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# Writing Lessons from Abroad: A Comparative Perspective on the Teaching of Legal Writing

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# Writing Lessons from Abroad: A Comparative Perspective on the Teaching of Legal Writing

Adam G. Todd\*

## I. INTRODUCTION

With a few exceptions, American legal writing pedagogy has not been adopted in any meaningful way in foreign countries. At most, it has garnered some attention in Legal English courses,<sup>1</sup> but has otherwise received scant reception in foreign universities and little academic interest by continental and other civil law<sup>2</sup> academics.<sup>3</sup>

The reason transplantation, or “borrowing,” of American legal writing pedagogy has not occurred is due to the deep structural differences between the American legal education system and the education system found in most other countries, especially civil law countries.<sup>4</sup> For example, many law schools in Western Europe require up to three years of apprentice experience before admitting a person into the practice of law.<sup>5</sup> This apprentice

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\* Associate Professor of Lawyering Skills, University of Dayton School of Law. This Article comes out of presentations and conversations I had at the following conferences: Preparing for Practice: A Conference on Legal Skills Training in Central and Eastern Europe, Prague, Czech Republic, May 19, 2005; Conference on Legal Writing Pedagogy in East Africa, sponsored by LWI & ALWD, Nairobi, Kenya, March 15, 2007; and Global Legal Skills Conference, San Jose, Costa Rica, May 14, 2012. The author thanks John Lyle for his work as research assistant as well as the support of Cynthia Richards and Lily and Samuel Todd.

1. See Norbert Reich & Linda Freiman, *Preparing for the European Future of Law Studies in the Baltic Countries*, 22 PENN ST. INT'L L. REV. 101, 120 (2003).

2. This Article uses the term “civil law” very broadly to identify the legal systems that stem from Roman and Germanic law, which is found in the vast majority of legal systems. Comparative law scholars have categorized legal systems into traditions or families. The three main categories are the civil law systems, common law, and socialist. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683 (2000); see also N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1266 (1994).

3. This issue has been noted by professors examining the (limited) transplantation of clinical education abroad. See Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 139 (2008); David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815, 819 (2009); Richard J. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10 GERMAN L.J. 823, 828 (2009).

4. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994); Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003).

5. RICHARD J. WILSON, *THE ROLE OF PRACTICE IN LEGAL EDUCATION*, REPORT PRESENTED AT THE 18TH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 16 (2010), available at <http://ssrn.com/abstract=1695618>.

requirement is in stark contrast to the general absence of any apprentice or internship requirements in the United States prior to being admitted to the practice of law as an attorney.<sup>6</sup> This lack of an apprentice period in the United States's legal education system gives a greater urgency to the teaching of legal skills—particularly legal writing<sup>7</sup>—in American law schools.<sup>8</sup> In addition, the market-based system of legal education found in the United States has shifted the cost of teaching legal writing from law firms and other legal employers to law schools, in contrast to most continental legal systems where employers (or government subsidies) provide such training.<sup>9</sup>

The fact that legal education in most civil law countries combines undergraduate and professional education and urges students to specialize in their legal education for particular careers (be it in the judiciary, academia, prosecutors' offices, or general practice) also makes the American-style legal writing program less compelling to these countries.<sup>10</sup> Generally speaking, continental legal education begins earlier for most students (usually age nineteen or earlier), runs longer (usually five years), and provides foundational courses such as history and philosophy in the initial years of study.<sup>11</sup> In contrast, American law students come to law school with a variety of backgrounds and training, and the American legal writing classes found in its law schools provide a remedial and leveling function for American law students whose undergraduate training did not provide for skills needed for law studies.<sup>12</sup>

This Article does not argue that it is impossible, impractical, or unimportant to try to transplant legal educational methods from one system to the other. Quite the contrary, law schools in the United States and civil law countries share the same basic pedagogical goal, which is to train skilled lawyers and legal professionals.<sup>13</sup> As a consequence, the teaching of skills

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6. Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 348 (2006).

7. The "legal writing" class in American law schools is not simply a class in writing. A typical legal writing class includes legal analysis, reasoning, rhetoric, legal methods, use of sources of law, research, negotiations, role playing, oral advocacy, and more. The teaching about the form of written legal documents is only a small part of the course. See Joseph Kimble, *On Legal-Writing Programs*, 2 PERSP. 43, 44 (1994); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1194 (2000); see also Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 910 (2006).

8. Katcher, *supra* note 6, at 364.

9. WILSON, *supra* note 5, at 26.

10. See John H. Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 865 (1975).

11. *Id.* at 866; Juergen R. Ostertag, *Legal Education in Germany and the United States*, 26 VAND. J. TRANSNAT'L L. 301, 339 (1993).

12. Abigail Salisbury, *Skills Without Stigma: Using the JURIST Method to Teach Legal Research And Writing*, 59 J. LEGAL EDUC. 173, 177 (2009); see also AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 98 (Eric Easton et al. ed., 2d ed. 2006) [hereinafter AM. BAR ASS'N SOURCEBOOK].

13. WILSON, *supra* note 5, at 14–15; see also Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53, 88 (2009); Andras Jakab, *Dilemmas of Legal Education: A Comparative*

such as legal writing should be a high priority in both education systems.<sup>14</sup> The structural differences, however, cause each system to have varying strengths and weaknesses in the teaching of skills, particularly in the field of legal writing. An examination of these differences provides a useful point for learning and profiting from the other's experiences.<sup>15</sup>

## II. THE PERILS AND PROMISES OF THE COMPARATIVE PROCESS

Because this Article engages in the comparative law process, a caveat is needed.<sup>16</sup> Comparative law is a tricky enterprise.<sup>17</sup> The comparative process usually requires generalizations about the legal systems being compared.<sup>18</sup> Furthermore, the methodology of the comparative process remains rather incoherent.<sup>19</sup> But, paradoxically, comparative law has recently grown in its prominence and has generated significant literature and data on the interplay of foreign legal systems.<sup>20</sup> Indeed, globalization, particularly through the use of technology and the internet, compels the study of foreign law and legal systems.<sup>21</sup> Thus, though comparative process has shortcomings, it provides the normative benefits of promoting international understanding and trade as well as a greater understanding of our own legal system and traditions.<sup>22</sup>

When comparing the legal systems of two or more countries, scholars of

Overview, 57 JOURNAL OF LEGAL EDUC. 253, 253–54 (2007).

14. Jan M. Smits, *European Legal Education, or: How to Prepare Students for Global Citizenship?*, 45 THE LAW TEACHER 163 (2011).

15. A number of scholars have examined the efforts of transplanting American clinical legal education in foreign countries with similar insights. See John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 95 (2002); Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 745 (1992); Haider Ala Hamoudi, *Toward a Rule of Law Society: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 BERKELEY J. INT'L L. 112, 115 (2005); Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE HUM. RTS. & DEV. L.J. 117, 139–40 (2005); Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN. ST. INT'L L. REV. 421, 427–29 (2004); Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to do so Effectively*, 12 CLINICAL L. REV. 615, 630–32 (2006).

16. The term “comparative law process” is applied to the act of comparing the laws of different legal systems. See, e.g., Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX REV. 133, 140 (2012).

17. See Mathias Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 CARDOZO J. INT'L & COMP. L. 521, 534 (2005).

18. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 252–53 (1999) (questioning the comparative process); Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 720 (2004) (discussing the comparability of apples and oranges within the context of comparing legal systems); see also Merryman, *supra* note 10, at 860.

19. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673–84 (2002); see also Marian, *supra* note 16, at 138–39 (referring to comparative law relating to tax reform).

20. Reimann, *supra* note 19, at 673–74.

21. David S. Clark, *American Law Schools in the Age of Globalization: A Comparative Perspective*, 61 RUTGERS L. REV. 1037, 1076 (2009) [hereinafter Clark, *Globalization*]; see also Jon Mills et. al., *VII. Legal Education in the Americas C. A Dean's Perspective on Legal Education*, 15 FLA. J. INT'L L. 140, 143 (2002).

22. V. G. Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 665 (1998); Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 452 (2009).

comparative law use a variety of terms to describe the movement of laws and legal institutions between states.<sup>23</sup> The term “transplant” is most often used to mean “the moving of a rule or system of law from one country to another.”<sup>24</sup> A similar term, “borrowing,” is often used synonymously and is done so in this Article.<sup>25</sup> For example, it is widely acknowledged that much of American law is based on transplanted, or borrowed, British law.<sup>26</sup>

The study or tracking of the transplantation of a foreign law or aspects of foreign legal system into another is a perilous undertaking. Its study has engendered debate regarding how, when, and to what extent transplantation occurs.<sup>27</sup> Some scholars, such as Alan Watson, identified legal borrowing as ubiquitous<sup>28</sup>; indeed, examples of borrowing are easily identified in Japan’s reception of German law in its Civil Code<sup>29</sup> or the Latin American adoption of French and Spanish corporate law.<sup>30</sup> Yet subsequent writers have been more circumspect or even outright hostile to the notion of legal transplants playing a significant role in the formation of legal systems.<sup>31</sup> For example, Otto Kahn-Freund, writing around the same time as Professor Watson, was more skeptical about the idea of transplants because laws and legal institutions are reflections of a given society’s values.<sup>32</sup> Kahn-Freund states, “[w]e cannot take for granted that rules or institutions are transplantable.”<sup>33</sup>

23. Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304, 1306–08 (M. Rosenfeld & A. Sajo, eds.) (“options include ‘transplants’, ‘diffusion’, ‘borrowing’, ‘circulation’, ‘cross-fertilization’, ‘migration’, ‘engagement’, ‘influence’, ‘transmission’, ‘transfer’, and ‘reception’”).

24. Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. LEGAL EDUC. 413, 444 (2008); see also Julie A. Davies, *Methods of Experiential Education: Context, Transferability and Resources*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 21, 28 (2009); Watson, *supra* note 4, at 22.

25. Borrowing is often used primarily as a verb or adjective when describing the process of the movement of law compared to “transplant,” which is used as a noun. See, e.g., Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY L.Q. 1295, 1297 (2001).

26. Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 12 (2010) (quoting Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 N.W. U. L. REV. 198, 211 (1977)); see also Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1427–28 (2010).

27. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQ. L. 723, 726–730 (2009).

28. Watson, *supra* note 4, at 22; see also Steven J. Heim, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 187, 191 (1996) (comparing Watson and Kahn-Freund).

29. J. Mark Ramseyer, *Mixing-and-Matching Across (Legal) Family Lines*, 2009 BYU L. REV. 1701, 1708.

30. Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or A Never-Ending Story?*, 86 WASH. L. REV. 475, 484 (2011); Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT’L ECON. L. 791, 844–48 (2002); see also James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT’L L. 501, 521 (2008).

31. John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657, 672 (2008).

32. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974).

33. *Id.* These words are a variation of the words written by Montesquieu that “[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.” Wiener, *supra* note 25, at 1353 n.217 (quoting CHARLES-LOUIS DE SECONDAT DE MONTESQUIEU,

This notion is consistent with a class of theories that William Ewald identifies as arguing that the law in a given society is a “mirror” of that society. These scholars see “every aspect of the law . . . molded by economy and society.”<sup>34</sup> Upon close examination, some scholars have found that a law “that looks like a transplant may, in fact, be homegrown.”<sup>35</sup>

Taken further, some scholars argue that legal transplantation is an impossible enterprise because a law does not remain the same once it is transplanted into a foreign system.<sup>36</sup> Although this proposition is correct on a strict hermeneutic basis,<sup>37</sup> the process of viewing a law or legal institution as borrowed from a foreign jurisdiction is “not impossible,” particularly when viewed on a historical or sociological basis.<sup>38</sup> The identification of borrowed law is a useful and rather conventional device that can track the movement and development of ideas and institutions.<sup>39</sup> Although the transplanted law may be different in form or function, this difference does not extinguish the fact that it was borrowed from another context. As one scholar noted, “transplants always involve a degree of cultural adaptation.”<sup>40</sup> Such adaptation, though important to understand, does not diminish the origins of the borrowed law and insight into the law creation process in the borrowing country.<sup>41</sup> Furthermore, the comparative exercise provides significant benefits to both of the legal systems involved in the comparative process when the normatively positive experience of one country’s system can be replicated, adapted, and enhanced by the other.<sup>42</sup>

It is with skepticism of the limitations of the comparative exercise—and with the above caveat in mind—that this Article posits that there are aspects of the American legal education system involving the instruction of legal writing that could be productively borrowed by foreign legal education systems.<sup>43</sup> Likewise, the American legal education system can profitably

THE SPIRIT OF THE LAWS, pt. I, bk. I, ch. III, at 105 (David Wallace Carrhiers ed. & trans. 1977); see also Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 219 (2011).

34. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 492 (1995).

35. Graziadei, *supra* note 27, at 731 (citing Pnina Lahav, *American Moment[s]: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools*, 10 THEORETICAL INQ. L. 653, 674 (2009)).

36. *Id.* at 728–29.

37. *Id.*

38. Manfred Weiss, *The Future of Comparative Labor Law As an Academic Discipline and As A Practical Tool*, 25 COMP. LAB. L. & POL’Y J. 169, 180 (2003).

39. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 349 (1998); see also Chris Nwachukwu Okeke, *African Law in Comparative Law: Does Comparativism Have Worth?*, 16 ROGER WILLIAMS U. L. REV. 1, 48 (2011).

40. Graziadei, *supra* note 27, at 728.

41. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 484 (2010); see also Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 335 (1998).

42. Tushnet, *supra* note 39, at 329; see also Tebbe & Tsai, *supra* note 41, at 471.

43. Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. LEGAL

borrow from its civil law counterparts in ways that might improve legal writing instruction in the United States. Using the lens of comparative law, this Article first describes how legal writing is taught in the United States and the unique circumstances surrounding its prominence in the American legal education curriculum. Then, continuing the comparative exercise, it examines how legal writing is taught in foreign legal education systems—particularly civil law jurisdictions. This Article concludes with an examination of ways foreign educational systems may want to borrow aspects of American legal writing pedagogy and, concomitantly, how American law schools might profit from foreign legal educational methods.

### III. THE UNIQUE DEVELOPMENT OF LEGAL WRITING AS A DISCIPLINE IN THE UNITED STATES

Although there is no uniform model of legal education in civil law countries, some broad generalizations can be made about how their legal education is delivered.<sup>44</sup> The International Congress on Comparative Law recently issued a report entitled *The Role of Practice in Legal Education*.<sup>45</sup> This report, based on a survey of members from seventeen countries, examined the teaching of legal skills or “practical lawyer-training” in these various countries’ systems of legal education. It confirmed what others had observed when comparing the way legal writing is taught in the United States to the way it is done in other countries: the United States is quite different in its approach to and emphasis on the teaching of legal writing as part of university instruction.<sup>46</sup>

Legal writing as an established and recognized discipline within legal education is a relatively recent and primarily American phenomenon.<sup>47</sup> Up until about twenty-five years ago, no formal legal writing programs existed in either civil law<sup>48</sup> or common law (including the United States) law schools.<sup>49</sup> Writing, if taught at all, might have been provided as a course in

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EDUC. 413, 444 (2008).

44. Merryman, *supra* note 10, at 859.

45. WILSON, *supra* note 5, at 1.

46. See, e.g., Su Li Zhu, *An Institutional Inquiry into Legal Skills Education in China*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 75, 85 (2009). “Although the course of ‘legal instruments and legal writing’ is also offered by some Chinese law schools, it has little strength to inspire students because they find it not intellectually challenging due to its overemphasis on highly formatted legal instruments and lack of orientation to practical legal issues.” *Id.*; see also Dauphinais, *supra* note 13, at 53–54 (noting the weakness in skill instruction in East African legal education but also recent growth in legal writing instruction).

47. There are notable exceptions. Common law countries such as England, Ireland, and New Zealand require legal writing courses in their law schools. Wilson, *supra* note 5, at Table 2. Richard J. Wilson points out that skills training is “deeply ingrained in Latin American legal culture” and countries such as Peru, Columbia, and Nicaragua emphasize “active learning.” *Id.* at 52.

48. *Id.* at 29.

49. Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 894 (2002); see also Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 123–30 (1997).

bibliography,<sup>50</sup> as a remedial course focusing on legal methods,<sup>51</sup> or as extra instruction in conjunction with doctrinal law classes.<sup>52</sup> The pedagogy related to legal writing in this earlier period emanated from false notions about the nature of the teaching of writing, such as the perception that writing was “unteachable” or “inherent.”<sup>53</sup> These beliefs were subsequently and quite significantly revised; today, such beliefs are inconsistent with current pedagogy and practice in the instruction of legal writing.<sup>54</sup> Concomitant with these changes in pedagogy, law schools encountered pressure to revise their curriculums to include more skills and to make students “practice ready” by the time they graduate from law school. The unique combination of these curricular, economic, and pedagogical pressures in the United States helped build a robust legal writing pedagogy not found in most other systems of legal education.

#### A. Administrative and Curricular Pressures in the Development of the American Legal Writing Course

The emergence of legal writing as a separate discipline in American law schools came about due to some particularities of the American legal education system not found in other countries.<sup>55</sup> The causes were a combination of economic and social pressures, which coincided with breakthroughs in the study and understanding of the process of writing, how writing is learned, and consequently how it can best be taught.<sup>56</sup>

In the beginning of the 1980s, law schools in the United States began to offer formal legal writing classes and develop legal writing programs.<sup>57</sup> Legal writing emerged during this period as a separate discipline.<sup>58</sup> Today, the most recent survey by the Association of Legal Writing Directors shows

50. Marjorie D. Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539–40 (1972).

51. *Id.*; see also Kristen K. Robbins-Tiscione, *A Call To Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 321 (2011).

52. Rombauer, *supra* note 50, at 539–40; see also Comm. on Curriculum, Ass’n of Am. Law Sch., *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 374–75 (1945); Karl Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 653 (1935); Karl Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 217 (1948).

53. Pollman, *supra* note 49, at 894; see also Jo Anne Durako, *A Snapshot of Writing Programs at the Millennium*, 6 J. LEGAL WRITING INST. 95, 98 (2000); Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51, 51 (2000); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 J. LEGAL WRITING INST. 123, 123 (1991); Michael Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS’N LEGAL WRITING DIRECTORS 1, n.11–20, n.92 (2004).

54. Durako, *supra* note 53, at 100; Pollman, *supra* note 49, at 894–96.

55. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* xiii (1983) (providing an account of the development of the American legal educational system).

56. See discussion *infra* Part III.B–C.

57. Arrigo, *supra* note 49, at 123–30; Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties As a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 331 (2001); Pollman, *supra* note 49, at 894.

58. Linda L. Berger et al., *The Past, Presence, And Future Of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 J. LEGAL WRITING INST. 521, 531 (2010).



that 196 law schools report having some form of legal writing program.<sup>59</sup> About ninety percent of these schools require at least two semesters of legal writing classes for students during their first year of study.<sup>60</sup>

In contrast, civil law countries' law schools generally do not offer legal writing instruction.<sup>61</sup> If taught at all, those law schools teaching legal writing do so in a manner similar to American schools over twenty-five years ago, in which a doctrinal professor may ask his students to draft a particular legal instrument as part of the doctrinal instruction of the course.<sup>62</sup>

One significant factor in the rise of American legal writing programs was a concern expressed by members of the legal academy about the poor state of entering law students' writing abilities, and concomitant concerns expressed by members of the legal profession about the legal skills of graduating law students. This distress was reflected in the American Bar Association's 1992 MacCrate Report, which urged greater attention to practical training in communication for law students.<sup>63</sup> These concerns then contributed to the development of legal writing classes and programs in American law schools.<sup>64</sup>

The concern about "poor legal writing ability," though not a uniquely American phenomenon, would be approached differently by law schools in other countries. In most other countries and particularly in civil law countries, law school or legal education begins for students at age eighteen or nineteen and combines the American undergraduate and graduate schooling.<sup>65</sup> These countries' legal education systems get students earlier and generally provide a longer period of legal instruction.<sup>66</sup> As a result, they have more control over students and can address some of the academic weaknesses in skills needed for law practice at an earlier stage of a student's education.

In contrast, American law students enter law school after four years of undergraduate study in a variety of fields.<sup>67</sup> As a result, United States law

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59. ASS'N OF LEGAL WRITING DIRS., LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2011), available at <http://www.lwionline.org/uploads/FileUpload/2011Survey.pdf>.

60. *Id.* at iv; Durako, *supra* note 53, at 115; Levine, *supra* note 53, at 57; Ramsfield, *supra* note 53, at 127.

61. WILSON, *supra* note 5, at 29.

62. *Id.* at 35.

63. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION 4 (1992) [hereinafter MacCrate Report]. These same sentiments were reiterated in subsequent reports. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 7 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 8 (2007) [hereinafter Carnegie Report].

64. Pollman, *supra* note 49, at 896.

65. Merryman, *supra* note 10, at 863; see, e.g., Vladimir Balas, *Problems of Legal Education in the Czech Republic*, 43 S. TEX. L. REV. 323, 328 (2002).

66. Merryman, *supra* note 10, at 869–71.

67. See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving 'Elite' College Students*, 89 CAL. L. REV. 1055, n.88 (2001) (citing Robert L. Linn & C. Nicholas Hastings, *A Meta Analysis of the Validity of Predictors of Performance in Law School*, 21 J. EDUC. MEASUREMENT 245, 250 (1984)).

schools have a greater need to norm incoming graduate students, some of whom may have weak academic or social science writing backgrounds.<sup>68</sup> The legal writing class assists in the norming process by providing necessary foundational instruction that students in most other countries receive during early undergraduate education.<sup>69</sup>

For example, a student in the United States entering law school may have studied music for four years as an undergraduate and received a B.A. in music before beginning legal studies. Such a student would likely have written fewer social science papers as an undergraduate than a student who studied political science or economics (or a “pre-law” major offered by some American colleges) and wrote extensively in these law-related fields.<sup>70</sup> The differing educational background between these two students, particularly if they are from different regions or socio-economic situations, push American law schools to provide a mechanism to norm students in their first year of study.<sup>71</sup> So, in addition to formal writing instruction, American legal writing courses often begin with instruction about the structure of the American legal system, the sources that make up the law, and the basic analytical process involved in determining the law.<sup>72</sup> Students with larger deficits in their past academic training are often provided with one-on-one instruction and additional resources to get them on par with their fellow students.<sup>73</sup>

This normalization function played by legal writing courses in American law schools is connected to concepts of social and professional mobility found in the United States education system.<sup>74</sup> Students in the United States are not necessarily encouraged to specialize in their undergraduate studies.<sup>75</sup> In fact,

68. Mary S. Lawrence et al., *A Review from Three Perspectives: Writing and Analysis in the Law*, Helene S. Shapo, Marilyn R. Walter and Elizabeth Fajans, 55 BROOK. L. REV. 1301, 1301 (1990); Carol M. Parker, *A Liberal Education in Law: Engaging the Legal Imagination Through Research and Writing Beyond the Curriculum*, 1 J. ASS’N LEGAL WRITING DIRECTORS 130, 138 (2002). “Directors of legal writing programs choose first year textbooks for entire entering classes consisting of students of dissimilar backgrounds and diverse abilities.” Lawrence, *supra*, at 1301.

69. See Jakab, *supra* note 13, at 254; Philip Leith, *Legal Education in Germany: Becoming Lawyer, Judge, and Professor*, 4 WEB J. OF CURRENT LEGAL ISSUES, at \*2–3 (1995), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/other/journals/WebJCLI/1995/issue4/leith4.html>.

70. See generally Pre-Law Committee of the ABA Section of Legal Education and Admissions to the Bar, *Preparing for Law School*, ABANET.ORG, <http://www.abanet.org/legaled/prelaw/prep.html> (last visited Feb. 11, 2014).

71. Patrick R. Hugg, *Comparative Models for Legal Education in the United States: Improved Admissions Standards and Professional Training Centers*, 30 VAL. U. L. REV. 51, 74 (1995); see also Susan L. DeJarmatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 510 (2002); Laurel Currie Oates, *Leveling the Playing Field: Helping Students to Succeed by Helping Them Learn to Read as Expert Lawyers*, 80 ST. JOHN’S L. REV. 227, 227 (2006).

72. AM. BAR ASS’N SOURCEBOOK, *supra* note 12, at chpt. II.

73. See M.H. Sam Jacobson, *Providing Academic Support Without an Academic Support Program*, 3 J. LEGAL WRITING INST. 241, 257 (1997); Dionne L. Koller, *Legal Writing and Academic Support: Timing Is Everything*, 53 CLEV. ST. L. REV. 51, 52–54 (2005); Todd, *supra* note 7, at 947.

74. See Jordan Weissmann, *Report: It’s Better to Be a Poor Student in Almost Any Rich Country but the U.S.*, THE ATLANTIC (Sep. 13, 2012), <http://www.theatlantic.com/business/archive/2012/09/report-its-better-to-be-a-poor-student-in-almost-any-rich-country-but-the-us/262336/>.

75. Doug Lederman, *When to Specialize?*, INSIDE HIGHER ED, (Nov. 25, 2009), <http://www.insidehighered.com/news/2009/11/25/nber#ixzz26TMwXv3t>.

many law schools encourage students to simply pursue a “well-rounded” liberal arts education rather than focusing on legal studies in their undergraduate education.<sup>76</sup> Professional mobility is less flexible under the educational systems found in many other countries, where students specialize in their chosen fields at a much earlier age.<sup>77</sup> Thus, because students begin their law studies much earlier under the legal education systems in these countries, they do not have the need for a “norming” course such as those found in the American legal education system.

### *B. Economic Pressures in the Development of American Legal Writing Courses*

In the 1980s, economic pressures from the changing nature of law firms and the competitive nature of American law schools caused a rise in writing programs in the United States.<sup>78</sup> Law firms—particularly large firms—began to charge higher fees and offer higher salaries.<sup>79</sup> As a result, the time and cost of training their new employees became more expensive and they began to favor hiring students who were already trained in legal skills such as legal writing.<sup>80</sup> It was believed that newly-hired attorneys with training in these legal skills required less on-the-job training and could begin generating fees more quickly.<sup>81</sup>

Law schools responded to these market pressures by offering more direct training in skills that make their students more competitive for these jobs.<sup>82</sup> The schools believed that their students would be more likely to be hired by a law firm upon graduation if they were trained in legal writing.<sup>83</sup> Thus, law schools allocated more resources toward such training.<sup>84</sup>

76. Pre-Law Committee of the ABA Section of Legal Education and Admissions to the Bar, *supra* note 70.

77. See generally Dirk Krueger & Krishna B. Kumar, *Skill-Specific Rather than General Education: A Reason for US—Europe Growth Differences?*, 9 J. ECON. GROWTH 167 (2004).

78. Pollman, *supra* note 49, at 894; see also Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 Touro L. Rev. 507, 527–28 (2005).

79. Kenneth Jost, *What Image Do We Deserve?*, A.B.A. J., Nov. 1988, at 47; William H. Rehnquist, *The State of the Legal Profession*, LEGAL ECON., Mar. 1988, at 44; Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 228 (2007); Vinson, *supra* note 78, at 545.

80. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2172–73 (1998); see also Mitchell D. Hiatt, *Why the American Bar Association Should Require Law Schools to Increase and Improve Law Students' Practical Skills Training*, 45 CREIGHTON L. REV. 869, 872 (2012).

81. Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 605 (2010).

82. Ward B. Coe III, *Profound “Nonchanges” in Small and Midsize Firms*, 70 MD. L. REV. 364, 372 (2011) (advocating for legal writing and analysis for firms).

83. Kristen A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in Its Wake*, 10 SEATTLE J. SOC. JUST. 49, 123–24 (2011); Thies, *supra* note 81, at 599.

84. Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 577 (2000); Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 286–87 (2007).

Connected to the economic pressures coming from the hiring market, economic pressures also came from rising undergraduate and law school tuition rates in the United States.<sup>85</sup> Tuition for one year of law school in 2012 was around \$35,000 and, for a number of schools, it was more than \$40,000.<sup>86</sup> Total legal education—including books, special bar exam courses, and costs for bar examinations—often totaled over \$100,000 for most students.<sup>87</sup> These figures do not include lost opportunity costs (lost earnings) during the three years of law study.<sup>88</sup> Moreover, since the mid-1980s the tuition at private law schools has increased by approximately 156 percent in real terms, while tuition for state residents at public law schools has increased by more than 400 percent.<sup>89</sup>

As costs have risen, so too has the need to get good-paying employment right out of law school in order to pay off tuition loans.<sup>90</sup> Concurrently, to secure these high-paying jobs, there was demand by students for marketable skills to be taught in law school.<sup>91</sup> Thus, higher tuitions spurred student demand as “consumers”<sup>92</sup> of legal education for more skills classes like legal writing, and the law school market responded by offering legal writing and other skills courses.<sup>93</sup> Competing for tuition-paying students and jobs for their graduates, law schools expanded and enhanced legal writing instruction, particularly in the first year of instruction.<sup>94</sup>

85. Christa McGill, *Educational Debt And Law Student Failure To Enter Public Service Careers: Bridging Empirical Data To Bear*, 31 LAW & SOC. INQUIRY 677, 677 (2006); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS (2009), available at <http://www.gao.gov/new.items/d1020.pdf>.

86. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 5 (2008); David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), [http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all&_r=0).

87. See Schwarzschild, *supra* note 86, at 5; Thies, *supra* note 81, at 599.

88. See John R. Kramer, *Will Legal Education Remain Affordable, by Whom, and How?*, 1987 DUKE L.J. 240, 245–46. “The lost economic opportunity of full-time employment for three years is, perhaps, as large a deterrent to applying to law school as the expected cash outlays.” *Id.*

89. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 180 (2012) (citing AM. BAR ASS'N, LAW SCHOOL TUITION 1985–2011 (2012), available at <http://www.americanbar.org>). Professor Campos adjusted the nominal dollar figures for inflation himself. *Id.* at 178 n.3.

90. Leigh Jones, *As Salaries Rise, So Does the Debt*, NAT'L L.J. (Feb. 1, 2006), <http://www.law.com/jsp/article.jsp?id=1138701909390>.

91. See Cynthia Baker & Robert Lancaster, *Under Pressure: Rethinking Externships in A Bleak Economy*, 17 CLINICAL L. REV. 71, 83 (2010); see also Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69, 121 (2009).

92. See, e.g., Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457, 463 (1999). A number of articles refer to law students as “consumers” of legal education and the MacCrate Report calls students “passive consumers of legal education.” Jared Lamb, *The Path of the Law School: Three Implementable Law School Reforms*, 3 FAULKNER L. REV. 343, 363 (2012). But calling law students “consumers” is also criticized as “flawed.” Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 684 (2012); see also James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 743 (2012).

93. Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 118 (2010).

94. See, e.g., Suzanne Craig Robertson, *Where Will All These Graduates Work?*, 45 TENN. B.J. 29, 35 (2009). “The largest growth in new [law] classes was in courses dealing with writing, skills training, and law practice.” Patricia Mell, *Law Schools and Their Disciples*, 79 MICH. B.J. 1392, 1394 (2000); see also Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an*

This historical trend has unfortunately led to a false correlation by some between the increase in the teaching of legal writing in law schools and higher costs of legal education in the United States.<sup>95</sup> Such suppositions have been based on overly reductive conclusions or anecdotal evidence.<sup>96</sup> For example, the Government Accounting Office reported that “more hands-on, resource-intensive” courses were a cause of increased tuition in American law schools.<sup>97</sup> Yet although this finding was based on conversations with law school officials, these officials also pointed out what they believed to be other significant causes of higher tuition: “increased diversity of course offerings—e.g., international law and environmental law; and . . . increased student support—e.g., academic support, career services, and admissions support.”<sup>98</sup> In addition, officials highlighted costs associated with the competition to attract students and faculty—including increased faculty salaries and measures to increase *U.S. News and World Report* ranking—as significant cost drivers.<sup>99</sup> However, considering that most legal writing courses are taught by non-tenure track faculty, who are paid significantly lower salaries, undercuts the idea that such courses played a significant role in higher tuitions.<sup>100</sup>

Indeed, many of the causes of increased law school tuition mirror increases in the cost of higher education in general in the United States; they have nothing to do with the curricular changes in American law schools that have established and expanded legal writing courses.<sup>101</sup> In fact, comprehensive examinations of the high cost of current legal education find numerous causes.<sup>102</sup> The growth of skills courses is not identified as a

*AALS Survey*, 47 J. LEGAL EDUC. 524, 534 (1997).

95. Elizabeth Chambliss, *Organizational Alliances by U.S. Law Schools*, 80 FORDHAM L. REV. 2615, 2646 (2012) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 85); Jon Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1468 n.36 (1998) (summarizing criticism of the MacCrate Report for “failing to sufficiently acknowledge the cost burdens” associated with its call for skills training).

96. See, e.g., Jennifer S. Bard, “*Practicing Medicine and Studying Law*”: *How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them*, 10 SEATTLE J. FOR SOC. JUST. 135, 188 (2011). “Given the reality of a tenured faculty without current legal skills, the question of who will—or should—teach skills is a difficult and expensive one.” *Id.*

97. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 85, at 2.

98. *Id.* at 20.

99. *Id.*

100. Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 577 (2001). “In adjusted dollars, in 1998, legal writing professors earned, on average, fifty-seven percent of the median salaries of assistant, tenure-track professors of doctrinal subjects, fifty-one percent of the median salaries of associate professors, and forty percent of the median salaries of full professors.” *Id.*; see also David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (“about half of a law school’s budget is spent on faculty salary and benefits, and . . . tenure-track faculty members consume about 80 percent of the faculty budget”).

101. Christine Armario, *Average Cost of Four-Year University Up 15%*, USA TODAY (June 13, 2012), <http://usatoday30.usatoday.com/money/economy/story/2012-06-13/college-costs-surge/55568278/1>; Lynn O’Shaughnessy, *Why College Tuition Keeps Rising*, MONEYWATCH (Sept. 21, 2012, 8:11 AM), [http://www.cbsnews.com/8301-505145\\_162-57517032/why-college-tuition-keeps-rising/](http://www.cbsnews.com/8301-505145_162-57517032/why-college-tuition-keeps-rising/).

102. John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 524 (2002). See generally Bourne, *supra* note 92.

significant factor in these empirical studies.<sup>103</sup> For example, a study in 2002 attributed the high cost of law school tuition to: (1) increases in student financial aid; (2) other law school operations such as travel, technology, publications, and co-curricular activities; and (3) increase in expenditures for administrative salaries.<sup>104</sup> The addition of skill-related courses was identified as only a minor factor at best.<sup>105</sup> These findings were also reflected in a study published by the Law School Admission Council.<sup>106</sup>

The economic pressures that encouraged legal writing in the law school curriculum in the United States are not found in many foreign countries. Law schools in many other countries are free to many students<sup>107</sup> or have very low tuition<sup>108</sup> compared to U.S. law schools. Costs in civil law legal educational systems are low. According to one recent study, “[c]osts for legal education run from a low of no tuition or fees to a cost of no more than €2,000 per year.”<sup>109</sup> Many countries also provide law students with additional subsidies for living expenses.<sup>110</sup>

As a result, law schools in many countries are immune from the type of market pressures exerted by students and employers in the United States. A student graduating with little or no debt has less urgency to secure a high paying job.<sup>111</sup> This frees the student and the employer to provide more of the training in legal skills during, rather than prior to, employment. As a result, the cost of legal skills training can be borne by the employer and employee during the employee’s job training rather than by the student during law

103. Sebert, *supra* note 102, at 524.

104. *Id.*

105. *Id.*

106. Gene R. Nichol, *Rankings, Economic Challenge, and the Future of Legal Education*, 61 J. LEGAL EDUC. 345, 349 (2012) (citing MICHAEL SAUDER & WENDY ESPELAND, L. SCH. ADMISSIONS COUNCIL, FEAR OF FALLING: THE EFFECT OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS (2007) available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>). The Law School Admissions Council found that the *U.S. News & World Report* law school rankings are a driver of high tuition because the rankings had put pressure on schools to allocate spending in ways that would increase their rankings. *Id.* It found that schools invested in actions to increase their rankings by spending on marketing and publicity campaigns; large dean, faculty, and administrative salaries to attract personnel with national reputations; and enormous scholarships to attract high-scoring LSAT and GPA students. *Id.*; see also David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>.

107. WILSON, *supra* note 5, at tbl. 1 (showing that some countries, such as Greece and Turkey, charge negligible tuition); see also Hugg, *supra* note 71, at 68.

108. WILSON, *supra* note 5, at 26. Table 1 shows a number of countries with annual tuition under \$1000 (Belgium, Hungary, and Switzerland) and most others under €10,000 (Czech Republic, France, Germany, Italy, New Zealand, Portugal, Taiwan, and Venezuela). *Id.* (noting that continental Europe has lower and publicly-subsidized legal education).

109. *Id.*

110. *Id.* “The Greek report indicates that the state ‘provides for books, access to libraries, food discounts for public transportation, as well as housing for economically deprived students.’ Germany provides a government stipend to anyone in the apprenticeship stage of training.” *Id.*; see, e.g., Balas, *supra* note 65, at 323–24.

111. William F. Downes, *The Indispensable Profession*, WYO. LAW. 24, 26 (2012) (noting how student debt drives student employment decisions); see also Dean Spade, *For Those Considering Law School*, 6 UNBOUND: HARV. J. LEGAL LEFT 111, 114 (2010) (noting how economic pressures facing graduating law students limit career choices).

school studies.<sup>112</sup>

Not surprisingly, the economics of the legal education system have an effect on law school curriculum. In many civil law nations, private universities play a minor role in the higher education system<sup>113</sup>; “[i]nstead, universities are maintained and are subject to control by the state, usually through the same ministry that has the responsibility for public elementary and secondary education.”<sup>114</sup> The United States in contrast has a rather robust private higher education market that competes with public universities. Private universities drive the standards in United States education.<sup>115</sup> Many countries do not have these competitive market forces, and issues of enrollment and curriculum are instead controlled or regulated by agencies like the Ministry of Education.<sup>116</sup> Thus, curricular decisions, such as those instituting legal writing courses or programs, emanate from the state based on a different set of pressures than in the United States.<sup>117</sup>

### C. Pedagogical Pressures in the Development of American Legal Writing Courses

The economic pressures that encouraged the development of legal writing courses in the United States were concurrent with significant changes in the way both legal writing and writing in general were taught in American universities.<sup>118</sup> Writing began to be recognized as central to the learning process and, thus, more important to student learning in all disciplines.<sup>119</sup> This pedagogical shift also contributed to the development of legal writing courses.

112. D. Harhoff & Th. J. Kane, *Is the German Apprenticeship System a Panacea for the U.S. Labor Market?*, 10 J. OF POPULATION ECON. 171, 175 (1995) (noting that an apprentice receives between one-half and one-third of the wage of a regular worker).

113. For example, Article 16 of the Greek Constitution prohibits private universities. George Psacharopoulos, *The Social Cost of an Outdated Law: Article 16 of the Greek Constitution*, Presented at the 19th Annual Conference European Association of Law and Economics in Athens, Greece 15, 19–20 (Sept. 19–21, 2002), available at <http://eale2002.phs.uoa.gr/papers/Psacharopoulos.pdf>; see also, Niki Kitsantonis, *E.U. Presses Greece on Private Colleges*, N.Y. TIMES (Apr. 10, 2011), <http://www.nytimes.com/2011/04/11/world/europe/11iht-eduLede11.html?pagewanted=all>.

114. Merryman, *supra* note 10, at 863; see also JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS* 435–76 (1994); Nadia de Araujo, *The Status of Brazilian Legal Education*, 51 J. LEGAL EDUC. 325, 331 (2001) (noting the role of the Brazilian Ministry of Education); Clark, *Globalization*, *supra* note 21, at 1057; Jun Zhao & Ming Hu, *A Comparative Study of the Legal Education System in the United States and China and the Reform of Legal Education in China*, 35 SUFFOLK TRANSNAT’L L. REV. 329, 336 (2012) (noting the role of the Chinese Ministry of Education).

115. *Id.* at 864.

116. Hugg, *supra* note 71, at 68.

117. *Id.*

118. See Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 719–20 (1997); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 99 (2005); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 63 (1994).

119. See Lee McKensie & Gail E. Tomkins, *Evaluating Students’ Writing: A Process Approach*, 3 J. OF TEACHING WRITING 201, 201 (1984) available at <http://journals.iupui.edu/index.php/teachingwriting/article/viewFile/709/683>.

When legal writing was first offered, particularly prior to the 1980s, it was taught in a very formalistic and formulaic way.<sup>120</sup> The focus of instruction was on the written product and not the process of writing.<sup>121</sup> But, in American universities in the 1980s, influential theories posited that writing was not a reflection of thought but rather a part of thought.<sup>122</sup> These theories argued that language constitutes thought and creates thought and meaning.<sup>123</sup> Under these theories, writing instruction thus focused on intervening during writing or drafting a document rather than after.<sup>124</sup> By breaking down and analyzing writing as a process of thinking, profound changes were instituted in the teaching of writing in American universities.<sup>125</sup> Writing changed from being taught through lecture and example—which emphasized the final written product—to smaller individualized instruction that focused on the writing process of each student.<sup>126</sup> This teaching method was labeled the “process method” of teaching writing.<sup>127</sup>

The changes in composition and rhetoric theory were mirrored in legal writing pedagogy.<sup>128</sup> Most legal writing teachers instituted the process method, also called “new rhetoric,” to teach legal writing.<sup>129</sup> This pedagogy, however, also required a focus on a student’s learning and thinking process, thereby necessitating lower student-to-faculty ratios to allow for individualized instructions.<sup>130</sup> This instruction also proved popular with students and employers, thereby prompting a boom in the hiring of writing faculty.<sup>131</sup> These new members of the academy undertook research, wrote articles, exchanged ideas in conferences, and developed a significant discipline within the American legal academy not found in other countries.<sup>132</sup>

It is surprising that this revolution in the academic study of composition

120. Margolis & DeJamatt, *supra* note 118, at 98.

121. *Id.*; see also John A. Lynch, Jr., *The New Legal Writing Pedagogy: Is Our Pride and Joy A Hobble?*, 61 J. LEGAL EDUC. 231, 234 (2011).

122. Rideout & Ramsfield, *supra* note 118, at 51–52.

123. See Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365, 366–87 (1981); see also Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 57, 58 (2000); Pollman, *supra* note 49, at 902–03.

124. Lynch, *supra* note 121, at 240 (citing Margolis & DeJamatt, *supra* note 118, at 99).

125. Rideout & Ramsfield, *supra* note 118, at 59; see also THOMAS NEWKIRK, TAKING STOCK: THE WRITING PROCESS MOVEMENT IN THE '90S 4 (Lad Tobin & Thomas Newkirk eds. 1994); Gary A. Olson, *Towards a Post-Process Composition: Abandoning the Rhetoric of Assertion*, in POST-PROCESS THEORY: BEYOND THE WRITING-PROCESS PARADIGM 7, 7–15 (Thomas Kent ed., 1999).

126. Durako et al., *supra* note 118, at 719–20; Margolis & DeJamatt, *supra* note 118, at 98–99; Rideout & Ramsfield, *supra* note 118, at 50.

127. Margolis & DeJamatt, *supra* note 118, at 99.

128. *Id.* at 98; Rideout & Ramsfield, *supra* note 118, at 59.

129. 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, 155 (1999); Margolis & DeJamatt, *supra* note 118, at 99.

130. Bonny L. Tavares & Rebecca L. Scilio, *Teaching After Dark: Part-Time Evening Students and the First-Year Legal Research & Writing Classroom*, 17 J. LEGAL WRITING INST. 65, 87 (2011).

131. See Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 7–10 (2000).

132. Berger et al., *supra* note 58, at 525; Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEG. WRITING 3, 15 (2005). See generally Smith, *supra* note 53.



was not emulated in the post-secondary education systems in other countries considering its popularity and importance in American university education.<sup>133</sup> The reticence of foreign universities to embrace composition studies in general also helps explain the resistance to the more specialized field of legal writing.

#### IV. LEGAL WRITING INSTRUCTION IN CIVIL LAW LEGAL EDUCATION SYSTEMS: THE TROUBLE WITH TRANSPLANTING AMERICAN LEGAL WRITING PEDAGOGY

The unique development of legal writing in the United States and the structural differences between U.S. and foreign legal education systems, as outlined above, make the task of transplanting American-style legal writing pedagogy into other legal educational systems quite problematic. Although specific components of the American legal educational system spurred the rise of legal writing in the United States,<sup>134</sup> the structure and history of legal education systems in other countries also helps explain why legal writing plays a small or nonexistent role in university instruction outside of the United States.<sup>135</sup>

Most countries have students begin their formal legal education at the undergraduate level.<sup>136</sup> The initial years of such undergraduate work consist of studying foundational courses in law, political science, economics, history, and philosophy, much like American pre-law programs.<sup>137</sup> But most American students entering law school do not have degrees in law, nor have they necessarily taken courses to prepare for law school.<sup>138</sup> In contrast, the undergraduate law school curriculum in civil law countries is focused on

133. Chris Thaiss, *Chapter 1: Origins, Aims and Uses of Writing Programs Worldwide*, in *WRITING PROGRAMS WORLDWIDE: PROFILES OF ACADEMIC WRITING IN MANY PLACES* 5, 8 (Chris Thaiss et al. eds., 2012), available at <http://wac.colostate.edu/books/wpww/>; see also Francoise Boch & Catherine Frier, *Chapter 19: The Teaching of Writing Skills in French Universities: The Case of the Université Stendhal, Grenoble III*, in *WRITING PROGRAMS WORLDWIDE: PROFILES OF ACADEMIC WRITING IN MANY PLACES* 213, 213–15; Susan McLeod, *WAC in International Contexts: An Introduction*, in *LANGUAGE AND LEARNING ACROSS THE DISCIPLINES* 5.3, 4–10 (2002).

134. See *supra* Part III.

135. The survey undertaken by the Congress on Comparative Law shows Switzerland as the only civil law country in its (limited) survey requiring legal writing instruction in the university, but there are some notable exceptions. A number of Latin American countries have legal writing requirements in their law school curricula. Wilson, *supra* note 5, at 27. In the 2000s, South Korea revamped its legal education system to require legal writing in the university curriculum. Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 *CARDOZO J. INT'L & COMP. L.* 295, 341 (2010). There are also American-style law schools that have recently been started in China (Peking University School of Transnational Law) and India (Jindal Global Law School). See Sabina Schiller, *A New Global Legal Order, with or Without America: The Case for Accrediting Foreign Law Schools*, 26 *EMORY INT'L L. REV.* 411, 448 (2012).

136. Hugg, *supra* note 71, at 67; Wilson, *supra* note 5, at 27.

137. See Jakob, *supra* note 13, at 254; Leith, *supra* note 69, at 254; see also Jacquelyn H. Slotkin, *Rabenmutter and the Glass Ceiling: An Analysis of Role Conflict Experienced by Women Lawyers in Germany Compared with Women Lawyers in the United States*, 38 *CAL. W. INT'L L.J.* 287, 295 (2008).

138. SAMUEL M. NATALE, *BUSINESS EDUCATION AND TRAINING: A VALUE-LADEN PROCESS—VOLUME V: THE MANAGEMENT OF VALUES—ORGANIZATIONAL AND EDUCATIONAL ISSUES* 268–69 (1998).

training students for legal careers.<sup>139</sup> Indeed, it is difficult in many countries for a student studying as an undergraduate in some other field, such as chemistry, to switch to law studies.<sup>140</sup> In their undergraduate studies, particularly at the latter stages, students in civil law nations delve much deeper into legal topics than American undergraduates who plan to enter law school.<sup>141</sup>

For example, in Germany and a number of other civil law countries,<sup>142</sup> legal education is broken down into two stages. Students typically begin an initial four years of law study at around age nineteen followed by an additional two years of practical training or apprenticeship.<sup>143</sup> The initial four years of study requires students to take the following subjects: the “civil law, criminal law, public law, procedural law, and the law of the European Union; legal methodology; and the philosophical, historical, and social foundations of the law.”<sup>144</sup> Students also must complete a practical stage of at least three months during breaks in this four-year period. The first stage ends with an examination that must be passed in order to advance to the apprenticeship stage.<sup>145</sup> Thus, at the end of a student’s “undergraduate” law studies in Germany, he has completed a course of study significantly more steeped in law than his counterpart in the United States.<sup>146</sup>

The second instructional period in the German legal education system, the apprenticeship or practical instruction period, takes place in several compulsory stages covering courts, government and private law offices, and government agencies.<sup>147</sup> Legal writing is done during these stages with the apprentice drafting legal documents in a professional setting.<sup>148</sup> In addition, the apprentice receives some practical training on skills such as negotiation,

139. Hugg, *supra* note 71, at 67; *see also* Balas, *supra* note 65, at 328.

140. Marijk van der Wende, *The Emergence of Liberal Arts and Sciences Education in Europe: A Comparative Perspective*, 2 HIGHER EDUC. POLICY 3 (2011) (noting the early specialization in the European education system); *see also* Ofer Malamud, *Discovering One’s Talent: Learning from Academic Specialization*, 64 INDUS. & LAB. REL. REV. 375, 397–98 (2011) (noting the effect of early specialization in the United Kingdom’s education system).

141. Hugg, *supra* note 71, at 67; *see also* Balas, *supra* note 65, at 328.

142. Bado Attila & Nagy Zsolt, *Some Aspects of Legal Training in Hungary*, 37 U. TOL. L. REV. 7, 8 (2005); Yoseph M. Edrey, *A Brief Introduction to the Legal System and Legal Education in Israel and the Curriculum at Haifa Faculty of Law*, 43 S. TEX. L. REV. 343, 346 (2002). Israel’s legal education “was influenced very much by the German model of higher education.” *Id.*; *see also* Qingjiang Kong, *Practice in Legal Education: International Experience and Chinese Response*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 35, 40 (2009) (noting the similarities of the Chinese education system with German and Japanese systems); Joanna Sliwa, *Report on the Legal Education in Poland*, PUB. INT. L. NETWORK (Aug. 23, 2010) <http://www.pilnet.org/public-interest-law-resources/45-legal-education-in-poland-building-institutional-will-for.html>. A discussion of African legal educational models can be found in Samuel O. Manteaw, *Legal Education in Africa: What Type Of Lawyer Does Africa Need?*, 39 MCGEORGE L. REV. 903 (2008).

143. Hugg, *supra* note 71, at 84.

144. Stefan Korioto, *Legal Education in Germany Today*, 24 WIS. INT’L L.J. 85, 92 (2006); *see also* Leith, *supra* note 69.

145. Leith, *supra* note 69.

146. Hugg, *supra* note 71, at 86; Korioto, *supra* note 144, at 92; *see also* Leith, *supra* note 69.

147. Korioto, *supra* note 144, at 85; *see also* Leith, *supra* note 69.

148. Korioto, *supra* note 144, at 85 (citing BAYERISCHE AUSBILDUNGS- UND PRÜFUNGSORDNUNG FÜR JURISTEN [JAPO] [JUDGES FOR THE LAW STUDIES FROM THE FEDERAL STATE OF BAVARIA] § 48 (1993)).

client counseling, and litigation.<sup>149</sup> Finally, apprentices are required to participate in “special study groups,” which focus on practical aspects of the legal profession.<sup>150</sup> Thus, in the German legal educational system, much of the topics covered in legal writing courses and clinics are provided during this apprentice stage.

At the end of legal education in the American and German system, the matriculating student enters the legal profession at approximately the same age (or number of years of education) but with quite different levels of instruction.<sup>151</sup> Under the American system, it is possible for a student to enter the legal profession with only three years of legal instruction and no formal practical instruction outside of any required skills classes.<sup>152</sup> In contrast, a German law student can only enter the profession after six years of legal training, with two of those years devoted to practical skills training in a professional setting.<sup>153</sup>

The 1998 Sorbonne Declaration, the 1999 Bologna Declaration, and subsequent European Union agreements (commonly known as the “Bologna Process”) encouraged many European Union member countries to adopt a two-tiered legal education system similar to the German model.<sup>154</sup> Under the Bologna Process, legal study is recommended to begin with an initial undergraduate period of three years followed by a focused master’s program of one to two years.<sup>155</sup> The apprentice period in European Union member countries varies, with most having an apprentice requirement from one to three years.<sup>156</sup>

In the legal education system of a country like Germany, American legal writing pedagogy could potentially be borrowed or transplanted in the initial undergraduate stage of legal instruction and, to a greater degree, in the secondary practical training period. Incorporating American legal writing pedagogy in the initial stages is complicated, however, by a number of other differences found in the legal instruction used in many civil law countries. The division of the more theoretical university instruction and the practical skills training during the apprentice period causes the pedagogy found in civil law schools to have quite a different bent compared to its American counterparts.

Besides the structure of the apprentice training, the fact that many civil

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149. *Id.* at 92; *see also* Leith, *supra* note 69.

150. Koriath, *supra* note 144, at 98.

151. Hugg, *supra* note 71, at 86.

152. *Id.*

153. *Id.*

154. Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 *VAND. J. TRANSNAT'L L.* 107, 116 (2008).

155. For university study in general, the Bologna Process calls for comparable degrees in three cycle structures: bachelor, master, and doctorate. *See generally* BOLOGNA PROCESS—EUROPEAN HIGHER EDUC. AREA, <http://www.ehea.info/> (last visited Feb. 12, 2014); *see also* Terry, *supra* note 154, at 116.

156. Hugg, *supra* note 71, at 83–84; WILSON, *supra* note 5, at 28–29.

law legal education systems are mired in tradition and are not receptive to pedagogical change, particularly from outside sources, also militates against the adoption of American legal writing pedagogy.<sup>157</sup> University legal education in many civil law countries has a deep history going back to the Middle Ages and, as a result, it is “‘embedded’ in a ‘tradition and culture with rather little contact to legal practice.’”<sup>158</sup>

The difference in legal culture affects the way that law students are taught in the university<sup>159</sup> and makes American-style legal writing pedagogy—with its emphasis on smaller classes and more individualized instruction—particularly difficult to transplant. Some scholars attribute the “magisterial” style of the civil law professor to the code-based system because it emphasizes determinative foundational rules that stress certainty and scientific deductive forms of analysis.<sup>160</sup> In civil law countries, professors primarily lecture to students who are expected to transcribe much of what is said.<sup>161</sup> Students are not expected to interact in class but rather take notes and memorize the content.<sup>162</sup> In the United States, professors focus on cases and, through interaction with students, explore a variety of interpretations.<sup>163</sup> The teaching in American legal writing classes, with one-on-one instruction and multiple written assessments, is incompatible with the more magisterial civil legal education tradition.

The emphasis of substance over process in many of the civil law educational systems is consistent with the ontological differences between the common and civil law systems.<sup>164</sup> Other scholars note that common-law inductive reasoning requires a different approach than the deductive rule-based reasoning found in the civil law system.<sup>165</sup> The essence of the common law system is that the law is created, interpreted, and changed by precedent.<sup>166</sup> In contrast, the civil law system, in which precedent plays a significantly lesser role in the determination of law, emphasizes

157. Hugg, *supra* note 71, at 69; WILSON, *supra* note 5, at 32; *see also* Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151, 164 (1998).

158. Hugg, *supra* note 71, at 69; WILSON, *supra* note 5, at 32.

159. Genty, *supra* note 3, at 139.

160. *Id.* at 137 (citing Gary F. Bell, *The U.S. Legal Tradition Among the Legal Traditions of the World*, in JANE C. GINSBURG, *LEGAL METHODS CASES AND MATERIALS* 66 (rev. 2d ed. 2004)).

161. Lempereur, *supra* note 157, at 164; Lisa Rieder & Hanjo Hamann, *Student Participation in Legal Education in Germany and Europe*, 10 GERMAN L.J. 1095, 1104 (2009).

162. Genty, *supra* note 3, at 137–40.

163. Sandra R. Klein, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT’L & COMP. L.J. 601, 617 (1991).

164. Genty, *supra* note 3, at 137–40; *see also* Gregory F. Hauser, *Representing Clients from Civil Law Systems in U.S. Litigation: Understanding How Clients from Civil Law Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits*, 17 INT’L L. PRACTICUM 129, 136 (2004).

165. Genty, *supra* note 3, at 137–38.

166. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 629–30 (1991); Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT’L & COMP. L. REV. 307, 341 (2007).

determinacy.<sup>167</sup> Common law focuses on the changing nature of the law and places a primacy on judicial decisions, compared to civil law's emphasis on legislation and the primacy of the legislature.<sup>168</sup> The case-by-case decision making process of the common law requires American law students to focus on incremental problem solving; a legislative-focused civil law system that emphasizes fundamental principles emanating from the Roman legal codes requires broader, larger scale solutions.<sup>169</sup> The American legal writing class plays a key role in introducing law students to the particular form of the common law method.<sup>170</sup> This type of class is inconsistent with the more unitary deductive analysis demanded by the civil law system.

Another significant difference that makes American legal writing pedagogy unsuited to the civil law tradition is that American legal education is one-size-fits-all, compared to more specialized and deliberately-fragmented legal skills instruction found in civil law systems.<sup>171</sup> In the United States, one does not formally train to have a career as a judge. Judges, prosecutors, and lawyers move in and out of their professions and, thus, "legal writing" in these professionals' education has a different emphasis.<sup>172</sup> In contrast, civil law legal education channels students into training for the specialized work of notaries, barristers, prosecutors, judges, and even bailiffs.<sup>173</sup> For example, in France, the National School for Magistrates only trains judges and magistrates. "The course of study lasts for thirty-one months, covers both theoretical and practical elements of judging, and culminates with an exit examination. 'Initial appointments are made on the basis of examination scores, those receiving the highest scores getting first pick of the

167. James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541, 549 (2007); see also Genty, *supra* note 3, at 132–33. Genty notes these five differences between broadly defined civil law and common law legal cultures: (1) importance in civil law cultures of substance over process; (2) importance in civil law cultures of mastering, rather than creatively interpreting, legal doctrine; (3) limited importance in civil law cultures of attorney-client relationship; (4) importance in civil law cultures of an informed authority figure; and (5) the lack of a concept in civil law cultures of cause lawyering. *Id.* at 149.

168. Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 334 (1999) (citing Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87 (1998)); see also Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933–1937*, 27 LAW & SOC'Y REV. 361, 388 (1993).

169. Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 94 (1998).

170. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 17–19 (Ralph L. Brill et al. ed., 1st ed. 1997); Smith, *supra* note 53, at 14 (citing Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 405–15 (1997)); see also Kris Franklin, *Theory Saved My Life*, 8 N.Y. CITY L. REV. 599, 622 (2005).

171. Maureen K. Monahan, *Mandatory Internships in the United States: A Comparison to European Legal Education Systems*, 63 B. EXAMINER 54, 56–58 (1994); see also Deborah Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 715 (1996); WILSON, *supra* note 5, at 14.

172. Mary L. Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805, 810–12 (2011).

173. WILSON, *supra* note 5, at 14. For example, being a judge or magistrate in many other countries is a life-long profession and a form of civil service. And there is, as a result, greater specialization within law school. Volcansek, *supra* note 172, at 810–12.

positions.’<sup>174</sup>

The American legal writing classroom provides a more standardized, unitary format for legal writing and its instruction.<sup>175</sup> Many American legal writing classes emphasize the skills needed in large law firm practice.<sup>176</sup> This rather broad, law firm practice emphasis of American legal writing programs may not be as useful in the context of the specialized professional education provided in other countries.<sup>177</sup>

The transplanting process is also hampered by cultural bias and suspicion.<sup>178</sup> A significant number of legal professionals in the United States are openly resistant to the use of foreign law and hostile to the value of comparative law.<sup>179</sup> Similarly, some countries may be resistant to American law school pedagogy due to cultural suspicion of American hegemony and neo-colonialism.<sup>180</sup> Thus, a minister of education or other officials responsible for curricular reform may associate the adoption of any program emanating from the United States as suspect and subject to resistance. Indeed, pedagogy related to the common law method has been identified as carrying “baggage” even in foreign countries with common law traditions when there has been a history of colonial occupation.<sup>181</sup> Thus, an impediment

174. Mary L. Volcansek, *Appointing Judges the European Way*, 34 *FORDHAM URB. L.J.* 363, 372–73 (2007).

175. See AM. BAR ASS’N SOURCEBOOK, *supra* note 12, at 5–47; see also Beverly Petersen Jennison, *Saving the Law Professor: Using Rubrics in the Teaching of Legal Writing to Assist in Grading Writing Assignments by Section and Provide More Effective Assessment in Less Time*, 80 *UMKC L. REV.* 353, 359 (2011).

176. See generally Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 *J. LEGAL WRITING INST.* 143 (1999).

177. U.S. judges, prosecutors, attorneys, and law professors are all drawn from the same pool, but civil law systems are Balkanized. John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 *S. CAL. L. REV.* 1865, 1874 (1988). Law students decide early on and receive specialized instruction in the area of specialization. Hungdah Chiu & Jyh-Pin Fa, *Taiwan’s Legal System and Legal Profession*, in *TAIWAN TRADE AND INV. LAW* 21, 33 (Mitchell A. Silk ed. 1994), available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1123&context=mscsc>.

178. See David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretative Authority of NAFTA*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 294, 296–98 (Sujit Choudhry ed., 2006); Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 *DENV. J. INT’L L. & POL’Y* 67, 97 (2010) (citing David Schneiderman, *NAFTA’s Takings Rule: American Constitutionalism Comes to Canada*, 46 *U. TORONTO L.J.* 499 (1996)).

179. The Hon. Michael Kirby AC, CMG, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 *GEO. L.J.* 433, 452 (2010); see also Roger Alford, *International Law Banned in Oklahoma State Courts*, *OPINIO JURIS* (Nov. 3, 2010), <http://opiniojuris.org/2010/11/03/international-law-banned-in-oklahoma-state-courts/>; Jason Chandler, *Foreign Law—A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 *SUFFOLK TRANSNAT’L L. REV.* 117, 123 (2011) (describing the confirmation hearings of Justice Sotomayor); Chris Stein, *State Seeks to Bar Foreign Law from Courts*, *JUNEAU EMPIRE.COM* (Mar. 18, 2011), [http://juneauempire.com/stories/031811/sta\\_801376702.shtml](http://juneauempire.com/stories/031811/sta_801376702.shtml).

180. Karen J. Alter et al., *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 *AM. J. COMP. L.* 629, 634 (2012); Daniel Berkowitz et al., *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 189 (2003) (“Perhaps the rejection of the earlier transplants can be attributed to the fact that they were for the most part imposed under colonialism.”); see also Mattei, *supra* note 4, at 319; David Pimentel, *Rule of Law Reform without Cultural Imperialism: Reinforcing Customary Justice through Collateral Review in Southern Sudan*, 2 *HAGUE J. ON RULE L.* 1, 5 (2010).

181. Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 *CLINICAL L. REV.* 379, 386 (2006); Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training*

to transplanting American legal education pedagogy to other countries' legal systems is this history of Western colonialism and the concern that neo-colonialism or neo-imperialism might accompany it.<sup>182</sup>

#### V. CONVERGENCE TOWARD STRONGER LEGAL WRITING INSTRUCTION

Although the differences in the legal systems make the project of transferring foreign forms of pedagogy and foreign institutions of legal education seem impractical, if not futile, the adoption of aspects of foreign legal educational systems holds promise for improving legal writing training in both the United States and in foreign legal systems. Convergence could benefit legal education worldwide.

John H. Merryman, in his excellent article on comparative legal education, stated that the objectives of legal education in civil law countries are "vastly different" from those in the United States.<sup>183</sup> He noted the differences in the structure of the two educational and legal systems, the differences in pedagogical approaches, and the differences in the role of lawyers in the two systems.<sup>184</sup>

But Merryman's observations may now be outdated. Since the time he wrote his article, the legal educational systems have converged in certain respects.<sup>185</sup> There are shared or universal expectations about the goal of a legal education in both civil and common law systems. For example, Richard Wilson writes in his report prepared for the 18th International Congress on Comparative Law: "[t]he European distinctions between law practice and other legal roles, however, do not appreciably differ from the functions carried out by U.S. jurists and advocates, and legal education still has, as its primary function, 'the formation of skilled lawyers.'<sup>186</sup> And thus, though the exact criteria of a "skilled lawyer" may vary from country to country,<sup>187</sup> and this training or instruction is delivered in different stages of the students' education, skills training such as the development of competent legal writing is a universally important component in the training of lawyers.<sup>188</sup> Both

*Lessons from the International Human Rights Clinic*, 56 N.Y.L. SCH. L. REV. 445, 449 (2012).

182. Remarks by Bernard Freamon, *Legal Education Initiatives in Africa*, 102 AM. SOC'Y INT'L L. PROC. 467, 471 (2008); Pimentel, *supra* note 180, at 4; see also Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West's Newest Export in Africa*, 10 PEPP. DISP. RESOL. L.J. 649, 660 (2010).

183. Merryman, *supra* note 10, at 865.

184. *Id.* at 865–66.

185. Most significantly, since Professor Merryman wrote this article, the European Union has entered into the Bologna Process, which explicitly seeks to converge or harmonize with American educational methods. See Ana Cecilia MacLean, *Rethinking Legal Education in Latin America*, 12 L. & BUS. REV. AM. 503, 506 (2006).

186. WILSON, *supra* note 5, at 14–15.

187. Lawyers in different countries hold varying positions that are not necessarily considered "the traditional practice of law. These include, most typically, notaries, prosecutors, judges or magistrates, and sometimes bailiffs." *Id.* at 14.

188. *Id.*; see also Rainer Grote, *Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition—A German Perspective*, 82 U. DET. MERCY L. REV. 163, 170 (2005) ("The German system of legal education remains committed to the aim of producing jurists qualified for all legal professions

systems of law could profitably borrow from one another to advance this shared goal.

*A. Civil Law Legal Educational Systems Could Profitably Borrow from the American Legal Writing Academy*

Although the structural and historical differences between American and civil law countries' legal systems make transplantation or borrowing aspects of the legal education systems seem futile, there are places where civil law legal education systems could profit directly from American legal writing pedagogy. In particular, the firm separation in the instruction of the theory and practice of law found in many civil law legal education systems is lamentable because theory and practice inform each other.<sup>189</sup> Studies on the best practices for legal education stress the need for the integration of theory and practice. Indeed, the Carnegie and MacCrate reports set the integration of theory and practice as a key goal for the American legal education system.<sup>190</sup>

Although law schools in the United States do not have complete integration in the instruction of theory and practice, they tend to aspire to and do achieve a relatively high level of integration<sup>191</sup> compared to their civil law counterparts.<sup>192</sup> For example, most American law schools offer an array of practical classes on topics such as client counseling, alternative dispute resolution, and contract drafting, which integrate the substantive doctrine of the law with its application to simulated or actual client cases.<sup>193</sup> The civil law legal education system would profit from a greater integration of theory and practice during the university stages of legal instruction.<sup>194</sup> Relegating such instruction to the apprentice period is detrimental to a complete understanding of the theory and practice of law because it divides the theory taught in the university from the practice taught during the apprentice period.<sup>195</sup>

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(Einheitsjuristen.”); MacLean, *supra* note 185, at 506.

189. Berkowitz et al., *supra* note 180, at 189–90; David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of A Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1805 (1988) [hereinafter Clark, *West Germany*]; Merryman, *supra* note 10, at 866.

190. MacCrate Report, *supra* note 63, 128; SULLIVAN ET AL., *supra* note 63, at 12; Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research and Writing Courses*, 16 J. LEGAL WRITING INST. 313, 313–14 n.3 (2010).

191. Siegel, *supra* note 3, at 819; *see also* Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C.J.L. & SOC. JUST. 247, 268 (2012); Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 51, 61 (2002); M. H. Hoeflich, *Plus Ça Change, Plus C'est La Même Chose: The Integration of Theory & Practice in Legal Education*, 66 TEMPLE L. REV. 123, 134 (1993); Ostertag, *supra* note 11, at 334; Robbins-Tiscione, *supra* note 51, at 324.

192. Ostertag, *supra* note 11, at 334; Robbins-Tiscione, *supra* note 51, at 324.

193. *See* DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 11–12 (2008), available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>; Sudeb Basu & J.P. “Sandy” Ogilvy, *Externship Demographics Across Two Decades with Lessons for Future Surveys*, 19 CLINICAL L. REV. 1, 1 (2012); Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 204 (2012).

194. Hugg, *supra* note 71, at 83; Wilson, *supra* note 3, at 827; *see also* Davies, *supra* note 24, at 29.

195. Wilson, *supra* note 3, at 828; *see also* Clark, *West Germany*, *supra* note 189, at 1805.



More specifically, the study of both theory and practice can be enhanced in the civil law legal education curriculum by offering specialized legal writing and rhetoric courses like those found in American law schools. Such courses address the drafting of contracts, wills, judicial opinions, and legislation.<sup>196</sup> A by-product of the growth of these courses and the legal writing faculty teaching and writing about them is a robust catalogue of teaching materials on legal skills.<sup>197</sup> In the past few years, excellent new textbooks have been released on transactional drafting that provide instruction to a level unavailable in the past and rivaling that available through bespoken instruction provided in a specialized law firm to its own associates.<sup>198</sup>

The legal education system in many civil law nations would also benefit if it followed its American counterparts by giving the study and instruction of legal writing and discourse greater prominence in the academy in general. Although in some countries instruction during the apprentice period includes a classroom component,<sup>199</sup> this instruction usually takes place outside of the university.<sup>200</sup> Because it is physically removed from the university, such instruction maintains the rigid divide between practical instruction outside of the university and the academic and theoretical teaching found inside. As a result, theory gets disconnected from practice and concomitantly practice gets removed and provides less guidance for theory.<sup>201</sup>

Legal writing is central to the work of the legal profession and it deserves study and prominence in the legal academy as a discipline of its own right.<sup>202</sup> The separation of the teaching of academic and practice skills, as found in many civil law legal education systems, harms students because academic writing becomes separate and divorced from practical writing and vice versa. Bringing the teaching of legal writing into the academic

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196. See W. David East et. al., *Teaching Transactional Skills and Tasks Other Than Contract Drafting*, 12 TRANSACTIONS:TENN. J. BUS. L. 217, 230 (2011); Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 J. ASS'N LEGAL WRITING DIRECTORS 133, 134 (2008).

197. Teitcher, *supra* note 196, at 134.

198. LENNÉ EIDSON ESPENSCHIED, *CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE* (2010); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (2002); WAYNE SCHIESS, *PREPARING LEGAL DOCUMENTS NONLAWYERS CAN READ AND UNDERSTAND* (2008); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007); Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in A Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 239 n.30 (2012) (citing LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* (5th ed. 2010)).

199. See Edward Chen, *Legal Training and Research Institute of Japan*, 22 U. TOL. L. REV. 975, 986 (1991); see also James R. Maxeiner, *Integrating Practical Training and Professional Legal Education*, 2 IUS GENTIUM 37, 45 (2008).

200. See Maxeiner, *supra* note 199, at 45 (illustrating German and Japanese models). In some civil law countries, such as Belgium and Italy, university faculty design and teach courses offered during the apprentice period. WILSON, *supra* note 5, at 15 n.35.

201. Davies, *supra* note 24, at 29 (citing Japan as an example of where there is a disconnect between theory and practice in legal scholarship).

202. Berger et al., *supra* note 58, at 527; see also Mary S. Lawrence, *The Legal Writing Institute the Beginning: Extraordinary Vision, Extraordinary Accomplishment Based on Interviews with Laurel Currie Oates and J. Christopher Rideout, and Documents from the Archives of the Legal Writing*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 213, 214 (2005).

curriculum is a way to bridge theory and practice.<sup>203</sup> In addition, practical writing, which is connected to the academic subjects being studied, enhances a “deeper” learning of those subjects.<sup>204</sup> Furthermore, the academic study of writing shows that writing is not the end product of thinking and academic exploration, but an integral part of the process of thinking and articulating academic theory.<sup>205</sup>

In addition, American legal writing pedagogy could be valuable to the later stages of the civil law legal education system. Legal writing is taught during the final stage of legal education in most civil systems—specifically during the apprentice period.<sup>206</sup> The mandatory training or apprentice period in civil law countries, however, has been criticized for its uneven quality of instruction.<sup>207</sup> American legal writing pedagogy holds out the promise of improving the training and apprentice periods in countries that require such service. Because legal writing pedagogy has matured as a formal discipline in the United States, the apprentice instruction in other countries could profit from its advances.<sup>208</sup> The apprenticeships could be made more efficient, effective, and connected to the universities if American legal writing pedagogy is borrowed during these final stages of the formal legal education process.<sup>209</sup> Indeed, this could be an area of growth for universities in civil law countries consistent with the Bologna principles and an inroad for greater life-long learning opportunities.<sup>210</sup>

Furthermore, legal writing pedagogy can play a role in harmonizing the legal education in the European Union with principles found in the Sorbonne-Bologna Declaration.<sup>211</sup> The Bologna Declaration, adopted by European Ministers of Education in 1999, sought to bring about convergence in higher education in Europe, including legal education.<sup>212</sup> The Declaration

203. See *supra* Part III.C.

204. Charles R. Irish, *Reflections of an Observer: The International Conference on Legal Education Reform*, 24 WIS. INT'L L.J. 5, 14 (2006).

205. Laurie C. Kadoch, *The Third Paradigm: Bringing Legal Writing “Out of the Box” and Into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine*, 13 LEG. WRITING 55, 58 (2007); Joseph Kimble, *supra* note 7, at 2; Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140 (1987).

206. WILSON, *supra* note 5, at 15, 28.

207. Wilson, *supra* note 3, at 832–33. *But see* Robert W. Glover, *The German Apprenticeship System: Lessons for Austin, Texas*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 88 (1996).

208. See Bernadette T. Feeley, *Training Field Supervisors to Be Efficient and Effective Critics of Student Writing*, 15 CLINICAL L. REV. 211, 213 (2009); J. Christopher Rideout, *Discipline-Building and Disciplinary Values: Thoughts on Legal Writing at Year Twenty-Five of the Legal Writing Institute*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 477, 480 (2010); *see also* Dauphinais, *supra* note 13, at 92.

209. Wilson, *supra* note 3, at 832–33.

210. See EDUC., AUDIOVISUAL & CULTURE EXEC. AGENCY, THE EUROPEAN HIGHER EDUCATION AREA IN 2012: BOLOGNA PROCESS IMPLEMENTATION REPORT 127 (2012), available at: [http://www.ehea.info/Uploads/\(1\)/Bologna%20Process%20Implementation%20Report.pdf](http://www.ehea.info/Uploads/(1)/Bologna%20Process%20Implementation%20Report.pdf).

211. Andreas Bückler & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, 9 GERMAN L. J. 586, 611 (2008); *Joint Declaration of the European Ministers of Education*, at para. 9 (June 19, 1999), available at [http://www.bologna-berlin2003.de/pdf/bologna\\_declaration.pdf](http://www.bologna-berlin2003.de/pdf/bologna_declaration.pdf) [Bologna Declaration].

212. The Bologna Process refers to the procedures for implementing the Bologna Declaration, which was signed on June 19, 1999 by twenty-nine countries. It is also referred to as the “Sorbonne-Bologna”

established three main goals: international competitiveness, mobility, and employability.<sup>213</sup> It also specifically sought to make European universities “more competitive internationally so as to rival American universities” and to increase the connection between education and employment.<sup>214</sup> Borrowing American legal writing pedagogy would advance these goals because it is intimately connected to employment<sup>215</sup> and is a prominent component of American universities teaching law.<sup>216</sup> Furthermore, the norming effect of American legal writing courses would also promote the norming goals underlying the Bologna Process, which seek consistency and student mobility between European Union members’ educational systems.<sup>217</sup>

Finally, civil law students appear to want more skills instruction, such as legal writing, in their university education.<sup>218</sup> For example, in one poll taken at a Hungarian University, students identified the lack of instruction in practical skills as a “serious defect” in their legal education.<sup>219</sup> Transplanting American legal writing-type courses into the civil law curriculum would remedy this deficiency.

*B. American Law Schools Can Benefit From Borrowing Aspects of Other Countries’ Legal Education Systems as it Relates to the Teaching of Legal Skills*

With a similar dose of skepticism about the efficacy of borrowing from foreign legal educational systems, American law schools—and the way they approach the teaching of legal skills such as writing—may benefit by borrowing from foreign legal educational systems.

American legal education would benefit from more robust pupillage or apprentice periods for students entering legal practice.<sup>220</sup> Currently, legal practice opportunities are available to most law students through clinics, externships, and internships.<sup>221</sup> But such opportunities are usually not

process. Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It’s So Much More Than Degree Changes*, 41 VAND. J. TRANSNAT’L L. 107, 157 (2008).

213. *Towards the European Higher Education Area: Communiqué of the meeting of European Ministers in charge of Higher Education*, at 1 (May 19, 2001), available at [http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/MDC/PRAGUE\\_COMMUNIQUE.pdf](http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/MDC/PRAGUE_COMMUNIQUE.pdf).

214. *Id.*

215. *See supra* Part III.B.

216. Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing*, 16 LEGAL WRITING J. LEGAL WRITING INST. 463, 471–72 (2010); Berger et al., *supra* note 58, at 527.

217. *See generally* BOLOGNA PROCESS—EUROPEAN HIGHER EDUC. AREA, *supra* note 155; *see also* Terry, *supra* note 154, at 116.

218. WILSON, *supra* note 5, at 32 (citing to a 2002 empirical study taken among students at the University of Szeged Faculty of Law who “identified problems with teaching methods among the three most serious defects of legal education . . . 54% of the students said that ‘the lack of practical legal education’ was a serious defect in their education”).

219. *Id.*

220. Hugg, *supra* note 71, at 86; Monahan, *supra* note 171, at 56.

221. *See* SANTACROCE & ROBERT R. KUEHN, *supra* note 193; Basu & Ogilvy, *supra* note 193, at 4; Hoffman, *supra* note 193, at 204.

required for graduation<sup>222</sup> and the law school accrediting agencies, such as the American Bar Association and the Association of American Law Schools, limit the number of hours of practical training students may take.<sup>223</sup> The quality of legal skills instruction, including the skill of practical legal writing, in the United States would be enhanced if apprenticeships were required to the extent found in many civil law educational systems.<sup>224</sup>

More rigorous and extensive apprentice training for American lawyers is a topic that receives regular attention from members of the profession.<sup>225</sup> Such an idea is not new<sup>226</sup> and not inconsistent with a number of state bar admission regulations that permit apprentice training in lieu of law school.<sup>227</sup> Substituting an apprentice period for the third year of law school is one suggestion that has recently gained attention and would have significant benefits for students.<sup>228</sup> Indeed, in 1973 U.S. Supreme Court Chief Justice Warren Burger made such a recommendation,<sup>229</sup> and this same suggestion was raised in 2012 by Judge Jose Cabranes of the U.S. Court of Appeals for the Second Circuit.<sup>230</sup> Certainly, instituting apprenticeships would make American law schools more like their civil law counterparts,<sup>231</sup> as well as more in line with the education provided by medical schools in the United

222. James H. Backman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1, 10 (2007); see also NALP & NALP FOUND., 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS 6 (2011), available at <http://www.nalp.org/uploads/2010ExperientialLearningStudy.pdf>.

223. James Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 22 (2010).

224. The Carnegie Report calls apprenticeship the “heart of all education.” Carnegie Report, *supra* note 63, at 97.

225. Backman, *supra* note 223, at 22; Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 142 (1997); David Lat, *Bring Back Apprenticeships*, N.Y. TIMES (Feb. 2, 2012), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/bring-back-apprenticeships-in-legal-education>.

226. Lawyers in eighteenth- and nineteenth-century America usually spent some period in a law office apprenticeship. Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 351 (2010).

227. Cunniffe, *supra* note 225, at 133–34. Several states have bar admission requirements involving apprentice training:

In four states, Washington, Vermont, California, and Virginia, an individual can be admitted to the bar despite never having spent any time in law school. In New York, Wyoming, and Alaska, at least one year of law school is required prior to completion of a law-office study program. In Maine, a student may gain admission to the bar by completing two years of law school followed by one year of law-office study. Delaware and Vermont require apprenticeship experience for all bar applicants even if they complete three years of law school training. Several states have replaced post-law school apprenticeship requirements with so-called “bridge the gap” programs.

*Id.* (footnotes omitted).

228. *Id.*; see also Michael A. Fitts, *What Will Our Future Look Like and How Will We Respond?*, 96 IOWA L. REV. 1539, 1545 (2011).

229. Monahan, *supra* note 171, at 56 (citing Chief Justice William Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 227 (1973)).

230. Katherine Mangan, *At Meeting, Federal Judge Hands Down a Sharp Opinion About Law Schools*, CHRONICLE OF HIGHER ED. (Jan. 8, 2012), <http://chronicle.com/article/Federal-Judge-Hands-Down-a/130264/>.

231. See *supra* Part IV.

States.<sup>232</sup>

Apprentice programs, if administered appropriately, hold the promise of more cost-effective legal training by shifting the burden to employers, who have the means and motivation to train newly-hired employees.<sup>233</sup> In addition, the training would be more specialized and focused on the needs of the market in a particular practice area and thus more effective in teaching.<sup>234</sup> As an extreme example, imagine three students attending a law school in Boston, Massachusetts. One intends to move to a small town in Alaska to work in a small general legal practice firm specializing in family law, another intends to join a law firm in Louisiana specializing in oil and gas law with an emphasis in transactional consulting, and the last intends to work as a prosecutor in New York. The types of specialized legal skills training needed to succeed in each of these jobs are significantly different and, thus, most efficiently delivered by each individual employer instead of instructors in a classroom in Boston.<sup>235</sup> Although certainly some general skills, like good writing, research, and oral advocacy, can be taught on a broad basis and are transferable to more specialized employment, it is more efficient and effective to perform such training in the employment rather than academic setting.<sup>236</sup>

Another aspect of foreign legal education that could be borrowed by the United States to potentially improve the legal writing instruction is providing legal education at the undergraduate level.<sup>237</sup> Allowing students to shorten the length of their post-secondary instruction through undergraduate legal education—like most civil law and some common law countries—permits students to complete the formal instruction in legal doctrine at an earlier stage

232. See generally Roy Stuckey, *The Evolution of Legal Education in the United States and the United Kingdom: How One System Became More Faculty-Oriented While the Other Became More Consumer-Oriented*, 6 INT'L J. CLINICAL LEGAL EDUC. 101 (2004).

233. See John Furlong, *The Return of the Apprentice: New Lawyer Training Models for the 21<sup>st</sup> Century*, CTR. FOR THE L. PROF. 1, 7–8 (2010), available at <http://dotank.nyls.edu/futureed/Furlong%20The%20Return%20of%20the%20Apprentice.pdf>; see also David Finegold & Karin Wagner, *Are Apprenticeships Still Relevant in the 21st Century? A Case Study of Changing Youth Training Arrangements in German Banks*, 55 INDUS. & LAB. REL. REV. 667, 683 (2002), available at <http://milestoneplanning.net/whitepapers/Apprenticeship%20Article%20Final.pdf>. Employment-based or in-house training of legal skills also promotes distributive fairness. Under the current law-school-based teaching of specialized legal skills, the student (particularly the students not receiving scholarships) indirectly subsidize the law firms with which they ultimately work because the student pays for the training from which the employer benefits. Such distributive justice concerns are less urgent in civil legal education systems where students receive significant state support for education. See *supra* note 110 and accompanying text.

234. See Karen Sloan, *The Apprentice: Three Firms Claim Success with a New Model for Training and Mentoring Legal Associates*, NAT'L L.J., June 14, 2010, at 19, 22; see also Fitts, *supra* note 228, at 1539.

235. See ANDREW SHARPE & JAMES GIBSON, CTR. FOR STUDY OF LIVING STANDARDS, *THE APPRENTICESHIP SYSTEM IN CANADA: TRENDS AND ISSUES 20* (2005), available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/25001/1/The%20Apprenticeship%20System%20in%20Canada%20-%20Trends%20and%20Issues.pdf?1> (discussing the benefits of specialized training through apprenticeships).

236. *Id.*; see also Irish, *supra* note 204, at 11 (“At the University of Wisconsin Law School, for example, we devote enormous resources to trial and appellate advocacy courses even though many of our graduates never engage in either trial or appellate practices.”).

237. See *supra* notes 139–141 and accompanying text.

and advance to the more specialized legal skills training proposed above.<sup>238</sup> Although some scholars advocate allowing undergraduates to major in law and sit for the bar exam,<sup>239</sup> such proposals would improve legal writing and other legal skills instruction only if they were paired with rigorous apprentice or pupillage requirements.<sup>240</sup>

A less extreme alternative for expanding undergraduate legal training is the more routine use of joint degree programs, which allow students to begin their law studies as an undergraduate and apply credits for law school classes toward both the undergraduate and law degrees.<sup>241</sup> A combined degree program can currently be found in some schools but is rather rare.<sup>242</sup> Such programs could lower the cost of a lawyer's overall education and, if legal instruction begins at the undergraduate level, provide for a more robust legal training.

Another aspect of civil law legal education that might indirectly effect legal writing instruction is increased public subsidies of legal education.<sup>243</sup> Reducing the cost of legal education in the United States would allow recent law school graduates the flexibility to take lower paying jobs that provide more practical training or to pursue additional practical training.<sup>244</sup> Such an initiative can be found in student loan forgiveness programs that subsidize lawyers' law school debts in exchange for working in certain public interest positions.<sup>245</sup> Unfortunately, the trend in the United States in recent years has been away from public subsidies for higher education.<sup>246</sup> This policy has made a law school education difficult for people with limited financial resources, and it places greater urgency on finding high paying jobs after

238. John O. McGinnis & Russell D. Mangas, *An Undergraduate Option for Legal Education*, INT'L REV. L. & ECON., at 34 (2013), available at <http://www.sciencedirect.com/science/article/pii/S014481881300046X>.

239. John O. McGinnis & Russell D. Mangas, *First Thing We Do, Let's Kill All the Law Schools*, WALL ST. J., Jan. 17, 2012, at A15, available at <http://online.wsj.com/article/SB10001424052970204632204577128443306853890.html>; see also Bob Denney, *An Undergraduate Law Degree*, LAW PRAC., Nov./Dec. 2012, at 12. See generally McGinnis & Mangas, *supra* note 238.

240. McGinnis & Mangas, *supra* note 238.

241. Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599 (2012); see also BRIAN Z. TAMANAHA, *FAILING LAW SCHOOL* 20–27 (2012).

242. See *Dual Enrollment*, UNIV. OF MO., <http://registrar.missouri.edu/policies/dual-enrollment.php> (last visited Mar. 2, 2014); *Accelerated Degree Programs*, DREXEL UNIV., <http://www.drexel.edu/undergrad/academics/accelerated-degrees/> (last visited Mar. 2, 2014).

243. WILSON, *supra* note 5, at 26; see *supra* note 110 and accompanying text.

244. Public subsidies for legal education would demonstrate that society values people with legal training for society, justice, and the greater good. When a legal education is self-funded and students enter the profession with high levels of debt, their personal interest is likely to outweigh their professional commitment to working for the interests of others. See generally Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 832 (1995); Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 886 (2002).

245. Bourne, *supra* note 92, at 676.

246. *Id.*; JOHN QUINTERNO, *THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS* 32 (2012).

graduation.<sup>247</sup>

A final area of civil law legal education that would improve American legal writing instruction is the prominence of comparative and international law in its law school curriculums, including the study of foreign languages. Many law schools in civil law countries require the study of international and comparative law, while few American law schools do.<sup>248</sup> In an increasingly globalized legal practice, such an omission by U.S. law schools underprepares their students for the practice of law.<sup>249</sup> Similarly, most other countries require the study of a foreign language by their law students, unlike American law schools.<sup>250</sup> Recent studies have documented the benefits of second language learning not only on students' linguistic abilities but also on their cognitive and creative abilities.<sup>251</sup> The lack of foreign language pedagogy in American law schools detracts from their otherwise comprehensive and rigorous curriculum of legal skills instruction.<sup>252</sup>

## VI. CONCLUSION

Due to historical and structural differences between the legal education systems of the United States and other countries, the American model of teaching legal writing has limited appeal for most other countries, particularly in civil law countries. Despite the barriers to its adoption, American legal writing pedagogy can be useful for foreign legal educators.<sup>253</sup>

As a general matter, civil law legal education systems would profit from the more robust and developed pedagogy of legal writing found in the United States. On the most basic level, the civil law legal education curriculum can be enhanced with specialized legal writing courses addressing the drafting of contracts, wills, judicial opinions, and legislation. Additionally, legal writing pedagogy can play a greater role at the stage in which most legal writing is

247. QUINTERNO, *supra* note 246, at 33; Bourne, *supra* note 92, at 676; *see also supra* note 111 and accompanying text.

248. Clark, *Globalization*, *supra* note 21, at 1075; Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 837 (2006) (citing Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT'L L. 367, 374 n.31 (2002)).

249. Clark, *Globalization*, *supra* note 21, at 1076; Curran, *supra* note 22, at 660; Mills et al., *supra* note 21, at 143.

250. William E. Butler, *Mezhdunarodnoe Pravo*, 101 AM. J. INT'L L. 917, 918 (2007) (reviewing INTERNATIONAL LAW (V. I. Kuznetsov & B. R. Tuzmukhamedov eds., 2d ed. 2007) ("all Russian law students are required to study at least one foreign language during their first degree in law, with emphasis on legal terminology and texts"); Chang-fa Lo, *Driving an Ox Cart to Catch Up with the Space Shuttle: The Need for and Prospects of Legal Education Reform in Taiwan*, 24 WIS. INT'L L.J. 41, 58 (2006) ("To take the College of Law of National Taiwan University as an example, mandatory courses required by the university are Chinese, foreign language, and history.").

251. Kathleen M. Marcos, *Second Language Learning: Everyone Can Benefit*, 6 ERIC REV. 2, 2–5 (1998), available at <http://www.cal.org/earlylang/benefits/marcos.html>.

252. *See* Kara Abramson, *Art for a Better Life: A New Image of American Legal Education*, 2006 BYU EDUC. & L.J. 227, 261; Vivian Grosswalk Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 661 (1998).

253. Irish, *supra* note 204, at 12–13.

taught in civil law legal education systems: the apprentice period. Legal writing pedagogy can enhance the apprentice period, broaden the mission of civil law universities, and provide an inroad for greater life-long learning opportunities. Such changes would harmonize the legal education in the European Union with the principles in the Sorbonne-Bologna Declarations.<sup>254</sup> Lastly, these changes are likely to be popular with students and enhance their overall learning.

By the same token, the United States can profitably borrow from its civil law counterparts to enhance the instruction of legal writing. By providing more opportunities for apprenticeships in its legal education system, legal skills can be taught more efficiently and effectively. Increasing undergraduate legal instruction presents the opportunity to lower the costs of legal education in the United States and to improve the effectiveness of legal training, particularly during the third year of law school. Lastly, American law students' writing and general legal skills would benefit from borrowing the civil law system's more robust foreign language and comparative and international law instruction. Borrowing these aspects of foreign legal education systems would strengthen the teaching of legal writing and other legal skills in American law schools.

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254. See generally Bologna Declaration, *supra* note 211.