucial elements from rhetorical genre theory to enhance students’ understanding of how genres work. Once students understand how genres work, they can write any genre that they encounter (in upper-level courses and the workplace), even genres that they have never seen before. They will be prepared to write any legal document.

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I. INTRODUCTION

In *Educating Lawyers: Preparation for the Profession of Law*, published by the Carnegie Foundation for the Advancement of Teaching—commonly referred to as “The Carnegie Report”—the authors praise the work currently being done in legal writing courses in preparing students for the practice of law.¹ They suggest that “[t]he teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.”² The authors point to the field of

1. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 105 (2007) (“By learning to analyze facts and construct arguments in use, students were also being taught how to strategize as a lawyer would. They were beginning to cross the bridge from legal theory to professional practice.”).

2. *Id.* at 111. Legal writing scholars have pointed out the shortcomings of the Carnegie Report, however, in particular with regards to its treatment of legal writing faculty. See Lisa T. McElroy et al., *The Carnegie Report and Legal Writing: Does the Report Go Far Enough?*, 17 *LEGAL WRITING: J. LEGAL WRITING INST.* 279, 281 (2011) (“[Th]is Article criticizes the *Report’s* failure to recognize that legal writing professionals routinely use best practices in education, including formative assessments, and notes its missed opportunity to promote this particular expertise throughout the academy.”).

rhetoric and composition as a source of pedagogical ideas for first-year legal writing courses.³ This article takes the advice of the Carnegie Report and draws from rhetoric and composition theory, in particular the area of rhetorical genre theory, to suggest a new strategy to help law students become more independent writers right out of the gate by preparing them to write any legal document with confidence. Because no legal writing course can hope to teach law students how to write every text that lawyers encounter in practice, we must ask ourselves this question: how do we prepare students to write legal documents that we never teach them to write?

Rhetoric, the ability to locate the “available means of persuasion” in a given situation,⁴ the study of the “invention” and “arrangement” of ideas⁵ in certain contexts, and “the central art by which community and culture are established, maintained, and transformed,”⁶ has made a resurgence recently in legal scholarship. For example, Linda L. Berger has recently pointed out that “introducing students to rhetoric makes it possible for them to envision their role as lawyers as constructive, effective, and imaginative while grounded in law, language, and persuasive rationality.”⁷ Berger makes clear that rhetoric should be central to legal pedagogy. More specifically, legal writing professors have argued for the inclusion of rhetoric in legal writing and reasoning courses, producing many articles⁸ and books⁹ on the subject over the past

3. SULLIVAN ET AL., *supra* note 1, at 111 (“Composition studies’ insights and practices have now entered even highly technical fields, such as engineering, which have previously given little attention to verbal and written reasoning and communication. Contemporary composition theory holds significant promise for legal education as well.”).

4. 1 ARISTOTLE, RHETORIC 6 (Lee Honeycutt ed., W. Rhys Roberts trans., 2010) (“Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.”).

5. 3 QUINTILIAN, INSTITUTES OF ORATORY 3.1 (Lee Honeycutt ed., John Selby Watson trans., 2010) (“The whole art of oratory, as the most and greatest writers have taught, consists of five parts: invention, arrangement, expression, memory, and delivery or action (the last is designated by either of these terms).”).

6. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

7. Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 3, 4 (2010). See also Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319 (2011) [hereinafter Robbins-Tiscione, *A Call to Combine*].

8. The list of well-researched articles on the intersections of rhetoric and legal writing pedagogy is quite large, and I only provide a few titles here. For more, see, for example, recent issues of the following journals: LEGAL COMMUNICATION & RHETORIC; JALWD, LEGAL WRITING: JOURNAL OF THE LEGAL WRITING INSTITUTE, and

few decades. This article adds to this body of knowledge on rhetorical strategies in legal writing pedagogy, specifically focusing on rhetorical genre theory. I argue that first-year legal writing courses should actively incorporate rhetorical genre theory into their pedagogy to better prepare students to write in upper-level law courses and in the workplace. In particular, students need to learn the skills of what I call “genre discovery” so that they will be prepared to write any legal documents they might encounter.

What do I mean by genre? Simply put, a genre is a set of communications that share certain, predictable conventions. To borrow Tzvetan Todorov’s definition, “A genre, whether literary or not, is nothing other than the codification of discursive properties.”¹⁰ Thus, the codification of properties—the shared, repeating conventions—are what makes a genre a genre in the first place. I would add to Todorov’s definition Mikhail Bakhtin’s fuller explanation of how genres arise: “A particular function (scientific, technical, commentarial, business, everyday) and the particular conditions of speech communication specific for each sphere give rise to particular genres, that is, certain relatively stable thematic, compositional, and stylistic types of utterances.”¹¹ In other words, genres arise because a function needs doing over and over, under conditions that exist within a particular sphere (we might say “discourse community”). Together this need and these conditions create “relatively stable . . . types of utterances”—what we call genres.¹²

PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING. *See, e.g.*, Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089 (1986); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 123 (1991); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999); Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 57 (2000).

9. *See, e.g.*, KRISTEN K. ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* (2009); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (3d ed. 2013); KATIE ROSE GUEST PRYAL & JORDYNN JACK, *THE LEGAL WRITING WORKSHOP: BETTER WRITING, ONE CASE AT A TIME* (2010); KATIE ROSE GUEST PRYAL, *A SHORT GUIDE TO WRITING ABOUT LAW* (2010).

10. TZVETAN TODOROV, *GENRES IN DISCOURSE* 18 (Catherine Porter trans., 1990).

11. M.M. BAKHTIN, *SPEECH GENRES AND OTHER LATE ESSAYS* 64 (Vern W. McGee trans., 1986).

12. My definition of genre does not seem to align well with the (neo-)classical notion of genre as a type of literary form, e.g., poetry, drama, or novel. *See* ANIS S. BAWARSHI & MARY JO REIFF, *GENRE: AN INTRODUCTION TO HISTORY, THEORY, RESEARCH, AND*

For example, a lawyer needs to move for dismissal (a function that needs doing) under the conditions of federal district court (a particular sphere with particular rules of discourse). The type of utterance—or document in this situation—that the lawyer creates might be a Rule 12(b)(6) motion to dismiss with its attendant documents. These genres (the motion and trial brief) are predictable because the function and conditions are predictable. These are the genres a lawyer writes when a lawyer wants to move for dismissal under certain conditions.

As I explain below, rhetorical genre theory has much to offer legal writing pedagogy. My intended audience here is first-year legal writing professors, upper-level legal writing professors, and others, such as law firm mentors, who teach law students (and even new lawyers) how to write legal genres. Legal genres include all of the documents that lawyers produce (e.g., a complaint or a motion to suppress) following specific conventions called for by certain rhetorical situations (e.g., the beginning of a lawsuit or the defense of a client). Most legal writing courses are already, if unintentionally, genre-driven, focusing on the teaching of a set of documents (both written and oral) with shared conventions that are important for success in legal practice. However, no legal writing course or set of courses can possibly teach law students how to produce every text that lawyers encounter in practice, for there are just too many. Furthermore, the landscape of legal practice changes, bringing change to legal documents. Therein lies one of the greatest challenges of legal writing pedagogy: how to prepare students to write the documents that we do not teach them to write. This is the challenge that I take up with this article.

The genre discovery approach deliberately teaches familiar legal texts as rhetorically-driven genres whose conventions are dictated by an audience's needs and other rhetorical demands, rather than by abstract rules or templates. Students thereby develop a greater ability to write unfamiliar documents. Furthermore, upper-level law students and new lawyers equipped with the genre discovery approach are able to discover the conventions of unfamiliar genres and are able to write those genres when their legal writing professors or lawyer-mentors are no longer there to guide them.

In Part II, I give a brief overview of the history of rhetorical genre theory, its contemporary framework, and its current role in legal studies.

PEDAGOGY 15 (2010) (“Gérard Genette has described how Neoclassical literary taxonomies have their basis in the famous literary triad of lyric, epic, and dramatic, which is mistakenly attributed to Aristotle but is actually more the product of Romantic and post-Romantic poetics.” (citations omitted)). The shift from literary taxonomy to rhetorical genre theory is outlined in more detail in Part II.

In Part III, I point out ways that legal writing courses already employ genre theory, showing current teaching practices that employ what could be described as genre theory and the strengths and weaknesses of these current approaches. In Part IV, I argue that first-year law students must leave their legal writing class with “genre discovery” skills: the ability to identify a legal document as a genre, to locate themselves within the discourse community of that genre, to locate examples of the new genre, to study those examples for rhetorical conventions, and to use their discoveries to write the new genre that they have discovered.

II. RHETORICAL GENRE THEORY FOR LAWYERS

As I describe in detail below in Part II, for centuries genre theory concerned itself with categorizing types of literary texts. Only recently did genre theory shift to an examination of what effect these categories themselves had upon the literary texts examined. Only recently, in the mid-twentieth century, did rhetorical genre theory gain the spotlight. Rhetorical genre theory became both a tool for examining the way texts work in society—any text produced by a society, from a shopping list to a presidential speech—and a pedagogical tool for teaching students to create the texts of a particular discourse community.

A. Brief History of Genre Theory

Many who are unfamiliar with rhetorical genre theory believe that genre theory is merely concerned with the taxonomy—the sorting—of literary genres. Indeed, what genre theorists call the “neoclassical” approach to genre does just this kind of thing: “[R]ather than beginning with actual practices and texts, [the neoclassical approach] begin[s] with a priori categories, which are then applied to texts for the purposes of classification.”¹³ The most well-known taxonomy is perhaps the “famous literary triad of lyric, epic, and dramatic,” which has been expanded upon “to define the literary landscape: the novel, novella, epic (epical); the tragedy, comedy, bourgeois drama (dramatic); ode, hymn, epigram (lyrical).”¹⁴ The neoclassical taxonomical approach is thus concerned with “systematic and inclusive rules based on universal validity for classifying and describing kinds of literary texts.”¹⁵ The taxonomy approach to genre grew out of favor, however. Tzvetan Todorov mocks

13. BAWARSHI & REIFF, *supra* note 12, at 14.

14. *Id.* (citing GÉRARD GENETTE, *THE ARCHITEXT: AN INTRODUCTION* 49 (Jane E. Lewin trans., 1992)).

15. *Id.* (citing JOHN FROW, *GENRE (THE NEW CRITICAL IDIOM)* 52 (2006)).

the taxonomy project: “To persist in paying attention to genres may seem to be a vain if not anachronistic pastime today. We all know that genres used to exist; in the good old days of classicism there were ballads, odes, sonnets, tragedies, and comedies; but do these exist today?”¹⁶ Perhaps they do, but literary taxonomies do not concern legal writing professors, nor do they help our students become better legal writers.

Literary theorist Northrop Frye reframed the literary-taxonomy approach to genre, writing, “The purpose of criticism by genres is not so much to *classify* as to *clarify* . . . traditions and affinities, thereby bringing out a large number of literary relationships that would not be noticed as long as there were no context established for them.”¹⁷ Frye’s focus on traditions, relationships, and contexts was a move toward rhetorical genre theory, which focuses not on listing *a priori* categories (into which existing texts could be shoehorned) but rather on the way that texts themselves shift with circumstance and that genre changes to accommodate the texts.¹⁸

This notion of change is important, for genres are not fixed. They change as the needs of audiences change. For example, the seriatim judicial opinion, in which each judge on a panel delivered an individual opinion, was a practice that formerly dominated the English judicial system.¹⁹ The practice gave way in the U.S. (and in the contemporary U.K. judiciary) to what we now recognize as the “opinion of the court” (with its attendant dissenting and concurring opinions, if necessary).²⁰ And yet, with more contentious cases, we now see all or nearly all the justices on a court weighing in with what may appear to be seriatim opinions once again. Genres, such as appellate judicial opinions, appear

16. TODOROV, *supra* note 10, at 13.

17. NORTHROP FRYE, *Rhetorical Criticism: Theory of Genres*, in ANATOMY OF CRITICISM: FOUR ESSAYS 247-48 (3d ed. 1973) (emphasis added). Frye also perpetuated the disconnect of rhetoric from logical thought, writing (inaccurately), “Rhetoric has from the beginning meant two things: ornamental speech and persuasive speech. These two things seem psychologically opposed to each other, as the desire to ornament is essentially disinterested, and the desire to persuade essentially the reverse. . . . One articulates emotion; the other manipulates it.” *Id.* at 245. Furthermore, he points out the distrust of rhetoric among even our own profession: “What we have been calling assertive, descriptive, or factual writing tends to be, or attempts to be, a direct union of grammar and logic. . . . In assertive writing, therefore, there seems to be little place for any such middle term as rhetoric, and in fact we often find that among philosophers, scientists, *jurists*, critics, historians, and theologians, rhetoric is looked upon with some distrust.” *Id.* (emphasis added).

18. *Id.*

19. JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? AND OTHER ESSAYS ON LAW AND THE CONSTITUTION 34 (2006).

20. *Id.* at 34-36.

to be fixed, but they, too, are flexible depending on the needs of a community.

Rhetorical genre studies, then, ushered in a field of study of both the community in which texts arise and the various texts that a community produces—even the non-literary. Mikhail Bakhtin, in *The Problem of Speech Genres*, a foundational text in rhetorical genre studies, helped articulate the relationships between genres and communities. At its most basic, “[l]anguage is realized in the form of individual concrete utterances (oral and written) by participants in various areas of human activity.”²¹ The first part of this claim is easy enough to understand: language is constituted by people using that language. When users of the language cease to use it, the language dies.

The second part of Bakhtin’s claim is essential for the purposes of rhetorical genre theory: utterances occur in “areas of human activity,” that is, in contexts, or “spheres.”²² For our purposes, we can think of the legal profession as its own area of human activity. Bakhtin continues, “Each separate utterance is individual, of course, but each sphere in which language is used develops its own *relatively stable types* of these utterances. These we may call *speech genres*.”²³ Thus, language users within certain spheres of activity repeat certain types of communications over and over. These repetitions solidify into genres. For example, in the sphere of U.S. legal practice in the early twenty-first century, lawyers produce many genres, including those that law professors teach in the 1L legal writing curricula at U.S. law schools: office memoranda, trial briefs, appellate briefs, and others.

Where do these genres come from? Genres come “[q]uite simply from other genres. A new genre is always the transformation of an earlier one, or of several: by inversion, by displacement, by combination.”²⁴ Legal genres did not spring from the skull of a Supreme Court Justice; they grew over time as the sphere of legal practice changed and demanded certain texts.²⁵ And, as new lawyers join the sphere of legal practice, they bring their own approaches to these texts, and these approaches in turn changed the sphere of legal practice.²⁶ Technological

21. BAKHTIN, *supra* note 11, at 60.

22. *Id.*

23. *Id.*

24. TODOROV, *supra* note 10, at 15.

25. See Noah Messing et al., “The Past, Present, and Future of Appellate Briefs,” Panel Presentation at the Association of American Law Schools Annual Meeting (Jan. 6, 2013).

26. See, e.g., Patricia F. First, *Education Legislation, Law & Social Science Research: The Influence of Social Science Research*, 33 J.L. & EDUC. xi, xi (explaining the emergence of what we now call the “Brandeis Brief,” and writing, “Louis D. Brandeis

and other societal changes bring their own demands to genres as well, such as the electronic filing of court documents, legal email memos supplementing legal office memos, and other communication of legal knowledge.²⁷

B. Contemporary Rhetorical Genre Theory

The mutability of genres is central to rhetorical genre theory, which focuses on the interactions between the rhetorical situation in which a genre arises and the genre itself. Contemporary rhetorical genre theory focuses on repeating moments in which speech arises. These repeating similar moments require similar types of speech. In other words, these similar rhetorical situations call for similar rhetorical responses. Rhetoric scholar Lloyd Bitzer, author of the foundational article “The Rhetorical Situation” (1968), observed a gap in rhetorical scholarship in the middle of the twentieth century: “Typically the questions which trigger theories of rhetoric focus upon the orator’s method or upon the discourse itself, rather than upon the situation which invites the orator’s application of his method and the creation of discourse.”²⁸ Bitzer’s shift of focus from the orator toward the rhetorical situation that “invites” the orator’s response called for a shift in the very definition of rhetoric: “[R]hetoric is a mode of altering reality, not by the direct application of energy to objects, but by the creation of discourse which changes reality through the mediation of thought and action.”²⁹ Therefore, under Bitzer’s formulation, legal

argued that judges must consciously consider the probable social results of their decisions. He prepared briefs filled with sociological evidence” (citations omitted)); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 765 (1995) (arguing that, in civil rights cases, plaintiffs’ attorneys must transform the plain complaint into one that no longer “omits the social chemistry underneath the events normally invisible to the law” so that the justice system no longer “lose[s] the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society, the significance of it all”).

27. See, e.g., Kirsten K. Davis, “*The Reports of My Death are Greatly Exaggerated*”: *Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2281252>. “Some have suggested that new technology, such as e-mail, require identifying perhaps a new category of legal writing described as ‘e-mail’ or ‘informal’ memos. As a result, recent calls have been made to ‘update’ the ‘traditional’ legal memo to make it more suited for the economic realities of practice and the technology on which memos are read; some, perhaps, may want to kill off the memo altogether or let it die what seems to be an inevitable death.” *Id.* at 3 (citations omitted).

28. Lloyd Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 2 (1968).

29. *Id.* at 4 (“The rhetor alters reality by bringing into existence a discourse of such a character that the audience, in thought and action, is so engaged that it becomes mediator of change. In this sense rhetoric is always persuasive.”).

rhetoric, by its very nature, has great potential to alter both thought and action. Certainly a Supreme Court opinion shapes the law of the land. But even a modest demand letter written by a summer associate at a small law firm shapes the actions of others, who must respond to the letter in some fashion. But these genres—the court opinion and the letter—must also be studied in the context, the situations, within which they arise.

Given Bitzer's definition of genre, as an invited response to a rhetorical situation, what is a rhetorical situation? "Let us regard rhetorical situation as a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance."³⁰ The rhetorical situation is thus composed of both the people and events that surround the rhetor,³¹ but also the "exigence," or urgent need, that "invites" the rhetorical response. "[T]his invited utterance participates naturally in the situation, is in many instances necessary to the completion of situational activity, and by means of its participation with situation obtains its meaning and its rhetorical character."³² In legal practice, the filing of a complaint invites an answer from the defense; the granting of certiorari invites an appellate brief; the receipt of a demand letter invites a response from the opposing party.

Bitzer subdivides the rhetorical situation into three parts: "[T]here are three constituents of any rhetorical situation: the first is the *exigence*; the second and third are elements of the complex, namely the *audience* to be constrained in decision and action, and the *constraints* which influence the rhetor and can be brought to bear upon the audience."³³ He gives particular attention to "exigence": "Any exigence is an imperfection marked by urgency; it is a defect, an obstacle, something waiting to be done, a thing which is other than it should be."³⁴ In sum, every rhetorical situation has (1) a need to respond, (2) an audience, and (3) constraints that limit the rhetor.³⁵ Taking as our example the

30. *Id.* at 5.

31. A "rhetor" is a person who performs a rhetorical act, such as producing a written or oral text.

32. Bitzer, *supra* note 28, at 5.

33. *Id.* at 6.

34. *Id.*

35. See Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 LEGAL COMM. & RHETORIC: JALWD 73 (2011). Cohen implements Bitzer's theories for legal oral presentations such as oral arguments. Cohen creates a list of "plain language questions" useful to lawyers: (1) "What outside events have prompted the need for a speech?" (2) "Which audiences are affected and what are their needs?" (3) "What limits will make it difficult to meet audience expectations?" and (4) "How can the speech meet

petitioner who was granted certiorari, the grant created the need to respond. The audience for the document—the brief to the Court—is the Supreme Court of the United States. The constraints include anything that might limit the resources of the rhetor, such as deadlines, financial or personnel resources, or access to materials.

Most importantly for our purposes, Bitzer observes that rhetorical situations recur: “From day to day, year to year, comparable situations occur, prompting comparable responses.”³⁶ These “comparable responses,” what Bitzer calls “rhetorical forms,”³⁷ are genres.³⁸ Bitzer uses as an example the recurrence of the presidential inauguration as calling for a recurrent rhetorical form: the inaugural address³⁹ is a speech that adheres to certain generic qualities. In law, the recurrent event of the granting of certiorari would call for a variety of recurrent genres: appellate briefs, amicus briefs, and oral arguments among other, smaller genres that work behind the scenes to produce those major public documents (research memos, letters, emails, and others).

Building in part on Bitzer’s work (although criticizing it in part, as well⁴⁰), Carolyn R. Miller makes two major contributions to rhetorical genre theory that are important for our purposes here. First, she observes that genres are action: “[A] rhetorically sound definition of genre must be centered not on the substance or form of discourse but on the action it is used to accomplish.”⁴¹ She “examine[s] the connection between genre and recurrent situation and the way in which genre can be said to represent typified rhetorical action.”⁴² This groundbreaking definition of genre changed the course of rhetorical genre studies. She not only pointed out how rhetorical situations can recur, and by recurring can constitute generic responses,⁴³ but that these generic responses actually *accomplish* something.

the needs of each audience group?” *Id.* at 80. *See also* Davis, *supra* note 27, at 7 (using Bitzer’s terms to describe the rhetorical situation for the legal memorandum).

36. Bitzer, *supra* note 28, at 13.

37. *Id.*

38. Note that Miller draws a distinction between “form” and “genre”: “Genre is distinct from form: form is the more general term used at all levels of the hierarchy. Genre is a form at one particular level that is a fusion of lower-level forms and characteristic substance.” Carolyn R. Miller, *Genre as Social Action*, 70 Q. J. SPEECH 151, 163 (1984). This distinction is important for Miller’s complete formulation of genre; it does not appear to be a likely distinction that Bitzer was contemplating in his article.

39. Bitzer, *supra* note 28, at 13.

40. *Compare* Bitzer, *supra* note 28, *with* Miller, *supra* note 38.

41. Miller, *supra* note 38, at 151.

42. *Id.*

43. *See id.* at 152 (“In Bitzer’s definition of rhetorical situation as a ‘complex of persons, events, objects, and relations’ presenting an ‘exigence’ that can be allayed

For Miller, the rhetorical situation in which a genre arises “contribute[s] to [the] character” of the genre itself.⁴⁴ She points out that this relationship between a genre and its rhetorical situation is not present in the work of Frye, for example, for whom “situation serves primarily to locate a genre.”⁴⁵ Thus, although Frye (and others like him) were concerned with the structures of genres, he was not concerned with the rhetorical situation in which genres arose. When viewed as located within a situation, Miller explains, “[A] genre becomes a complex of formal and substantive features that create a particular effect in a given situation.”⁴⁶ A genre *does* something. A genre is *action*. Genres help us “learn to understand better the situations in which we find ourselves and the potentials for failure and success in acting together . . . for the student, genres serve as keys to understanding how to participate in the actions of a community.”⁴⁷

For a lawyer, being able to identify the genre that a certain situation calls for—the need to move to dismiss calling for a motion and a supporting trial brief, for example—and being able to write those genres well, marks a lawyer as an expert member of the discourse community of lawyers. For law students, then, learning how to identify, discover, and produce legal genres provides the keys to legal discourse itself. In this way, knowledge of genres is a powerful tool indeed. (Parts III and IV of this Article provide specific ways to teach rhetorical genre skills to legal writing students.)

Miller’s second major contribution that is important here is her observation about the mutability of genres: “[T]he set of genres is an open class, with new members evolving, old ones decaying.”⁴⁸ Genres change over time because situations and authors change, too. Genres are constituted by the rhetorical situation and by the authors that write them. Like a river whose course changes slightly over time until, one day, an entirely new course is set, a genre’s features change slightly over time, because the demands on the genre change, and because the authors of the genre revise the features. Furthermore, the quantity of genres in a sphere can grow and shrink as well: “[T]he number of genres current in any

through the mediation of discourse, he establishes the demand-response vocabulary [Bitzer] essentially points the way to genre study.”).

44. *Id.* at 153.

45. *Id.*

46. *Id.*

47. Miller, *supra* note 38, at 165.

48. *Id.* at 153.

society is indeterminate and depends upon the complexity and diversity of the society.”⁴⁹

John Swales’s work on genre analysis put into practice much of the rhetorical genre theory mapped out by Miller. Similar to Bakhtin’s “spheres of action,” Swales provided a term to define a group of speakers that share a genre or group of genres—“discourse community”—which Swales defined as “socio-rhetorical networks that form in order to work towards sets of common goals.”⁵⁰ Lawyers, then, can be thought of as a discourse community with a set of common goals (e.g., to zealously advocate for our clients, and other shared rules of professional conduct). Swales explains the relationship between genres and discourse communities this way: “One of the characteristics that established members of these discourse communities possess is familiarity with the particular genres that are used in the communicative furtherance of those sets of goals.”⁵¹ Because discourse communities such as law share our genres for the purpose of furthering goals, “genres are the properties of discourse communities; that is to say, genres belong to discourse communities, not to individuals, other kinds of grouping or to wider speech communities.”⁵² In many ways, genres are the ways that the communities compose themselves and accomplish their work.

The question I would like to pose, then, is this: What is the best way to bring new members into the discourse community of lawyers, a community that possesses a certain set of complex genres (a set that is, as Miller notes, “open”), genres that arise under a wide variety of rhetorical situations in response to a wide variety of exigences? The answer, I argue, is a conscious use of rhetorical genre pedagogy—of *genre discovery*.

C. Genre Theory and Legal Studies

Legal study has not entirely ignored genre theory *qua* genre theory. Some scholars have used genre theory to study legal cinema,⁵³

49. *Id.* at 163. See First, *supra* note 26 (describing ways lawyers have pushed the boundaries of existing legal genres, e.g., through the creation of the “Brandeis Brief” and the complaints of civil rights lawyers).

50. JOHN M. SWALES, *GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS* 9 (Michael H. Long & Jack C. Richards eds., 1990).

51. *Id.*

52. *Id.*

53. See Steve Greenfield et al., *Genre, Iconography, and British Legal Film*, 36 U. BALT. L. REV. 371 (2007); Katie Rose Guest Pryal, *Hollywood’s White Legal Heroes and the Legacy of Slave Codes*, in *AFTERIMAGES OF SLAVERY: ESSAYS ON APPEARANCES IN*

speeches,⁵⁴ and music.⁵⁵ One has used genre theory (in the widest sense) to critique legal education.⁵⁶ Others have used literary genre theory to study the texts (written and oral) that lawyers produce, the topic of interest here.⁵⁷ But few legal scholars have engaged *rhetorical* genre theory to study these texts.⁵⁸ And, as I will show later, few professors use rhetorical genre theory to *teach* these texts.

The law and literature movement in legal studies has garnered some interest for literary genre studies of legal writings. For example, Robert A. Ferguson conducted a “literary treatment of the appellate opinion” with the “ultimate goal” of “identify[ing] and clarify[ing] the appellate judicial opinion as a distinct literary genre within the larger civic literature of the American republic of laws.”⁵⁹ Ferguson argues that “genre is perhaps the single most powerful explanatory tool available to a critic.”⁶⁰ He points out, accurately, that “[c]urrent genre theory cares less about issues of classification and definition than it does about principles of reconstruction and interpretation.”⁶¹ Thus, he rejects the arhetorical, neo-classical task of categorizing genres based on taxonomies.

However, rather than turn toward the rhetorical, he embraces the role of literary critic: that of interpreter of texts. For Ferguson, then, generic conventions are useful only insofar as they can help him interpret his target texts: appellate opinions.⁶² His mode of genre study is one of what

RECENT AMERICAN FILMS, LITERATURE, TELEVISION, AND OTHER MEDIA 145 (Marlene D. Allen & Seretha D. Williams eds., 2012).

54. See Nina Philadelphoff-Puren, *Genre's Judgment: Discrediting Torture Testimony in the War on Terror*, 19 LAW & LITERATURE 229 (2007) (studying the effects of public genres such as speeches and interviews on the perceived legitimacy of torture testimony).

55. See Michael A. Coffino, *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679 (1994).

56. See William E. Conklin, *Teaching Critically Within a Modern Legal Genre*, 8 CAN. J.L. & SOC'Y 33, 40-41 (1993) (arguing that a new law student, in order to succeed in legal education, must assimilate a Bakhtinian secondary genre of legal speech, and the student's own primary genre is thereby lost (“lopped off”).

57. See, e.g., Cristiane Fuzer & Nina Celia Barros, *Accusation and Defense: The Ideational Metafunction of Language in the Genre Closing Argument*, in GENRE IN A CHANGING WORLD (Charles Bazerman et al. eds., 2009).

58. Recently, a study was conducted of patents as rhetorical genres. Dan L. Burk & Jessica Reyman, *Patents as Genre: A Prospectus*, 25 LAW & LITERATURE (forthcoming 2013).

59. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 202 (1990).

60. *Id.* at 202.

61. *Id.* at 204.

62. *Id.*

Bawarshi and Reiff would term “structuralist approaches to genre.”⁶³ True, the structuralist approaches to genre “recogniz[e] genre’s roles in structuring aesthetic worlds” and “acknowledge the power of genre to shape textual interpretation and production.”⁶⁴ However, structuralist approaches such as Ferguson’s “focus[] on genres as literary artifacts that structure literary realities” and thereby “overlook how all genres, not just literary ones, help organize and generate social practices and realities in ways that prove important for the teaching of writing.”⁶⁵ Ferguson’s study, as I demonstrate below, offers little for teaching of legal writing, even the teaching of judicial opinion writing, for it does not focus on the genre as a rhetorical action, but rather as a dead “literary artifact.”

In focusing on appellate opinions “as literary artifacts,” Ferguson discards their more easily recognizable generic traits because, he claims, although these traits are easily identified, “their very easiness has blocked access to deeper structures in the judicial opinion.”⁶⁶ And, because he is using a structuralist approach to genre, the “deeper structures” are what he is seeking.⁶⁷ Instead, Ferguson identifies four more “literary” conventions to focus on, what he calls “impulses”: “the monologic voice” (a term borrowed from Bakhtin⁶⁸), “the interrogative mode,” “the declarative tone,” and “the rhetoric of inevitability.”⁶⁹ As a methodology, he lays out the theoretical groundwork for each of these generic traits and then examines these traits as they appear in two

63. BAWARSHI & REIFF, *supra* note 12, at 17.

64. *Id.* at 19.

65. *Id.* at 20.

66. Ferguson, *supra* note 59, at 204.

67. Ferguson’s insistence on discovering the “deeper structures” beneath the surface of judicial opinions is a common goal in literary studies. Rhetoric scholars Jeanne Fahnestock and Marie Secor have conducted a rhetorical study of literary scholarship, noting the common lines of argument (i.e., *topoi*) used by literary scholars, including the one that Ferguson employs, which they identify as the “appearance/reality” *topos*: “The most prevalent special *topos* of literary argument appears in many forms, but we can nevertheless group its manifestations under the general heading ‘appearance/reality.’” Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in *TEXTUAL DYNAMICS OF THE PROFESSIONS: HISTORICAL AND CONTEMPORARY STUDIES OF WRITING IN PROFESSIONAL COMMUNITIES* 74, 84 (Charles Bazerman & James Paradis eds., 2004) (citing CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (1969)). “This dissociation [between appearance and reality] can stand for all those occasions when the literary article is structured by a dualism, the perception of two entities: one more immediate, the other latent; one on the surface, the other deep; one obvious, the other the object of search.” *Id.* at 85.

68. Ferguson acknowledges that the notion of monologic voice is borrowed from Bakhtin, specifically from M. M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981).

69. *Id.* at 204.

appellate opinions.⁷⁰ In his attempt to do a scholarly study “of the deeper structures,” then, Ferguson ignores the features of the opinion genre that would be more recognizable to a larger portion of the legal discourse community. A rhetorical genre study would have examined both the recognizable features as well as the “deeper,” less recognizable ones; it would have examined the rhetorical situation in which these features arose (e.g., the procedural history), the exigence that motivated them (e.g., the underlying case), and the rhetors who participated in their constitution (e.g., the parties, the judges below, and the authors of the opinions at hand). In the end, then, Ferguson’s genre study teaches us little about how to produce judicial opinions or other legal genres or how to join the discourse community of law.

In 1995, George Kamberelis, a communication studies professor writing for a legal audience, highlighted the importance of rhetorical genre theory not only for legal practice, but also for legal pedagogy. He provided a rhetorical definition of genres and applied this definition to the legal discourse community: “Systems of genres develop within social formations that represent the ways in which those social formations have constrained an infinite number of discourse possibilities into a relatively small set of conventionalized codifications.”⁷¹ He then takes this definition of genre and applies this to the legal discourse community: “Within law, for example, these would include contracts, textbooks, bar exams, depositions, patents, professional conference presentations, cross-examinations, subpoenas, and the like.”⁷²

He points out the importance of *learning* genres, what he refers to as “conventionalized codifications,” to effectively join any discourse community (such as law):

Knowledge of these conventionalized codifications, albeit tacit knowledge in many cases, is a critical component of communicative competence within both everyday and professional fields of practice. Briefly, communicative competence involves packaging and interpreting messages in ways that are culturally appropriate and socially expected in

70. For example, for “The Interrogative Mode,” Ferguson notes, “The real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations.” *Id.* at 208. Indeed, the choosing of the question is “the methodological anchor of judicial rhetoric.” *Id.*

71. George Kamberelis, *Genre as Institutionally Informed Social Practice*, 6 J. CONTEMP. LEGAL ISSUES 115, 119 (1995).

72. *Id.*

relation to the specific communicative contexts in which they are used.⁷³

Despite serving as an excellent introduction to rhetorical genre theory, Kamberelis's article unfortunately does not seem to have had much influence on legal scholarship or legal pedagogy, given the dearth of work in rhetorical genre studies as I demonstrated *supra*. Nor has he much influenced legal writing pedagogy specifically, as I demonstrate in the next section.⁷⁴

III. CURRENT LEGAL WRITING PEDAGOGY

Legal writing professors already teach legal genres, just as lawyers already write them. As Bakhtin observes, all participants in a sphere of activity use genres, even if the participants are not aware of it: "We use [genres] confidently and skillfully in practice, and it is quite possible for us not even to suspect their existence in theory."⁷⁵ The more embedded a person is within a discourse community, the more expert that person is in that community's genres. Indeed, "we speak in diverse genres without suspecting that they exist."⁷⁶ In this section of this article, I will demonstrate how much legal writing pedagogy already embraces legal genres and urge that legal writing curricula embrace an explicit genre: *discovery* pedagogy.

A. What We Are Doing Right in Terms of Genre Pedagogy

Current legal writing courses and textbooks already employ rhetorical genre theory in a variety of ways that are pedagogically sound:

(1) we teach a predictable set of genres;

73. *Id.*

74. A tax law professor urged professors to bring writing into their pedagogy and cites Kamberelis:

Learning the genres of legal writing involves becoming aware of the practical and rhetorical contexts of the communications, not simply their forms. One commentator has observed that "learning the genres of institutions and disciplines is more like learning languages than learning algorithms. It is accomplished within and through immersion in the lifeworld of the community."

Scott A. Schumacher, *Learning To Write in Code: The Value Of Using Legal Writing Exercises To Teach Tax Law*, 4 PITT. TAX REV. 103, 111 n.41 (2007) (citing Kamberelis at 150).

75. BAKHTIN, *supra* note 11, at 78.

76. *Id.*

(2) we teach the conventions of these genres; and

(3) we teach audience awareness.

However, although legal writing professors are using some strategies from rhetorical genre pedagogy, we are using them without adequate deliberation. Furthermore, the strategies we do use do not go far enough in preparing our students to write any genres they might encounter in practice. For example, it is not enough to teach a list of a genre's conventions that appears in legal writing textbooks. Such lists, though common in legal writing pedagogy, are decontextualized from the discourse communities in which the genres arise.

Part of the problem arises from the psychology of law students. Law students, as most of us know, feel adrift in the new discourse community of law.⁷⁷ They seek templates and checklists. They want to be told what to write. (How many have seen that particular request on a course evaluation?)

We must empower law students and new lawyers to discover the conventions of new genres on their own. This is the true challenge of legal writing instruction, a challenge that I will take up in detail in Part IV. For now, let us explore what we are doing now in legal writing courses, based on an empirical analysis of legal writing textbooks and syllabi.

B. Textbooks & Syllabi: Predictable Genres

Legal writing textbooks teach a limited set of genres. A survey conducted of twenty-six non-specialized⁷⁸ legal writing textbooks (a sampling that covers the vast majority of the books on the market) revealed that the following were the most commonly covered genres in these textbooks:

77. See Dionne L. Koller, *Legal Writing and Academic Support: Timing is Everything*, 53 CLEV. ST. L. REV. 51, 59 (2005) ("New law students struggle with several issues as they become socialized into the law's 'community of discourse.'"); see also David T. ButleRitchie, *Situating "Thinking Like a Lawyer" Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 33 (2002) ("Learning how to 'think like a lawyer' in this first year of law school involves immersing students in a world that is alien and, in many ways, frightening.").

78. As opposed to non-specialized legal writing textbooks, specialized legal writing textbooks are books that only cover a certain type of genre. See, e.g., LAUREL CURRIE OATES & ANNE ENQUIST, *JUST MEMOS* (3d ed. 2011); NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS* (2013).

- 100% covered office memos
- 88% covered appellate briefs
- 69% covered motion memos
- 62% covered oral arguments
- 62% covered client letters
- 35% covered email memos
- 27% covered demand letters

This predictable set of documents comprises the “canon” of legal writing genres.⁷⁹

There is a pleasant trend in legal writing programs across the country toward expansion of course credits to better prepare law students for the rigors of writing in both law school and in their legal careers.⁸⁰ A common pedagogical sub-trend in this credit-hour expansion is to include more and more genres in the semester in order to “expose” students to different types of genres during their 1L year.⁸¹ This is what I

79. *Genres in Law School*, GENRE PROJECT, <http://genre.web.unc.edu/genres-in-law-school/> (last visited Mar. 15, 2014). The Genre Project is an endeavor by the University of Chapel Hill Writing Program to study the genres students read and write across the disciplines. The “Genres in Law School” portion of the study surveyed fifty-two syllabi and thirty-two textbooks for 1L (first-year law student) legal writing courses. Data was gathered with the research assistance of Kelly Morris, UNC Law Class of 2015.

80. Many legal writing programs are making changes to better prepare students for the world of practice. Beginning in 2009, Yale Law School made staffing changes to improve its program. It hired a second legal writing professor and has recruited a number of prestigious federal judges to assist in teaching students and critiquing student writing. *Yale Law School Expands Legal Writing Instruction*, YALE L. SCH. (Oct. 26, 2010), <http://www.law.yale.edu/news/12388.htm>. In order to teach students the essential lawyering skills needed for today’s legal environment, the University of North Dakota’s School of Law has added more experiential and collaborative learning opportunities in the form of negotiation projects that culminate in contract drafting. Rob Carolin, *The Art of Negotiation*, U. N.D. LAWYERING SKILLS PROGRAM (SCHOOL OF LAW) (Fall 2006/Winter 2007), <http://web.law.und.edu/Class/lawyeringskills/negotiation.php>.

81. For example, at the University of North Carolina School of Law, our program prior to Fall 2011 taught (across two semesters and four credits) two office memos, an appellate brief, and an oral argument—a total of three genres and four documents. Now, across two semesters (and six credits), our program teaches an email memo, a client letter, two office memos, a contract, two trial motions, an appellate brief, and an oral argument—a total of seven genres and nine documents. *See, e.g.*, Susan McClellan &

call the “inoculation” method of genre pedagogy.⁸² Students are exposed to a fixed list of genres with a fixed list of conventions, the more genres the better.⁸³ The hope is that the more genres students are exposed to, the more prepared they will be to write the genres they will encounter in upper-level classes and law practice.

The problem is that the inoculation method does not actually work as planned. First, it is not possible to expose students to all of the possible genres that they will encounter in law school or in practice; the list is just too long.⁸⁴ Second, given traditional legal research and writing pedagogy, when students encounter a new genre that they haven’t been

Constance Krontz, *Improving Legal Writing Courses: Perspectives From the Bar and Bench*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 201, 223 (2002) (“To improve writing skills, programs need to provide a number of writing assignments [per semester], not just one or two.”).

82. Rhetorical genre theorist Amy J. Devitt refers to the teaching of genres and their conventions as “explicit” genre pedagogy. AMY J. DEVITT, WRITING GENRES 193 (2004) (“It is easy to see how such [explicit teaching of genre] could lead to rigidly prescriptive conceptions of a genre and to formulaic writing.”). However, with these words, Devitt is criticizing a practice that is, at first glance, similar to what I propose here: “All the processes of teaching described involve examining sample texts in order to generalize explicitly about generic features, followed by producing individual texts within that genre.” *Id.* Devitt poses this question as a challenge: “What if the goal were not to teach students particular genres but rather to teach students how to analyze genres, to teach students a critical awareness of how genres operate so that they could learn the new genres they encounter with rhetorical and ideological understanding?” *Id.* at 194. Part of Devitt’s challenge arises from a fear of ideological inculcation: “[B]y the time one has learned to perform a genre, one is already inducted into its ideology.” *Id.* at 196. She proposes a pedagogy of “critical genre awareness” that goes farther than the genre discovery that I propose (which does allow for meta-awareness of genres as situated and changing). Devitt proposes that

[w]e must teach contextualized genres, situated within their contexts of culture, situation, and other genres. Generic forms must be embedded within their social and rhetorical purposes so that rhetorical understanding can counter the urge toward formula. Genres must be embedded within their social and cultural ideologies so that critical awareness can counter potential ideological effects.

Id. at 191. This kind of work is largely inappropriate in a 1L legal writing course, but might be of use in an upper-level legal writing and rhetoric course, in which the discourse of law is put under closer scrutiny.

83. Composition scholars Clark and Hernandez contrast teaching students “genre awareness,” knowledge of how genres work, with teaching “formulaic” conventions of particular genres. Irene L. Clark & Andrea Hernandez, *Genre Awareness, Academic Argument, and Transferability*, 22 WAC J. 65, 66 (2011) (pointing out that teaching “‘genre awareness’ is not the same as the ‘explicit teaching’ of a particular genre,” as “[e]xplicit teaching . . . means teaching students to write in a particular genre, and often the pedagogical approach is formulaic—a sort of ‘do it like this’ method”).

84. See Robert J. Condlin, “*Practice Ready Graduates*”: *A Millennialist Fantasy* 11 (Sept. 15, 2013), available at http://digitalcommons.law.umaryland.edu/fac_pubs/1372/ (working paper).

exposed to, they lack skills to approach the new genre with confidence. This is because exposing students to more genres, with more decontextualized lists of conventions, does not necessarily teach students how to discover unfamiliar genres that they encounter in the future. And they will, most certainly, encounter unfamiliar genres. We must not only expose students to the genres that they are most likely to write, but also prepare them to write the genres that we do not expose them to at all.⁸⁵

To prepare students to write genres they have not been exposed to, we must teach students the skills of genre discovery. Take this example: When a law student enters an upper-level complex litigation course and is asked to write a motion to suppress evidence, what, ideally, will the student do? If the student asks the litigation professor for a prefabricated checklist of conventions, then the first-year legal writing curriculum has done that student a disservice. The student does not have the skills to write like a lawyer.

Genre discovery means enabling students to encounter new genres and decipher them (as readers) and to encounter new genres and write them (as rhetors)—without a teacher or guidebook. To borrow a very old metaphor, giving students prefabricated lists of generic conventions is giving them the fish to eat. Teaching them to discover how genres work—and how to discover those conventions for themselves—is teaching them to fish.

C. Rhetorical Genre Pedagogy in Practice: The Question of “Transfer”

Here I make a small proposition: rhetorical genre pedagogy, in particular the genre discovery techniques, can help first-year legal writing students acquire skills that will, with practice, transfer into upper-level law courses and into the workplace. After all, rhetorical genre

85. Robert J. Condlin protests the recent call for “practice ready” law students in part because the training that law schools provide must, by its very nature, be too general to do much strong practical training. *Id.* at 10 (explaining that “law is not a ‘unitary profession’”) (citations omitted). Condlin explains,

Law schools cannot prepare students for all [possible work] settings because the range of skills needed is too large. But they also cannot target sub-categories of the settings because students will not know what types of practice they will enter when they graduate. They may know what they would like to do, but they cannot be sure there will be jobs in those fields, or if there are jobs, that they will be competitive in the markets to fill them. They also cannot be sure that their preferences in law school will remain intact once they have worked in a field.

Id. at 11. The benefit training grounded in genre theory is that such training “transfers” to new situations, from small firm to large firm, from DA’s office to criminal defense practice.

theory has always meant to be used for teaching. Carolyn R. Miller explains that the rhetorical genre theory she espouses—genre as social action—“has implications not only for criticism and theory, but also for rhetorical education.”⁸⁶ She writes, “[W]hat we learn when we learn a genre is not just a pattern of forms or even a method of achieving our own ends. We learn, more importantly, what ends we may have.”⁸⁷ Indeed, the ends Miller describes have often been the goals of rhetorical genre pedagogy. Generally speaking, rhetorical genre pedagogy seeks “to give students access to language, structures, and institutions that are important for their individual, academic, and professional development.”⁸⁸ Knowledge of genres gives an inductee into a new discourse community power within that community: the power to communicate as an expert, even the power to help shape the community’s genres.⁸⁹

Knowledge transfer and first-year writing was a focus of the Carnegie Report, which cited “experimental work on differences among writers” that “led to the distinction between ‘knowledge telling’ and ‘knowledge transforming’ writing processes.”⁹⁰ The report notes that “knowledge telling” writing “relies on existing knowledge structures and involves little or no solving of problems.”⁹¹ However, “knowledge transforming” writing helps with

the complex tasks of improving one’s own performance in a given context. This kind of writing represents a highly sophisticated set of metacognitive practices through which students can learn to *transfer the insights* gained in one experience to other writing tasks. It is the kind of problem solving that legal professionals must master in order to function well in a variety of legal roles.⁹²

86. Miller, *supra* note 38, at 165.

87. *Id.*

88. Amy Devitt, *Teaching Critical Genre Awareness*, in *GENRE IN A CHANGING WORLD* 337, 342 (Charles Bazerman et al. eds., 2009).

89. *See, e.g., id.* at 347 (“I want students not only to add to their repertoire but also to learn to critique the genres they know and encounter, with an end possibility of changing the genres that need to change to better serve their needs. The end goal is a critical consciousness of genre, a genre awareness—a conscious attention to genres and their potential influences on people and the ability to consider acting differently within genres.”).

90. SULLIVAN ET AL., *supra* note 1, at 108.

91. *Id.*

92. *Id.* (emphasis added) (citations omitted).

The Carnegie Report's emphasis on focus on knowledge transforming writing and the importance of learning that secures knowledge transfer demands pedagogical practices that can meet the needs the Report describes.

There has been little published research on the subject of writing knowledge transfer in the legal writing context; however, the question of knowledge transfer from first-year writing courses to upper-division writing courses and the workplace is also a popular subject of research among composition theorists.⁹³ Recently, Elizabeth Wardle summed up the challenge of transfer with these two questions: "What general knowledge can we teach students about academic genres that will help them write in later courses? And how can we ensure that students will transfer that general knowledge—at all and in helpful ways?"⁹⁴ Wardle noted that "[t]he answer to the former question hinges, first and foremost, on our ability to know what genres students will write later so that we can help them learn about those genres."⁹⁵ I would argue that Wardle's observation is only half-true. Exposing students to the genres that they are most likely to write later is helpful to knowledge transfer because familiarity with a genre means that a student is more likely to be able to identify the conventions and write those conventions comfortably. But we cannot possibly teach students every genre that they will be exposed to in life. Thus, only if we also teach them how to discover the genres that we did not expose them to in classrooms will they be truly ready to write as professionals. Otherwise we send them out of our classrooms—whether first-year composition or first-year legal writing—only half-prepared.

Furthermore, even if we did teach first-year law students how to write the legal genres they are most likely to encounter in law practice, students must learn how to adjust these genres for particular audiences. Learning to follow a template (such as the templates often provided in legal writing textbooks) does not prepare students to write *even the genres they are exposed to* in legal writing classrooms. What happens when jurisdictions change? When rules of court change? When one supervisor prefers one sort of office memo rather than another? Templates only teach students to write a particular document for a

93. See, e.g., Elizabeth Wardle, "Mutt Genres" and the Goal of FYC: Can We Help Students Write the Genres of the University?, 60 C. COMPOSITION & COMM. 765 (2009); ANNE BEAUFORT, COLLEGE WRITING AND BEYOND: A NEW FRAMEWORK FOR UNIVERSITY WRITING INSTRUCTION (2007) (reporting a longitudinal study of one student's experience in a first-year composition course, upper-level college writing experiences in humanities and STEM courses, and writing experiences in the workplace).

94. Wardle, *supra* note 93, at 769.

95. *Id.*

particular professor on a particular topic. Genre exposure must therefore be paired with genre discovery to be most useful.

Thus, my proposal is not one of curriculum content (which can be determined a number of ways, for example, based on the documents that your students are most likely to encounter later),⁹⁶ but rather one of curriculum *strategy*. There are two main challenges to keep in mind when crafting a rhetorical genre pedagogy in first year legal writing:

(1) *Breadth of coverage*: Which genres do you want to expose your students to?

(2) *Transfer of knowledge*: How can you ensure that your students learn how to discover new genres?

What I am proposing is essentially a small shift. First of all, writing programs often focus exclusively on (1), above, adding more and more genres to ensure students are exposed to enough genres to prepare them adequately to write in practice. This increase in exposure, the inoculation method, is a reaction to changes in the genres that lawyers write (for example, the new prevalence of email) and a reaction to employers' cries that new lawyers are not prepared to write the documents they encounter in practice. But we need to focus more on (2), on preparing students to write the genres they were not exposed to in their legal writing courses. This is where genre discovery comes in.

IV. BRINGING GENRE DISCOVERY PEDAGOGY INTO LEGAL WRITING COURSES

To prepare law students to write any legal document, a central purpose of first-year legal writing must be to teach genre discovery.

96. See Alexa Z. Chew & Katie Rose Guest Pryal, *New Legal Writers Survey 1* (results forthcoming 2014) (on file with the authors). The New Legal Writers Survey (NLWS) is an anonymous, online survey of legal employers that hire University of North Carolina School of Law (UNC Law) students and graduates. The purpose of the survey is to gather data about three main areas of inquiry: (1) writing samples preferred by employers; (2) document types that new legal writers write; and (3) supervision of new legal writers. See also Erin Donelon, *Using a Survey of Returning Students to Improve Your Legal Writing Program*, 19 PERSP: TEACHING LEGAL RES. & WRITING 148 (2011) (surveying returning second- and third-year law students to determine whether the legal writing program was fully preparing students for real-world law practice); Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1 (2009) (surveying lawyers, judges, and clerks to understand the gap between what is taught in writing classes and what skills students and young lawyers need in practice).

Teaching students the ability to discover new genres means teaching them that a genre is a thing that exists in a recurring situation with an audience, context, and needs,⁹⁷ with conventions that arise in response to this recurring situation. Teaching law students how to discover new genres also prepares new lawyers-to-be to write new genres that come into being after they have graduated from law school.⁹⁸

A. Curricular Design: Fewer Genres, More Discovery

The purpose of learning genres is not only to learn the genres themselves but to learn how to approach unfamiliar genres as well. Genre pedagogy should be a process of discovery, not one of mere inoculation. Thus, a legal writing curriculum should thoughtfully include the genres that law students will most likely write in their first years in practice,⁹⁹ and it should also provide a method that will prepare upper-level law students and new lawyers to discover how to write genres that they were not exposed to in their 1L writing course at all. This method is genre discovery.

To excel at genre discovery, when first-year law students leave their legal writing course, they need to possess the following skills:

- (1) How to identify a legal document as a genre.
- (2) How to identify the discourse community (or sub-community) of a legal genre and locate themselves within that community.
- (3) How to locate examples of the new genre and figure out which examples are strong and which examples are weak.
- (4) How to study examples of the new genre to identify conventions, including form, style, and tone.

97. Bitzer, *supra* note 28, at 5.

98. New or modified genres arise in response to new rhetorical situations. For example, the email memo genre arose with the technology of email and became even more popular with the advent of smartphones that enabled senior lawyers to receive research from associates on-the-go. See Charles Calleros, *Traditional Office Memoranda and E-mail Memos*, in *Practice and in the First Semester*, 21 PERSP: TEACHING LEGAL RES. & WRITING 105, 106 (2013) (describing how an attorney's "associates typically support her by sending e-mail messages conveying brief research findings in response to questions, limited in scope and requiring quick responses, which pop up during negotiations"). See also Davis, *supra* note 27, on the supposed demise of the office memo in light of the popularity of email.

99. See, e.g., Chew & Pryal, *supra* note 96.

(5) How to put these “discoveries” together and write the new genre.

Legal writing textbooks and the current legal writing pedagogies that these textbooks supplement provide excellent guidance for developing good writing processes. The problem is that, too often, current pedagogies only begin at step (5), above, providing the template or formula for steps (1) through (4) and failing to teach discovery at all. Later, when faced with a new genre in an upper-level course or the workplace, students and new lawyers do not have the skills needed to figure out how to write that new document.

Legal writing assignments need to incorporate these five steps of genre discovery. One consequence of this proposal is that there must be fewer genres assigned per semester, so that students can practice the steps of genre discovery with each genre. Fortunately, because genre discovery enables new legal writers to write any new legal genre they might encounter, there is no need to inoculate them against as many genres as possible by filling the curriculum with more and more assignments. This is a situation in which quality and depth of instruction outweighs quantity.

With practice, law students will gain these skills and will be able to transfer them to upper-level courses (seminars, clinical courses, and externships) and the workplace, learning how to find go-bys, to download briefs from databases and study them, and to ask the right questions of their supervisors when writing new documents.

B. Classroom Practices for Genre Discovery

Using the example of a trial brief (or motion memo), here is how an assignment that uses the genre discovery approach might be structured. This example assignment presumes a case-file method of pedagogy, in which students receive some or all of the following elements:

- (1) an assigning memo briefly describing the case of a fictional client and the parameters of the genre to be written;
- (2) some sort of discovery documents from which the students can draw the relevant facts of the case (interrogatories, depositions, etc.);
- (3) a textbook chapter or handout that describes the template of the document; and

(4) relevant cases and statutes—if the assignment is “closed universe.”

For (3), many (if not most) legal writing courses in the United States assign a chapter from a textbook that provides a template or format for the genre. For example, in the popular legal writing textbook by Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style*,¹⁰⁰ chapter 27 addresses “Motion Memoranda,” and section 27.1 is titled “Motion Memorandum Format.”¹⁰¹ Neumann writes, “The format of a motion memo is often more flexible than that of an office memo or an appellate brief,” but he then provides a numbered list of the conventions often found in motion memoranda.¹⁰² After providing the list of conventions, he urges writers to “shape the format to suit your case.”¹⁰³

Thus, in conventional legal writing pedagogy, students would be armed with the following knowledge about the motion memo genre before being asked to write one:

- a list of generic conventions from the textbook with the advice to modify the list “to suit your case,”

100. See generally RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (6th ed. 2009).

101. *Id.* at 341.

102. Neumann explains these conventions:

The following *might* be found in a motion memo, although very few memos include them all: (1) a cover page; (2) a Table of Contents, if the memo is long or if you want to gain the persuasive effect of showing all the point headings and sub-headings in one place; (3) a Table of Authorities—*but only if* the memo is long and many authorities have been cited; (4) a Preliminary Statement, also called an Introduction or Summary or a Statement of the Case; (5) *in complex and unusual situations*, a Question (or Questions) Presented, also called Issue Presented or just Issue; (6) a Statement of the Case, also called Statement of Facts or just Facts; (7) an Argument, broken up by point headings; (8) a Conclusion; (9) an indorsement [sic] (and, in some courts, the attorney’s signature).

Id. at 342; see also ROBIN WELLFORD SLOCUM, *LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS* 504 (3d ed. 2011) (“Most trial court briefs . . . contain the following sections: (1) an Introduction; (2) a Statement of Facts; and (3) an Argument.”); see also LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 168-171 (3rd ed. 2011) (noting that the components of a trial-level brief include a Case Caption and Title of Document; Introduction; Statement of Facts; Question(s) Presented; Argument; Conclusion; and Certificate of Service).

103. NEUMANN, *supra* note 100, at 342.

- perhaps a bit of abstract information about the personalities of judges who tend to read this genre,
- perhaps a sample document in the genre from the back of the textbook or provided by the professor.

But students would have little if any information about the rhetorical situation in which the generic conventions of a motion memo arose. Therefore, students would not know what needs the generic conventions of a motion memo arose to meet. Consequently, when the textbook author encourages students to shape the format of their motion memos to suit their cases, he makes an impossible request. Students have no ability to know which conventions to leave out and which to include because they do not know why the conventions are a part of the genre in the first place. If a student does not know what need a convention fills, then the student cannot know whether to include that convention or leave it out.

Here is where the strategies of genre discovery should enter into the teaching of this genre. Rather than teaching a motion memo in a rhetorical vacuum, using an arhetorical template and, perhaps, a single sample document (often from a jurisdiction meaningless to the assignment) in the back of a textbook, professors can use guided genre discovery to help students learn the five steps of writing any legal document. The best part of this teaching method is that every traditional teaching tool I have described above can continue to be used. The technique I describe now is merely a supplement to the best practices of existing legal writing pedagogy.

The five steps to genre discovery can easily enter into legal writing pedagogy. The first step (from the list *supra* in Part IV.A), is to *teach students what genres are in the first place*. Students need to recognize that any legal document—in this case, a motion memo—is a genre. Ideally, from the start of the semester, law students will learn that legal document types are genres, that indeed genres exist all around us. From grocery lists to wedding invitations to law school acceptance letters, genres help us make sense of the world. They are predictable texts because they use predictable conventions to respond to the needs of recurring rhetorical situations. Once law students grasp that concept, they are halfway home.

The second step in the process of genre discovery is to identify the discourse community (or sub-community) to which the genre belongs. In the case of any legal genre, the discourse community is the community of law. But for legal genres, the sub-community becomes important, as legal practice is a community composed of sub-communities of jurisdictions and practice areas with particular concerns and rules. To

help students learn how to identify the sub-communities of a genre and the needs of those sub-communities, when writing an assignment such as a motion memo, select a particular jurisdiction, and even a particular judge. Then, encourage students to discover the rules of the court to which they will submit their motion memos. For example, if the problem is set in the Eastern District of North Carolina, have your students go find that court's local rules. Indeed, an ideal curriculum would allow space for students to research a particular judge's published preferences as well. Students can then use these rules and preferences alongside of a list of conventions from a textbook to begin to decide which conventions they should include. Here, too, is an opportunity to introduce students to the rhetorical appeals of *ethos*, *logos*, and *pathos*,¹⁰⁴ or at the very least to principles of audience awareness.¹⁰⁵

But the rules of court might not be specific enough to provide guidance for motion memos, and at any rate students still do not know what sorts of things to write now that they have established their list items to include in their motion memo. What they need to see are examples of the genre. This is the third step of genre discovery: students need to analyze multiple examples of a genre written for their particular sub-community. Although textbooks often include examples of the genres that they teach, students do not have any way to know why these particular examples are written in the way that they are: why they include the conventions they include and leave out others, why they frame arguments in certain ways, even why they use certain fonts or heading layouts. These sorts of decisions are ones that employers and judges will expect new lawyers to make, and we can teach them how to make the right decisions by teaching them how to find and use examples. The example in a textbook is still useful, however, for showing how conventions shift across sub-communities. Teach students that examples can be found and how to find them. For internal documents such as

104. For an excellent summary of ways to include the rhetorical appeals in legal pedagogy, see Robbins-Tiscione, *A Call to Combine*, *supra* note 7. She includes methods for teaching each appeal: *logos*, *id.* at 328, *pathos*, *id.* at 332, and *ethos*, *id.* at 333.

105. For more on legal audience, see, for example, Michael J. Hidgon, *The Legal Reader: An Expose*, 43 N.M. L. REV. 77 (2013) (“Specifically, it is my goal not only to synthesize the various descriptions that others have used when describing the legal reader, but also to add to those descriptions to create a single manageable definition, one that is based on and that identifies the pertinent traits of the average legal reader.”); Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See Through the Eyes of the Reader*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 291, 300 (2008) (“By focusing mainly on superficial rather than global changes during revision, inexperienced writers typically ignore whether their text will be understandable to their reader.”).

office memos, letters, wills, and contracts, examples can be found in old client files and on office hard drives. New lawyers can ask their supervisors, other experienced attorneys, or paralegals, for assistance in finding reliable go-bys. For litigation documents, Westlaw and Lexis, as well as public records databases such as PACER, maintain documents that can be downloaded.

Step four in the genre discovery is to study the example documents to identify conventions. Once students have located sample motion memos for their jurisdiction, teach them to study the samples for similarities and differences. Ask students what patterns emerge across the documents. These patterns are the generic conventions that students should adhere to when writing their own motion memos. You can even teach students strategies for how to write for a particular judge. When designing a motion memo problem, try selecting a jurisdiction and a particular judge in that jurisdiction, and then download past motions that have been filed before that judge and won. Three samples is a good number to use in class for comparison; students will be amazed that they can find motions that have won before a judge and will learn how to model their writing accordingly. What does this judge seem to prefer? Look at some losing motions as well. What patterns emerge that did not seem to work for this judge?

The fifth and final step is one that legal writing professors already excel at: guiding students through the process of writing the genre now that they have discovered the genre's conventions. The only difference here is that students will have a better sense of the audience for whom they are writing and the reasons why they are including the various parts of the genre. They will have a deeper sense of ownership of their decision-making: rather than blindly following a document template that they encountered in a book, they will have intelligently engaged with that template after reading rules of court for a particular jurisdiction, sample documents filed in that jurisdiction, and even particular documents favored by a particular judge. With these genre discovery skills, students will not only be able to write the documents they encounter in our legal writing classes with greater confidence, but also, once they have mastered these skills, they will be able to discover new genres on their own in upper-level law courses and the workplace, enabling them to write any legal genre.

V. CONCLUSION

As I have demonstrated in Part IV, the genre discovery approach is easily integrated into existing legal writing pedagogy—so long as space is made in the curriculum to teach it. As I have noted, teaching genre

discovery takes time, and therefore fewer genres can be covered in a semester of legal writing instruction. However, since genre discovery prepares students to write any legal document, legal writing professors should feel less pressure to inoculate students against as many genres as possible. Instead, they should be free to select a few of the most pertinent genres to train students with during the semester.

Gaining skill in the five steps of genre discovery—knowledge of genres, situation of genres in communities, location of examples, identification of conventions, and creation of documents using those conventions—our former students will be well-prepared to write the genres expected of them in upper-division courses and in the workplace. They will know to ask for go-bys or samples and how to evaluate those samples once they have them in hand. They will know how to identify an audience with appropriate specificity and how to write for that specific audience in the most persuasive fashion. In short, they will be the professional writers that new lawyers need to be.