

2012

## 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

James Etienne Viator

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## 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

### Cover Page Footnote

Visiting Professor of Law, Washington & Lee University School of Law, 2012-2013; Adams and Reese Distinguished Professor, Loyola University New Orleans College of Law. Early versions of this Article were presented at the 2009 Annual Meeting of the Southeastern Association of Law Schools and the 2009 International Conference of Education Research and Innovation in Madrid, Spain. I would like to thank my Loyola colleagues: David Gruning, Johanna Kalb, John Lovett, Markus Puder, and Imré Szalai for vetting this Article. Also, this Article greatly benefitted from a written critique by Robert Lloyd of the University of Tennessee School of Law, the author whose piquant essay on the decline of rigorous law teaching inspired my first ruminations on this Article's general topic. See generally Lloyd, *infra* note 8; Doug Blaze, A Tribute to Bob Lloyd, 78 TENN. L. REV. 637 (2011). I owe a special debt of gratitude to James E. Moliterno of Washington and Lee University School of Law, not only for his written review of this Article, but especially, for all he has taught me, from my rookie years as a law teacher through today, by precept and example, about the techniques of legal pedagogy and the moral demands of law teachers' own unique professional ethic. For me, as for so many other law professors near and far, Jim has been both an exemplar and abettor, always in the diapasonal mode, of the law professor's calling. Thus, it was due to Jim's suggestion and assistance that I was able to interview Professor Joan M. Shaughnessy and Interim Dean Mark H. Grunewald of Washington and Lee about their law school's approach to teaching legal writing in small sections of first-year doctrinal courses. Those interviews were both informative and inspirational, and I thank Professor Shaughnessy and Dean Grunewald for their time and their insights. Much of the early research and reflection for this Article were made possible by Loyola Summer Research Grants, provided through a program that came about due to the good work of former Dean James M. Klebba. I also gratefully acknowledge the research assistance of Shannon Shelton (Loyola University New Orleans College of Law 2012) and Donna Marchand Spears (Loyola University New Orleans College of Law 2008; Assistant Professor of Law Library Services, Salmon P. Chase College of Law Library); the diligent cite-checking of Shan Jiang and Yanjun Tao; and all of their subventions provided through the generosity of the Alfred T. Bonomo and Rosario S. LaNasa Memorial Fund. Finally, I would like to thank the Adams & Reese Distinguished Professorship Endowment for providing funds in support of this Article.

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

*James Etienne Viator*<sup>+</sup>

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Professor Walter A. McDougall's recent, well-received histories of the United States confirm that the tried and true survival technique for individuals and businesses in America's roiling, competitive economy has traditionally been personal and institutional responsiveness to the needs and desires of customers and clients.<sup>1</sup> The early characterizations of the United States' drive to succeed in business demonstrate that the country's no-nonsense and occasionally grasping quest for wealth, success, and distinction typically accompanied fiscal advancement and success.<sup>2</sup> Hence, McDougall's history

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1. See, e.g., WALTER A. MCDUGALL, *FREEDOM JUST AROUND THE CORNER: A NEW AMERICAN HISTORY, 1585–1828*, at 7 (2004) (pointing out that Americans have often been flatteringly described as “builders, doers, go-getters, dreamers, hard workers, inventors, [and] organizers,” but the same traits have their dark side and have prompted unflattering descriptions such as “self-promoters, scofflaws, [and] occasional frauds”). To be sure, McDougall acknowledged that America's commercial culture was largely a transplant of English commercial savvy and developed over centuries of growth and trade. See *id.* at 5 (noting that Americans “have enjoyed more opportunity to pursue their ambitions . . . than any other people in history”); see also *id.* at 30–31 (describing the English maritime trade and commercial growth of the sixteenth century); STEVE PINCUS, *1688: THE FIRST MODERN REVOLUTION 62–64* (2009) (summarizing recent historical scholarship on the dynamism and rapid growth in the late seventeenth-century English economy, particularly in its booming overseas—especially Atlantic—trade).

2. See WALTER A. MCDUGALL, *THROES OF DEMOCRACY: THE AMERICAN CIVIL WAR ERA, 1829–1877*, at 37 (2008) (recounting Philip Schaff's description of the American character, which stated that “[t]he best advice he could give aspiring emigrants was the adage ‘Pray and work,’ . . . [because] just as genuine Americans despised idleness, so did they consider monetary

suggests that America has pulled itself out of historical slumps by reinvigorating its traditional economic drive,<sup>3</sup> renewing the national desire to succeed in all endeavors, and overcoming all challenges and competitors.<sup>4</sup> Indeed, one American studies professor has observed that national concerns about school quality tend to intensify whenever the American “economy appears to face a foreign threat.”<sup>5</sup>

This Article directs these quality concerns to the current system in most of the nation’s law schools. First, this Article discusses the increasing competition among law firms and the corresponding increase in firms’ demands of its new associates. Specifically, this Article points out the need for competent new lawyers who can think and write critically, and the noted lack of such skills in modern law-school graduates. Second, this Article comments on faculties’ decreased expectations of law students and the high time preference among modern law students, which culminates in law-school graduates being unable to meet the demands of the contemporary firm

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gain a chance ‘to do good’”). The American character trait of a desire to prosper was so well-established by the late eighteenth century that some Americans proffered the trait as a reason to dissent from the republican fervor that made self-denying civic virtue the sine qua non for the establishment of a successful republic. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 178* (2010). For example, Carter Braxton, a delegate from Virginia to the Continental Congress, became convinced by 1776 that Americans were so eager to get ahead and enjoy a life of pleasant consumption that they were too materialistic and self-interested “to play the ascetic Spartan role that strict republican theory assigned them.” *Id.* In short, America has been a commercial republic since its beginning. See MCDUGALL, *supra*, at 7; see also Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *FORDHAM L. REV.* 1933, 1952 (2001).

3. See, e.g., MCDUGALL, *supra* note 2, at 68 (noting the rapid recovery from the Panic of 1819); *id.* at 560, 748 n.71 (describing the establishment of huge business cartels and concentrated industries on the ruins of firms bankrupted by the Panic of 1873); *id.* at 515–16 (explaining that 50,000 settlers poured into Nebraska after territorial organization in 1855 and that despite the Panic of 1857, the vast majority of the settlers, as a local Baptist minister explained, “seemed in a terrible hurry to . . . push their various enterprises to success and wealth”).

4. See *America’s Future*, *ECONOMIST*, July 11, 2009, at 13 (“[I]t is the relentless competition of clever new firms from Portland to Pittsburgh that will pull the country out of its current [economic] gloom.”).

5. Andrew Delbanco, *Dreams of Better Schools*, N.Y. REV. BOOKS, Nov. 19, 2009, at 27, 27 n.1. For example, after the shock of the U.S.S.R.’s Sputnik launch in 1957, a frenzied emphasis on mathematics and science instruction arose in the United States as a response to the fear that the Soviets had surpassed the country in science education. *Id.* The Japanese incursion into the preserve of American automobile companies in the 1970s and 1980s prompted similar consternation. *Id.* As the United States experiences another bout of intensified foreign economic pressure, there are once again calls for better education and training as the competitive cure. See Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 *S. CAL. INTERDISC. L.J.* 505, 505 (2009) (“It is clear that the twenty-first century economy requires workers to seek more education and innovation to be competitive in the global marketplace.”).

environment. In particular, the abundance of easy law-school courses, administrators' reliance on student evaluations of professors, and the disappearance of the Socratic method in law-school classrooms contribute to a system that produces poorly prepared law school graduates. Next, this Article examines the need for a revamped law school curriculum and traces the historical role of rhetoric in legal teaching. This Article rejects the notion that law schools should teach rhetoric as a separate first-year course, but rather emphasizes the need to teach first-year law students rhetoric in their core substantive courses. The Iowa model offers an example of this integrated approach to teaching legal analysis and writing. Finally, the Article details the benefits and logistics of such a teaching model and concludes with a comparison between the Iowa model and the standard legal research and writing programs in most contemporary law schools.

### I. LAW FIRMS GO BOTTOM LINE

In response to the economic stagflation of the 1970s,<sup>6</sup> American law firms began shifting away from operating like comfortably prosperous public utilities<sup>7</sup> and instead started focusing on the elementary requirements for successful competition.<sup>8</sup> Specifically, firms have attended to supply and demand and the bottom-line necessity of satisfying clients by outperforming competitors in both price and quality.<sup>9</sup> Not surprisingly, novice associates—recent graduates who earned their law degree and passed their state's licensing examinations—feel the demands attendant to the new

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6. See BRIAN DOMITROVIC, *ECONOCLASTS: THE REBELS WHO SPARKED THE SUPPLY-SIDE REVOLUTION AND RESTORED AMERICAN PROSPERITY* 4–7 (2009) (providing an introduction to the economic turmoil of the 1970s, known as the “stagflation decade”).

7. Susan Raridon Lambreth, *The Changing Educational Needs of the American Lawyer*, *CLEJ.*, Oct. 2005, at 1, 1.

8. See Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 *S. CAL. L. REV.* 1231, 1232–33 (1991) (noting that in the late 1980s and early 1990s, law practice moved “toward commercialization,” with “an emphasis on money and profit rather than on service and justice”); Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 *N.C. L. REV.* 667, 674–77 (2005) (noting the shift toward competition in law practice); David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 *RUTGERS L. REV.* 1127, 1128 (2009) (“The legal profession . . . has become far more of a competitive business and far less of a traditional guild.”).

9. See Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 *OHIO ST. L.J.* 1965, 1979–80 (1999) (observing the shift toward specialization of law practice); Lambreth, *supra* note 7, at 1–3 (describing the increase of competition among firms, the commoditization of legal services, and changes in clients' legal needs as contributing to the transformation of the legal profession); Lloyd, *supra* note 8, at 676–77 (noting that the competition for clients has increased firms' expectations of new associates); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VAND. L. REV.* 871, 899–900 (1999) (“The market for lawyers' services has become intensely competitive. As the number of lawyers has soared, competition for clients has become ferocious.”).

economic competitiveness of law firms.<sup>10</sup> These associates are the downstream recipients of the pressure that demanding clients and eager competitors place on modern law firms.<sup>11</sup> These pressures have only intensified in recent years following the economic downturn that began in 2008.<sup>12</sup> The dismal hiring prospects at most law firms suggest that there will likely be a buyer's market for years to come,<sup>13</sup> therefore, contemporary law graduates must acquire a certain level of skill during law school in order to become or to remain law firm associates.<sup>14</sup> At one point in time, students who graduated from law school without learning to think and write proficiently were able to get jobs, but those pleasant days are over, possibly forever.

## II. LAW FIRM DEMANDS OF NEW LAWYERS GO UP

Contemporary law schools have, in general, failed to grasp, much less embrace, the notion that they are preparing future lawyers to enter the legal

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10. See Lloyd, *supra* note 8, at 677 (discussing firms' expectations of their new associates in an age of intense competition).

11. See *id.*; see also Van Zandt, *supra* note 8, at 1129 (stating that increasingly demanding clients have loaded greater pressures upon new attorneys).

12. See Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1 (describing the recession's effects on law firms); see also Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2289 (2010) ("The financial crisis has meant less work, leading more and more lawyers to become 'performance casualties' in their firms. The focus on the bottom line means that a lot of the resources associated with professional socialization have been cut; large law firms are no longer a venue to learn how to become a leader, a client developer, or even a good case manager. Faced with diminishing work, the lucky associates have . . . retooled by . . . changing substantive areas of practice, or mov[ing] to smaller firms where work is easier to obtain."); Van Zandt, *supra* note 8, at 1131 (indicating that the recession will further intensify the competitive trend among law firms).

13. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1; see also Nathan Koppel, *K&L Gates Gains as Rival Law Firms Suffer*, WALL ST. J., Sept. 25, 2009, at B8 ("The recession has cut demand for many corporate legal services, including work on mergers, real estate and corporate finance. In turn, profits at firms across the country have plummeted, forcing many of them to fire attorneys, freeze salaries and shut offices."); Patrick G. Lee, *Law Schools Get Practical: With the Tight Job Market, Course Emphasis Shifts from Textbooks to Skill Sets*, WALL ST. J., July 11, 2011, at B5 (noting the small percentages of law students hired by large firms); *The Firm Report: Entry-Level Recruiting Slows with Economy*, NAT'L JURIST, Mar. 2009, at 4 (observing that the recession prompted the downturn in legal employment in the fall of 2008); Karen Sloan, *The Bloom Is Coming off the Rose for Prospective Law Students*, NAT'L L.J., Oct. 26, 2011, at 1, 1, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202520270239> (last visited Mar. 22, 2012) (reporting that 2010 law-school graduates "had the lowest employment rate since 1996," with only sixty-eight percent of graduates employed in law jobs nine months after graduation).

14. See Lee, *supra* note 13, at B5 (noting that law schools are starting to teach more practical skills to better prepare students for legal careers).

profession.<sup>15</sup> Over the past two decades, law firms' chief demand has been for new associates to come in the door with sufficient legal knowledge and skills to handle basic commercial and litigation matters under minimal supervision.<sup>16</sup> However, as Robert Lloyd explains in his cogent review of contemporary legal education, those charged with training the next generation of lawyers are largely ignoring the competitive needs of American law firms.<sup>17</sup> Thus, although firms have become more demanding, American law schools have become less so.<sup>18</sup> New associates therefore often find themselves ill prepared for the rigorous expectations and demands of their new employers.<sup>19</sup>

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15. See ALAN WATSON, *THE SHAME OF AMERICAN LEGAL EDUCATION*, at ix (2006) ("We [law schools] proudly claim not to be trade schools, but that is what we are. The denial makes it inevitable that we will fail to be efficient trade schools."); see also Talbot D'Alemberte, *On Legal Education*, 76 A.B.A. J. 52, 53 (1990) ("Our insistence that we are part of the academy and our insistence that we are not a trade school has actually led us to cut ourselves off from the people who have things to say to our students, people from the profession . . ."); John E. Dunsford, *Nihilism and Legal Education—A Response to Sanford Levinson*, 31 ST. LOUIS U. L.J. 27, 30 (1986) (remarking that law schools exist "halfway between Plato's Academy and vocational training"); James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 84 (1991) (noting the struggle that law schools encounter when transitioning students into the legal profession).

16. One law dean recently explained, "As we surveyed alumni and employers, we kept hearing that our graduates needed to be able [to] 'hit the ground running' in those initial jobs. . . . Because we want to give our students an edge in a competitive job market, we focus on the skills most needed in those initial jobs." Lisa A. Kloppenberg, *Educating Problem Solving Lawyers for Our Profession and Communities*, 61 RUTGERS L. REV. 1099, 1102 (2009); see also Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 LOY. U. CHI. L.J. 123, 125 (2007) (underscoring the fact that "legal audiences expect upper-division students and law graduates to have achieved some level of analytical proficiency"); Anthony J. Sestric, *In Defense of Law Schools*, 53 J. MO. BAR 232, 233 (1997) (stating that "it is only in recent years that law schools have been expected to prepare the student more completely for the full practice [of law]," largely because "the profession became unable to assimilate the new lawyers [through in-house training and mentoring] in the same manner and degree that it had historically and traditionally done"); Timothy P. Terrell, *A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students*, 34 WASHBURN L.J. 1, 9 (1994) (stressing that law firms expect "new associates [to] work on very complex matters from their first moments in the office"); Van Zandt, *supra* note 8, at 1130 (noting that firms expect new associates to interact with clients as soon as they begin working and that consequently, mentorship is often dispensed with in favor of productivity). But see Jeff Jeffrey, *For Some Firms, An Extra Step for the Newest Recruits*, NAT'L L.J., June 29, 2009, at 7 (pointing out that some firms continue their mentorship programs, but only by cutting annual salaries up to \$80,000 for the mentored new associates during their first two years of employment).

17. Lloyd, *supra* note 8, at 677.

18. *Id.*

19. *Id.*; see also Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 LEGAL WRITING 123, 127 (1991) (advocating for increased training for law students in light of current law-school graduates' "ill-prepar[ation] for immediate practice" and that "law firms . . . should not have to 'pick up the difference'").

One obvious sign of this education-to-profession disjunction<sup>20</sup> is that judges and attorneys have been complaining insistently for some thirty years that law graduates are unable to communicate effectively through both oral and written means.<sup>21</sup> This inability translates into subpar analytical skills, because language is the only medium of analysis.<sup>22</sup> The dependence of good writing on good thinking cannot be overemphasized.<sup>23</sup> When judges and firms' hiring partners criticize the lamentable writing of modern law students and when those same students exclaim defensively in reviewing their examination answers that they knew the right answer, but failed to articulate it adequately, both the professionals and the students betray a shared misconception that

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20. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (suggesting that law schools are moving toward a theory-based teaching model, instead of practice-based, whereas firms are moving toward a profit-driven model).

21. DAVID I.C. THOMSON, LAW SCHOOL 2.0—LEGAL EDUCATION FOR A DIGITAL AGE 59 (2009); see also, e.g., Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 493–94 (1999) (noting the long-standing complaints about the quality of legal writing and the critical need for improvement); Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 389 (1959) (“[T]oo often . . . legal writing has become the stepchild of the curriculum, unwanted, starved, and neglected.”); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 37 n.3, 38 (1994) (noting that in recent decades, writing has become even more important in legal practice but that the quality of legal writing is insufficient); Steven Stark, Comment, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984) (“[L]egal writing' has become synonymous with poor writing . . .”). Furthermore, if the 2008 *Law School Survey of Student Engagement* is reflective of a broad student consensus, law students are aware of their deficient writing skills, as almost half of the nearly 30,000 responding law students from eighty-five schools reported that they did not have enough practice and training in law school to develop their legal-writing skills. LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2008 ANNUAL SURVEY RESULTS: STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS 7, 10 (2009), available at [http://lsse.iub.edu/2008\\_Annual\\_Report/pdf/lssse\\_Annual\\_Report\\_2008.pdf](http://lsse.iub.edu/2008_Annual_Report/pdf/lssse_Annual_Report_2008.pdf).

22. See, e.g., Peter W. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 266 (1973) (noting the interrelated nature of legal writing and analysis); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 1 (1991) (“[L]aw firms regularly complain that the law schools aren't teaching their graduates how to write or think critically.” (emphasis added)). Indeed, the analytical complexity of contemporary law and its concomitant pressures and demands on contemporary lawyers help explain the widely acknowledged view that good writing has, in recent decades, become even more important in legal practice. See Rideout & Ramsfield, *supra* note 21, at 37.

23. See Gross, *supra* note 22, at 266 (emphasizing the negative correlation between poor legal writing skills and legal analysis); Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems"*, 61 RUTGERS L. REV. 867, 907–13 (2009) (discussing the necessity and importance of developing legal literacy in the first year of law school). A veteran professor, who has taught legal writing and analysis as a part of first-year doctrinal courses for over twenty-five years, similarly noted that law students are unable to write effectively because they do not fully understand the subject matter. Interview with Mark H. Grunewald, Interim Dean & James P. Morefield Professor, Washington & Lee Univ. Sch. of Law, in Lexington, Va. (Sept. 7, 2010) [hereinafter Grunewald Interview] (on file with author).

writing and thinking are discrete skills, such that poor prose might conceal good thinking.<sup>24</sup> Nothing could be more untrue and harmful, for language itself provides the only dimension of human expression and explanation.<sup>25</sup> Thus, law school graduates' poor writing skills do not distort some pristine essence of their otherwise straightforward thinking; rather, their confusing prose reflects their confused thinking.<sup>26</sup>

### III. LAW SCHOOL EFFORT GOES DOWN: LOW FACULTY EXPECTATIONS MEET STUDENTS' HIGH TIME PREFERENCES—THE MAKING OF A PERFECT EDUCATIONAL STORM

It has been argued that the recent “softening” of American law schools resulted, in part, from the change in law-school curricula that commenced in the late 1960s and 1970s.<sup>27</sup> This new model decreased the number of required courses and created numerous electives resulting in a buffet of curricular options.<sup>28</sup> This model allows contemporary law students to “get a degree with

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24. See Gross, *supra* note 22, at 266 (contending that legal writing is not “a separable and peripheral subject”). There are signs, however, that the common misconception is abating. In a 2001 survey of judges and practicing attorneys, almost sixty percent of the respondents stated that recent law-school graduates write poorly, with “poorly” encompassing deficiencies in both style and substance. See Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 85–87 (2003) (reporting that stylistic deficiencies included “wordiness,” “sloppy language,” and the “overuse of quotations,” whereas substantive problems included the failure to identify and understand issues, “lack of focus,” and poor appreciation of facts and law); see also Reed Dickerson, *Teaching Legal Writing in Law Schools (with a Special Nod to Legal Drafting)*, 16 IDAHO L. REV. 85, 85–86 (1979) (noting that focusing on legal writing only in terms of language overlooks writing’s important role in the enhancement of substantive ideas); Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 885 (1991) (“Good writing results from good thinking.”).

25. See Gross, *supra* note 22, at 266; see also Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41, 62 (1996) (“We literally think through and experience the world through language.”).

26. With thirty years of experience teaching legal reasoning and writing, Professor James E. Moliterno similarly phrases this point: “I have usually found that the student who writes unclearly thinks unclearly.” E-mail from James E. Moliterno, Vincent Bradford Professor of Law, Washington & Lee Univ. Sch. of Law, to author (July 7, 2010, 12:03:38 CDT) (on file with author); see also *infra* note 125 and accompanying text.

27. Lloyd, *supra* note 8, at 667, 677; see also Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 276 (1986) (noting that “student activists . . . questioned the legitimacy of . . . law school methods”); Robert M. Lloyd, *Consumerism in Legal Education*, 45 J. LEGAL EDUC. 551, 555 (1995) (criticizing the lack of the Socratic method in modern legal education).

28. See JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 143–44 (1978) (observing the lack of required courses for second- and third-year students at Harvard Law School and noting that “[i]n 1976-1977, students could choose from over 150 elective courses”); Richard Linquanti, *Factors in Students’ Selection of Courses*, in *GOING TO*

the highest possible grades while doing the least possible work.”<sup>29</sup> Such behavior is demonstrative of a “high time preference,” a desire to do little work in exchange for the quick gratification of a high reward.<sup>30</sup> The growing trend toward a course selection “high time preference” is reciprocally connected to—and perhaps a driving factor in—the tendency of law faculties to make courses less challenging.<sup>31</sup> These reciprocal forces from both sides of the podium combine to produce a nearly perfect storm—a dynamic of mutually reinforcing trends of less challenging courses and more student forum shopping for the courses that offer the highest grades for the least amount of study.<sup>32</sup>

*A. Changes in Curricula Make Things Worse: Easy Courses and Teacher Evaluations Turn Students into Customers*

Legal classes that require students to develop and sharpen their legal-analysis and critical-reading skills, or hard courses, are being overshadowed by softer, easier courses that tend to focus on glossy topics, such as sports and entertainment law, or on modish political and cultural issues.<sup>33</sup> These “law and” courses, such as “Law and Wildlife,”<sup>34</sup> often offer more “and” than “law.”<sup>35</sup> Students are enticed to enroll in such courses partly because the course grade often is based on less stressful grading techniques, such as term papers or “take home” final examinations, and because the grades in these courses are typically higher than those in the difficult courses.<sup>36</sup> Not only do these easier courses fail to prepare law students for the current requirements and demands of law practice, but the proliferation of such courses encourages professors to soften the required core-curriculum courses

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LAW SCHOOL? READINGS ON A LEGAL CAREER 138, 138 ed. n. (Thomas Ehrlich & Geoffrey C. Hazard, Jr. eds., 1975) (“The curricula at most law schools are elective after the first year.”).

29. Lloyd, *supra* note 8, at 684.

30. See Ron Paul, *The Banks Versus the Constitution*, 33 HARV. J.L. & PUB. POL’Y 465, 471 (2010) (explaining that, in economic terms, individuals with a high time preference desire immediate satisfaction, whereas those with a low time preference are more patient with regard to obtaining gratification); see also Lloyd, *supra* note 8, at 684–85.

31. See *infra* Part III.A; see also Lloyd, *supra* note 8, at 679.

32. Lloyd, *supra* note 8, at 685.

33. See *id.* at 677–78, 681–83.

34. See ERIC T. FREYFOGLE & DALE E. GOBLE, *WILDLIFE LAW: A PRIMER*, at xi (2009) (asserting the book’s usefulness for law students).

35. Johnson, *supra* note 8, at 1232; see also Anthony D’Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 11 (1990) (stating that the “proliferation [of ‘law and’ courses] is a sign that collectively we are groping for a cure for educational malaise and aimlessness”).

36. Lloyd, *supra* note 8, at 678.

as well.<sup>37</sup> Such tactics become necessary to guarantee course enrollments that are substantial enough to impress the dean when faculty raises are at stake.<sup>38</sup>

Another change in the 1970s was the student “course evaluation,”<sup>39</sup> which should not, if employed modestly, present a problem.<sup>40</sup> Properly framed and administered, course evaluations could potentially provide teachers with first-hand information and observations about the effective and ineffective aspects of their teaching methods.<sup>41</sup> Unfortunately, the actual practice of student evaluations presents three major problems. First, there is pronounced and widespread over-reliance on student evaluations in hiring, compensating, and tenuring faculty.<sup>42</sup> Second, the methods of composing and collecting student evaluations are “often haphazard and unscientific.”<sup>43</sup> Third, these evaluations place an unrealistic demand on students’ limited capacity for dispassionate evaluation of the class and its instructors.<sup>44</sup> That modern

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37. *Id.* at 680.

38. See *infra* note 42 and accompanying text; see also Lloyd, *supra* note 8, at 679 (noting that if student enrollment in a particular course is low, the administration will cancel the class, thus incentivizing professors to offer easy classes).

39. Kissam, *supra* note 27, at 273.

40. See JOHN A. CENTRA, DETERMINING FACULTY EFFECTIVENESS: ASSESSING TEACHING, RESEARCH, AND SERVICE FOR PERSONNEL DECISIONS AND IMPROVEMENT 1–4 (1979) (describing the benefits of using student evaluations, but noting university administrators’ reliance on evaluations to justify decisions about tenure, and outlining the imperfections in the evaluation process as a whole).

41. See Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 SW. L. REV. 1, 1–3 (2008). But see Dennis R. Honabach, *Responding to “Educating Lawyers”: An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. TOL. L. REV. 311, 311–12 (2008).

42. See John M. Conley, *Can You Talk Like a Lawyer and Still Think Like a Human Being? Mertz’s The Language of Law School*, 34 LAW & SOC. INQUIRY 983, 991 (2009) (reviewing ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007)) (noting that one reason for the softening of law-school curricula is the widespread professorial “pander[ing] to the student-customers whose evaluations and upper-class patronage can influence tenure and salary decisions”); see also Jordan, *supra* note 25, at 42 (describing the evaluation process as a “popularity contest” with regard to tenure decisions); Lloyd, *supra* note 8, at 683–84.

43. Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 407 (1990) (suggesting that certain procedures for evaluating teaching “invite error”); see also Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN’S L. REV. 235, 235–37 (2008) (observing that despite strong indicators of racial and gender bias in student evaluations, administrations heavily rely upon them for employment decisions).

44. See Abel, *supra* note 43, at 424–26 (noting that personal student preferences and hostilities play a role in evaluations). Unfortunately, many contemporary law deans are years removed from the classroom and have been on the administrative career track aimed at maintaining a healthy revenue stream. See Gary J. Simson, *To Teach or Not to Teach*, 39 U. TOL. L. REV. 375, 378–80 (2008) (recommending that although law deans have multiple roles as administrators, they should continue to teach to keep “from falling into a thoroughly administrative mindset”). This necessarily means, as Professor Stanley Fish recently observed,

students live in a “credentials society” and focus on the concomitant need for high marks exacerbates this limitation.<sup>45</sup> In practice, the current system of student evaluation provides a strong incentive for law professors to please, rather than challenge, their students.<sup>46</sup>

For the reasons detailed above, law students have decreased competition among themselves for high grades and simultaneously increased competition among law professors to garner sufficient course enrollment.<sup>47</sup> Misplaced reliance on student evaluations, combined with easy course offerings, allow students to control the educational quality of their law-school experience, which leaves them at a level far below that expected of novice associates.<sup>48</sup> In

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that whether or not they would consciously so phrase it, these educational leaders “actively want their colleges and universities to be like car dealerships, with an emphasis on the bottom line . . . and consumer choice.” Stanley Fish, *Deep in the Heart of Texas*, N.Y. TIMES OPINIONATOR (June 21, 2010, 9:00 PM), <http://opinionator.blogs.nytimes.com/2010/06/21/deep-in-the-heart-of-texas/>. Given their years spent in this sort of administrative environment, too many modern law deans characterize law students as clients or customers, a terminology that naturally leads to the rhetorical question I once heard a dean pose in regard to student desires, “They’re our customers—how can they be wrong?”

Administrators and deans have thus improperly transferred the market principle of consumer sovereignty to the field of education, in which learning and knowledge have a perdurable, more objective content. See STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 158–59 (2008) (“[P]arents, students, and taxpayers are consumers of higher education only in the sense that they pay for it if they want it; they are not consumers in the sense that the operations of higher education should reflect either their desires or their judgments.”).

45. See JACQUES BARZUN, *TEACHER IN AMERICA*, at xiii–xiv (1981) (noting that the mid-1960s ushered in the idea that desired careers required advanced education). A historian of American higher education has identified an economic component reinforcing the “credential” insistence of modern students by linking the cost, and corresponding debt, associated with higher education and the need to obtain high grades to signify success as “the direct purchase of degrees.” John Zeugner, *Five Stealth Transformations of American Higher Education*, *ORG. AM. HISTORIANS NEWSL.* (Org. of Am. Historians, Bloomington, Ind.), May 2009, at 17.

46. See Kissam, *supra* note 27, at 273–74 (arguing that students tend to evaluate professors who lecture and spoon feed favorably, thereby discouraging teaching methods that focus on developing analytical skills); see also Lloyd, *supra* note 8, at 684.

47. See *supra* notes 33–46 and accompanying text.

48. See *supra* text accompanying notes 17–21. In regard to educational goods and services, law-student insouciance, if not indifference, toward learning law can be explained by predictable psychological effects produced by the financing mechanisms of both public and private law schools. See JAMES M. BUCHANAN & NICOS E. DEVLETGLOU, *ACADEMIA IN ANARCHY: AN ECONOMIC DIAGNOSIS* 8–9 (1970). For the former, taxpayers pay the great bulk of legal education’s costs, whereas some mix of taxpayers, private donors, and lenders finance the educational product for private schools. See *id.* at 9. In short, law students do not purchase their education. *Id.* at 8. Therefore, James Buchanan and Nicos Devletoglou conclude that under low-tuition and subsidized-tuition schemes, college students are offered a service that is free, in an economic sense. *Id.* at 29. This, in turn, leads to inefficient use. *Id.* It should be no surprise, then, that many students will treat learning with insouciance and indifference or, worse, “with disrespect and contempt.” *Id.*

short, law faculties and deans' expectations commensurately fall to accommodate their students' high time preferences.<sup>49</sup>

*B. Learning Legal Analysis Becomes Optional and the Socratic Method Fades Away*

As part of this reciprocal dynamic of “softening” in American legal education, lecturing and memorization of legal rules and other techniques of “information delivery” have replaced the development and strengthening of

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My own informal discussions with Loyola's highly leveraged students confirm the basic soundness of Buchanan and Devletoglou's explanation, while also disclosing a phenomenon that makes their general university-education diagnosis accurate even for the professional colleges they largely exempted from their strictures. *See id.* at 10–11. Although the typical Loyola law student will secure some mix of government and government-subsidized “private” loans before each school year, most of these students have never paid back any loan, much less a \$120,000 loan. Therefore, they regard their private-school education as essentially free because they give no thought to paying back their loans. Because loan repayment hardly ever enters the typical law student's thoughts, much less his or her study plans and curricular calculations, the student “has no conception, individually, that costs are involved at all.” *Id.* at 27.

Akin to Buchanan's public-college students, then, “a sizable proportion” of law students—under any “low tuition scheme” subsidized by taxpayers either directly, through state law schools, or indirectly through government loans—will “place a value on . . . education lower than the cost of providing this education.” *Id.* at 29.

49. *See supra* notes 30–31 and accompanying text. Several commentators maintain that the only countervailing force keeping law schools and their students from relaxing even more is the necessity that students pass their state's bar exams. *See, e.g.,* Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”—“Do the Work!”*, 40 CAL. W. L. REV. 321, 324 (2004) (“[B]ar examiners do effective and critical jobs of protecting the public from graduates who have not mastered the basics necessary to practice law.”); Lloyd, *supra* note 8, at 685 (citing the bar exam as the key check on law students' high time preference).

Professor Christian Day faults law professors for failing to hold students to rigorous academic standards and notes that many feel that it is the responsibility of the bar examiners, not faculty members, to prepare students for legal practice. Day, *supra*, at 332. Day is accurate in his description of professorial indifference toward their public trust. In my current institution, for example, our fifteen-year average on the Louisiana bar examination is a failure rate of roughly thirty-three percent (with a comparable failure rate on most out-of-state bars). Yet, to qualify to sit for any bar exam, a student must graduate with a cumulative average of at least a flat “C” (2.0 on a 4-point scale). *Academic Regulations Overview*, LOY. U. L. BULL. 2011–2012, <http://2011bulletin.loyno.edu/law/academic-regulations-overview#graduation-requirements> (last visited Mar. 24, 2012). Thus, all Loyola graduates have passed the faculty's tests, but tellingly, approximately one-third of the school's “passing” students cannot pass the one test that the Loyola faculty does not grade—the state bar examination. The Soviet-era Russian workers' joke, “we pretend to work and they pretend to pay us,” can be adapted to reflect current law students' experience of diminished efforts on both sides of the classroom lectern: “we pretend to learn and they pretend to teach.” *See* Murray Sperber, *How Undergraduate Education Became College Lite—And a Personal Apology*, in *DECLINING BY DEGREES: HIGHER EDUCATION AT RISK* 131, 138 (Richard H. Hersh & John Merrow eds., 2005) (finding Soviet history illuminating in the context of undergraduate education and describing the relationship between professors and students as one of “mutual nonaggression”).

legal analysis skills,<sup>50</sup> which law firms still consider a sine qua non skill.<sup>51</sup> Instead of being forced to learn and apply a body of law to typical legal problems, students are afforded the opportunity to attend class unprepared, with no incentive to engage in class discussion or dialectical analysis.<sup>52</sup> Students often attend class simply to meet the eligibility requirements set by the American Bar Association.<sup>53</sup> As a result, “few law students actually experience the active in-class engagement that . . . law school demands.”<sup>54</sup>

Relatedly, the Socratic case method<sup>55</sup>—traditionally heralded as one of the best means for developing analytical skills<sup>56</sup>—has largely been

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50. See Lloyd, *supra* note 8, at 680.

51. See Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992) (“Problem-solving is the single intellectual skill on which all law practice is based.”). This much, at least, has *not* changed since the days of Deans Christopher Langdell and James Ames of the early Harvard Law School. See SELIGMAN, *supra* note 28, at 20, 37; see also Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 610–11 (2008).

52. See, e.g., D’Amato, *supra* note 35, at 11 (describing students’ lack of preparedness for class); Lloyd, *supra* note 8, at 682 (noting that the classroom is no longer a rigorous learning environment, but rather a place where students can “slide by”); Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 421 (1998) (observing law students’ preference for legal conclusions over legal analysis and arguments).

53. See D’Amato, *supra* note 35, at 11 (noting that contemporary law students “are increasingly cutting classes when they can get away with it”); see also STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 304(d) (2011) [hereinafter AM. BAR ASS’N STANDARDS FOR LAW SCHOOLS], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_standards\\_chapter\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_3.authcheckdam.pdf) (“A law school shall require regular and punctual class attendance.”).

54. Bethany Rubin Henderson, *Asking the Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 64 (2003).

55. See Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 n.3 (1999) (“[T]he ‘traditional’ Socratic method [is] a teaching style in which the professor selects a single student without warning and questions the student about a particular judicial opinion that has been assigned for class. Often the professor begins by asking the student to state the facts of the case and then asks the student to explain how the court reasoned to an answer. The professor might then test the student’s understanding of the case by posing a series of hypotheticals and asking the student to apply the reasoning of the case to the new fact patterns. The purpose of this questioning is to explore the strengths and weaknesses of various legal arguments that might be marshaled to support or attack a given . . . decision. To that end, the professor’s inquiries are often designed to expose the weaknesses in the student’s responses.”). See generally Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911 (1996); Edmund M. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379 (1952); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989) (describing the Socratic case method).

56. See JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 29 (1914) (noting “the great value of th[e] Socratic method of instruction”); see also WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR

abandoned<sup>57</sup> for being “intimidating,” “adversarial,” and

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THE PROFESSION OF LAW 198–200 (2007) (extolling the virtues of the case method); THOMSON, *supra* note 21, at 65 (commenting on the conclusion that the Socratic case method is successful at teaching students to “think[] like a lawyer”); Richard B. Parker, *A Review of Zen and the Art of Motorcycle Maintenance with Some Remarks on the Teaching of Law*, 29 RUTGERS L. REV. 318, 326–27 (1976) (noting that although sometimes risky, structured questioning of students is actually designed to enhance their confidence).

The conclusion of these general studies is confirmed by the personal testimony of students who were educated by masters of the Socratic classroom dialogue. Professor Anthony D’Amato described how in law school, he was, for the first time in his life, “shocked into an experience of actual learning” by professors such as Lon Fuller and “Warren Seavey, the grandmaster of ping-pong classroom technique.” Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 465 (1987). Also, according to his students’ accounts, the techniques of legal reasoning and the Socratic dialogue provided the basis for Professor H.L.A. Hart’s confident and effective teaching. See NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 130–31 (2004).

57. See PETER CHARLES HOFFER, *A NATION OF LAWS: AMERICA’S IMPERFECT PURSUIT OF JUSTICE* 192 n.43 (2010) (concluding, in what might be *the* historical understatement of our young century, that the sort of high-impact Socratic exercise portrayed in “*Paper Chase* and . . . *One L* . . . may not be entirely representative of legal education today.”). For the voluminous evidence of the near total disappearance of the Socratic case method overlooked by Professor Peter Hoffer, see PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 37 n.75 (2003) (noting the widespread perception among law professors that the Socratic “method has been in decline since the 1950s and 60s”); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 164–66 (1977) (reporting that the conclusion of an empirical study of classes at the University of Indiana at Indianapolis, Notre Dame, and Valparaiso Law Schools indicated that lecture constituted the primary method of teaching and that the Socratic case method “has almost disappeared,” even in first-year courses); Conley, *supra* note 42, at 991 (“Pure Socratic teaching is now exceedingly rare in my observation, and largely devoid of the sarcasm.”); Kerr, *supra* note 55, at 114 (describing the Socratic method as being “more myth than reality”); Lloyd, *supra* note 8, at 681 (observing that the Socratic case method “has vanished from American law schools”).

Even an esteemed, dedicated law teacher who encouraged me as a novice law professor constantly to question and challenge students’ presentations and interpretations of cases now employs what I call the Alphabetic Socratic method—resulting in no more cold calls. See Telephone Interview with Thomas E. Baker, Professor of Law, Fla. Int’l Univ. Coll. of Law (July 2010) [hereinafter Baker Interview] (on file with author). Instead, students know in advance when their assigned participation day will arrive and therefore prepare deeply and thoroughly for this class only. E-mail from Thomas E. Baker, Professor of Law, Fla. Int’l Univ. Coll. of Law, to author (July 19, 2010, 9:46:49 CDT) [hereinafter Baker E-mail]. Dealing with unprepared students, my former colleague tells me, wastes valuable class time. Baker Interview, *supra*. Professor Lloyd reports that this method of conducting class has become widespread. Lloyd, *supra* note 8, at 683.

Even students recognize and admit the central shortcoming of this pseudo-Socratic method: it lacks an incentive to read and prepare every assigned case for every class and to attend the flow of the classroom dialogue closely. See, e.g., ERIC OWENS ET AL., *THE BEST 172 LAW SCHOOLS* 338 (2011 ed. 2010) (reporting that a University of Richmond 1L stated that the Socratic method ““can be a bit intimidating,”” but quickly admitted that ““[i]t makes class entertaining and ensures that you are prepared””); Christianna R. Dougherty, *Student Perspective*

“demeaning.”<sup>58</sup> As a result, law professors have replaced the traditional “case dialectic” method with approaches more solicitous of the law student’s daily contentedness.<sup>59</sup> Not surprisingly, after leaving the “contented classroom,” new associates find law practice to be everything that law school is not—intimidating, adversarial, and sometimes even demeaning.<sup>60</sup>

### C. The Result: Poorly Schooled Law-School Graduates

Whether or not students complain about the Socratic method’s brutality, most believe that the current, softened teaching style provides a better mode of professional training.<sup>61</sup> As novice associates, new graduates soon suffer for the style’s deficiencies when they are faced with the task of meeting the demands of highly competitive law firms.<sup>62</sup> Law schools that teach basic skills and instill a desire to study, learn, and outperform others are providing their

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*After the First Year*, in LEGAL EDUCATION FOR THE 21ST CENTURY 289, 293 (Donald B. King ed., 1999) (stating that for “a first-year student, the most comforting class is the one where the professor lets you know the day ‘you are up,’” because then “you have time to get your act together . . . by studying every aspect of your case,” despite the fact that the traditional Socratic method “makes you read every case”).

58. See Lloyd, *supra* note 8, at 681 (surveying a representative sample of law review articles critiquing the Socratic method and selecting the quoted adjectives as typifying and essentially summarizing the modern academic critique). Professors Phillip Areeda and Richard Parker each highlighted the inherently strenuous nature of effective Socratic teaching. See Areeda, *supra* note 55, at 916–17 (discussing the redeeming aspects of the Socratic method, despite students’ criticisms); Parker, *supra* note 56, at 326–27 (“A student can be put through a skillfully structured ordeal which, though unpleasant at the time, will drive him to greater efforts and thereby increase his confidence and his capacity for continued self-training.”).

59. See Kerr, *supra* note 55, at 123–25 (describing the group-learning and role-playing exercises that have replaced traditional Socratic instruction at Harvard Law School). Professor John Conley offers three main reasons for the displacement of “[p]ure Socratic teaching” by “modified” Socratic methods: (1) “compressed first-year courses that require a good deal of lecturing to achieve reasonable coverage”; (2) a “gentler attitude toward students”; and (3) “a desire to pander to the student-customers whose evaluations and upper-class patronage can influence tenure and salary decisions.” Conley, *supra* note 42, at 991.

60. Lloyd, *supra* note 8, at 681.

61. It is telling that most critical reference to the legendarily brutal Socratic method does not adduce real professors, but a fictional Hollywood character—Professor Kingsfield. See THE PAPER CHASE (Twentieth Century Fox Film Corp. 1973); see also THOMSON, *supra* note 21, at 139 (suggesting that the “Kingsfield model” of teaching may harm students); Conley, *supra* note 42, at 991 (“The classic Socratic purist . . . is epitomized by Kingsfield of *Paper Chase* . . . infamy.”). But see Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 960 (2005) (arguing that Kingsfield’s portrayal of the Socratic method “teaches highly relevant and practical skills”).

62. See Kissam, *supra* note 9, at 1981 (noting that upon graduation, law students are expected to have exemplary communication and problem-solving skills); see also Lloyd, *supra* note 8, at 677, 690 (discussing the need for law schools to adopt a more rigorous teaching method to reflect the realities of law practice).

students with the ability to exercise more control over their careers by helping them develop a reputation for producing first-rate legal work.<sup>63</sup>

New associates who are capable of taking responsibility and producing quality work will earn the repute and trust that leads to rewarding careers.<sup>64</sup> In contrast, new associates who take a passive approach to their workplace performance tend to be classified as irrelevant to the firm's success.<sup>65</sup> If an associate is not considered indispensable, then he or she is at risk.<sup>66</sup> As a result, first-year associates are encouraged to "spare no effort" or time in the quest to become an invaluable resource.<sup>67</sup> Law firms assume that this sort of effort comes from a solid foundation of analytical ability developed in law school.<sup>68</sup>

Contemporary law firms provide new associates opportunities to embrace assignments with such fervor and tenacity that each can become the firm's resident expert on some topic—often a topic never encountered, much less studied, during law school.<sup>69</sup> New associates are expected to be capable of learning, exploring, and analyzing the law, and firms thus routinely assume that associates will independently take responsibility for figuring out the answers.<sup>70</sup> In contrast to the approach of many law students, the best junior associates are always looking for more to do.<sup>71</sup> Gaining an understanding of the law, the cases, and the clients is necessary to successful legal practice, and doing so better than anyone else will make a new associate an indispensable resource.<sup>72</sup>

Unfortunately, when graduates of today's law schools are required to demonstrate the legal analysis skills presumed to have been developed during law school, firms are often surprised by their inability to perform at the level expected.<sup>73</sup> The next step in this surprising process might be a highly uncomfortable meeting with supervising partners, which consists of the

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63. MARK HERRMANN, *THE CURMUDGEON'S GUIDE TO PRACTICING LAW* 26–27 (2006) (recommending that new associates take a proactive approach to assignments when working at law firms because once they prove that they can contribute intelligently, they will be given greater opportunities).

64. *See id.*; *see also* Van Zandt, *supra* note 8, at 1130 (stating that immediate productivity is an essential characteristic of new lawyers who hope to advance).

65. *See* HERRMANN, *supra* note 63, at 27.

66. *Id.* at 24.

67. *Id.* at 23.

68. *See* Johnson, *supra* note 8, at 1246 ("[F]irms depend on law schools to teach students to think analytically during the first year.").

69. *See* HERRMANN, *supra* note 63, at 23.

70. *Id.* at 12.

71. *See id.* at 26; *see also* Lloyd, *supra* note 8, at 684–85.

72. HERRMANN, *supra* note 63, at 27.

73. *See* Johnson, *supra* note 8, at 1245 (noting that even top graduates from elite law schools may prove to be disappointing).

partners' queries about their inept attempts to practice law. Understandably, the disappointment, frustration, depression, and regret that undoubtedly follow such meetings take their toll on new associates. For the more self-reflective associates, the frustration might well be accompanied by the nagging question, "why didn't law school prepare me for this?" However, until modern law professors assist students in achieving the analysis and writing that modern law firms expect,<sup>74</sup> law schools will continue to produce a significant number of unprepared and therefore unmarketable graduates during a time when the legal job market is as competitive as ever.<sup>75</sup>

#### IV. DIAGNOSIS: MODERN LAW STUDENTS NEED A DIFFERENT EDUCATION—BUT WHY?

Like most simple questions, a solution to the legal education dilemma produces multiple, complex answers. Professor Anthony D'Amato provided one answer some twenty years ago in his well-known article *The Decline and Fall of Law Teaching in the Age of Student Consumerism*.<sup>76</sup> Professor D'Amato argues that law faculties and deans have encouraged the transformation of the law student's status from pupil to customer.<sup>77</sup> Because the customer is always right, law professors must pander to students by simplifying their courses and relaxing their standards to receive the positive student evaluations that deans and faculties rely on so heavily.<sup>78</sup>

Additionally, current law students exhibit a high time preference,<sup>79</sup> in part because modern law schools are increasingly finding their classrooms populated by students who lack the basic analytical and communication skills necessary for doing well in law school and modern law firms.<sup>80</sup> When these

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74. Because the modern university's research and service priority has captured the allegiance of many law professors and deans, it is unlikely that law faculties will proactively devote greater attention to teaching essential skills. See Patrick Allitt, *Faculty Norms Inhibit Excellence*, CHRON. HIGHER EDUC., Sept. 3, 2010, at A10 ("[T]he widespread awareness that the rewards of academic life most often go to the scholars, not the teachers, makes teaching very much the poor relation. Students suffer accordingly.").

75. See *supra* Parts I–II; see also *supra* notes 12–13 and accompanying text.

76. See generally D'Amato, *supra* note 56.

77. *Id.* at 494.

78. See *id.* at 461–62; see also *supra* Part III.A.

79. See *supra* text accompanying notes 28–32.

80. See Aida M. Alaka, *Phenomenology of Error in Legal Writing*, 28 QUINNIPIAC L. REV. 1, 4 (2009) (noting that many contemporary law students have received little instruction on the technical aspects of writing); Cohen, *supra* note 21, at 515 (stating that many law students did not acquire the basic writing skills taught in high school and college); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 387 (2003) (acknowledging that many law students fail to acquire basic writing skills as undergraduates); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1, 4 (1992) (arguing that the writing skills of college-bound students are in decline and noting that SAT verbal scores are lower than ever).

ill-prepared undergraduates become 1Ls and hit the analytical wall, they naturally do not blame themselves—they blame the wall.<sup>81</sup> The origin of this unhappy collision with reality can be remotely traced to the softening of modern undergraduate programs.<sup>82</sup> Therefore, the contemporary law-school admission pool is filled with students who have been programmed to expect maximum results with little effort.<sup>83</sup> Modern law schools have thus become populated with undergraduate students who have not been educated, trained, or equipped with the desired analytical skills.<sup>84</sup>

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81. See, e.g., Nancy Millich, *Building Blocks of Analysis: Using Simple “Sesame Street Skills” and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 SANTA CLARA L. REV. 1127, 1143 (1994) (observing that second-year law students often have diminished self-confidence due to poor grades in their 1L year and that such students sometimes “will manifest their insecurities by blaming the law school or a particular professor for their academic difficulties”); Terrell, *supra* note 16, at 12 (noting that the receipt of grades to which most law students are unaccustomed “provokes defense mechanisms aimed at the common villain of excessive [faculty] emphasis on the difficult idea of analytic thinking”). Professor Francis A. Allen discerned and diagnosed this “blame the wall” syndrome over thirty years ago. See Francis A. Allen, *The New Anti-intellectualism in American Legal Education*, 28 MERCER L. REV. 447, 460 (1977) (noting that law students who experience the tension between the need to succeed and the pain that accompanies the academic rigors of law school often express “resentment against the institution and the education process that engender it”).

82. See Kissam, *supra* note 9, at 1972 (concluding that “increasing attention and resources have been devoted by the university to faculty research, scholarship, and training of graduate students, while undergraduate education has been left to survive as something of a poor cousin”); see also Lloyd, *supra* note 8, at 679–80 (contending that because the viability of many liberal-arts undergraduate departments is based on a significant percentage of students who intend to pursue law degrees, undergraduate faculties are also encouraged to dumb down courses to increase the grade point averages of potential future law students to increase the students’ chances of gaining admission to law school).

83. See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 70 (2011) (“[S]tudents often embrace[] a ‘credentialist-collegiate orientation’ that focuse[s] on earning a degree with as little effort as possible.”); see also *supra* text accompanying note 45.

84. As one college professor tersely described the problem, young Americans are not learning how to think. Thomas Bertonneau, *What, Me Read?*, JOHN WILLIAM POPE CENTER FOR HIGHER EDUC. POLICY (Jan. 15, 2009), <http://www.popecenter.org/commentaries/article.html?id=2120> (analyzing his students’ examinations in his world-literature class and concluding that “[t]he inability of many students to cognize even such basic elements as story—first ‘A’ happens, then ‘B’ happens, and so forth—is alarming”); see also Jordan, *supra* note 25, at 61 (stating that students at all levels of education lack a strong foundation in communication and analytical skills); Francis J. Mootz III, *Vico’s “Ingenious Method” and Legal Education*, 83 CHI.-KENT L. REV. 1261, 1301 (2008) (“All too often, students arrive at law school lacking basic communication skills because they have not been provided a rigorous education in persuasive speaking and writing.”).

Popular journalistic accounts of the modern university confirm the accuracy of the foregoing scholarly diagnoses. Craig Brandon, an education reporter and former writing instructor at Keene State College in New Hampshire, recently surveyed non-elite colleges and found that most have abandoned serious academic standards and performance accountability. See

Predictably,

[w]hen these students enroll in law school, the pressure builds for the curriculum to suit the kind of 'thinking' and 'learning' to which these students have become accustomed. The curriculum and teaching will tend to shrink to fit the student rather than encouraging students to grow to meet the intellectual demands engendered by the curriculum.<sup>85</sup>

One major reason for the modern law student's lack of writing and verbal skills is that high school and college students no longer receive a classical liberal-arts education.<sup>86</sup> From the late seventeenth century through the end of the nineteenth century, all levels of American schooling were dedicated to the study of classical literature and history.<sup>87</sup> Assuming, perhaps, that this classical curriculum still reigns in American schools, law professors expect

CRAIG BRANDON, *THE FIVE-YEAR PARTY: HOW COLLEGES HAVE GIVEN UP ON EDUCATING YOUR CHILD AND WHAT YOU CAN DO ABOUT IT*, at ix, 5–6 (2010). An economic analysis of historical trends in college students' use of time during the school year supports this bleak appraisal of contemporary collegiate education:

Mindy S. Marks, an assistant professor of economics at the University of California at Riverside, performed a study that showed college students spend 10 fewer hours a week studying now than they did in 1961. Meanwhile, college grades on average have gone up. Unless one is to assume that current students learn much more, much faster than students did 50 years ago, a natural conclusion is that professors are demanding less while giving better grades.

Robin Wilson, *Why Teaching Is Not Priority No. 1*, *CHRON. HIGHER EDUC.*, Sept. 5, 2010, at A1.

85. Jordan, *supra* note 25, at 68.

86. See, e.g., Kissam, *supra* note 9, at 1972 ("Law students may begin their legal education with rather limited motivations, aptitudes, or experiences in several intellectual activities that are preconditions for successful learning in the case method/final examination system. These activities include: the careful, critical, imaginative reading of complicated texts, the contemplation of ethical questions—as presented by literature, philosophy, or the social sciences—and the writing of coherent texts on complex subjects . . ."); see also *supra* notes 79–84 and accompanying text.

Ironically, the noted lack of undergraduate education in liberal arts and social sciences provides a strong reason to continue relying on the Socratic case method for the bulk of 1L teaching. In his autobiography, Professor Samuel Williston offered a proleptic retort to those who maintain that Socratic rigors are inappropriate for modern law students. SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 212 (1940) ("[A] lawyer who has not acquired when young the power to reason logically from legal principles rarely acquires it later, and few will care to deny that such power is an indispensable part of the equipment of a well trained lawyer.").

87. See LEE T. PEARCY, *THE GRAMMAR OF OUR CIVILITY: CLASSICAL EDUCATION IN AMERICA*, at x, 45–74 (2005); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 20 (1994) ("Americans derived their curricula and pedagogical methods from the English educational system, which . . . had originated in the Middle Ages. The medieval 'trivium' (rhetoric, logic, and grammar) and 'quadrivium' (arithmetic, music, geometry, and astronomy) continued to dominate western curricula well into the nineteenth century."); see also CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE, 1780–1910*, at 12 (2002).

entering law students to be equipped with the basic linguistic and analytical skills to rapidly grasp the techniques of case and statutory analysis.<sup>88</sup>

However, this assumption is unjustified<sup>89</sup> because today's law students arrive from the modern "multiversity" of instrumental training.<sup>90</sup> As a result, they "may be less capable or less interested in learning from the traditional case method or in writing competently about complex matters without extensive instruction or practice."<sup>91</sup> Moreover, because of increased competition among modern law firms,<sup>92</sup> law students find that they must be prepared upon graduation to compete immediately for jobs that demand accomplished analytical abilities.<sup>93</sup>

The true victims of this educational dereliction of duty are average law students from non-elite schools whose main desire is to finish the three-year sentence that the American Bar Association obliges them to serve<sup>94</sup> and enter the legal job market. Hence, this Article's prescriptions are not at all a romantic plea for a return to some mythic Golden Age of legal education. To the contrary, this Article's argument proceeds from a stark acknowledgement of the current reality of poorly educated entering 1Ls who have studied all their undergraduate lives for machine-graded, information-retrieval tests.<sup>95</sup> Thus, what may have been safely assumed during most of the twentieth century—namely, that students entered law school well grounded in critical

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88. See Jordan, *supra* note 25, at 59–60; see also Cathaleen A. Roach, *Is the Sky Falling? Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 J. LEGAL WRITING INST. 295, 299 (2005) (detailing a law professor's inquiries into the undergraduate writing experience and the varied responses).

89. See *supra* notes 79–85 and accompanying text.

90. See MARTHA C. NUSSBAUM, NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES 13–26 (2010) (critiquing the current educational emphasis on technology and the vocational skills suited to staying competitive in the global economy, with its concomitant loss of intellectual abilities crucial to the health of any democracy, especially the ability to think critically).

91. Kissam, *supra* note 9, at 1976; see also Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 571 (1997) ("For many law students, law school represents the first intellectual challenge of their academic careers.").

92. See *supra* Part I.

93. See *supra* note 16 and accompanying text; see also Johnson, *supra* note 8, at 1246.

94. See AM. BAR ASS'N STANDARDS FOR LAW SCHOOLS, *supra* note 53, § 304(c) (noting that a J.D. degree cannot be obtained in less than twenty-four months).

95. See Dougherty, *supra* note 57, at 291 (stating that soon after law school begins, the first-year student learns that the happy "days of 'multiple-guess' and 'scan-tron picture making'" are over); see also *supra* notes 79–86 and accompanying text.

reading, writing, and reasoning skills—most decidedly does not occur today.<sup>96</sup> Therefore, we must teach, and our students must develop, those abilities.<sup>97</sup>

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96. See ARUM & ROKSA, *supra* note 83, at 35–37. For example, Professors Richard Arum and Josipa Roska's empirically and methodologically impeccable monograph focuses on what contemporary collegians actually learn, and their answer is, it turns out, not much. *Id.* The authors' major data set comes from the performance of 2322 students on the Collegiate Learning Assessment (CLA), a standardized test administered to students in their first semester of college and again at the end of their second year. *Id.* at 19–20. The CLA deserves attention from law-school admissions committees because it is not a multiple-choice examination, but an open-ended writing assignment designed to test a student's ability to think critically, solve problems analytically, and write cogently. *Id.* at 21. The CLA does this by posing a "performance task" that requires the test-takers to read a set of documents on a hypothetical problem in business or politics and write a memorandum advising a superior on how to respond by explaining the goal sought and a desirable course of action for achieving that outcome. *Id.* at 21–22.

The results are sobering. The CLA data revealed that some forty-five percent of sample students made essentially no progress during critical reading, complex reasoning, and writing during their first two years of college. *Id.* at 36. Although factors such as educational background limit the students' ability to improve their scores, Arum and Roksa conclude that two characteristics of the college experience are most important to improve performance on the CLA. *Id.* at 93. First, students must take rigorous courses with extensive reading and writing requirements. *Id.* Second, students must study extensively out of class. *Id.* at 97–98. Undergirding these two characteristics of academic improvement is the fact that students learn more from the teachers who challenge them—a fact that does not need statistics to be recognized. *Id.* at 93. Another obvious fact is that students must do their own hard work to master the course material. *Id.* at 100. Yet, the statistical demonstration is sadly necessary, given that one quarter of the students surveyed had not taken even one course that required twenty pages of writing or a course that required as much as forty pages of reading a week in the previous semester. *Id.* at 93. Furthermore, the students reported spending, on average, only twelve hours a week studying, less than half of the twenty-five hours per week reported in 1961. *Id.* at 69; see also Wilson, *supra* note 84, at A1.

In short, as one academic reviewer of the Arum and Roksa book concludes, universities and their students do not regard "classroom learning as a primary pursuit." Anthony Grafton, *Our Universities: Why Are They Failing?*, N.Y. REV. BOOKS, Nov. 24, 2011, at 38, 39.

97. See Johnson, *supra* note 8, at 1252 (noting that contemporary law schools "fail to educate their students in legal doctrine and rigorous analytical thinking beyond the first year"). However, one must consider the possibility that current law students suffer under a disposition that is partly self-inflicted and partly rearing-imprinted. The disposition is exhibited in individuals who have been brought up in a "quick technology fix" culture and thus have been conditioned to believe that there *is* always, or *should* always be, an easier way to achieve their goals. See, e.g., Allen, *supra* note 81, at 459–60. For example, parents may request that their children be removed from a teacher's class simply because the teacher may have a reputation for being the hardest biology or algebra teacher for that grade level. American children in the 1980s and 1990s were reared to expect that their goals can be achieved by minimizing any and all challenges that come along; and thus there is no shame or social stigma in looking for a way to avoid breaking a sweat to accomplish those goals. Cf. Wilson, *supra* note 84, at A3 (noting that today's college students find the coursework overwhelming despite receiving better grades than their age group did fifty years ago).

Thus, today's over-protected students may not find themselves prepared for the demands of today's law practice. Francis Allen expressed the gravamen of the situation by

## V. THE REMEDY IS A RETURN TO CLASSICAL RHETORIC: A PRACTICAL PRESCRIPTION FOR TEACHING LEGAL REASONING AND WRITING

The first step toward reform consists of the law-school faculty's candid recognition of self-deception and failure.<sup>98</sup> Having acknowledged its actual identity as a trade school, the law school can focus on training its apprentices—the students—for their vocation,<sup>99</sup> a trade that depends on flawless writing, logical reasoning, and persuasive argumentation.<sup>100</sup> Not coincidentally, these three skills make up the trivium—the classical and medieval curriculum of grammar, logic, and rhetoric,<sup>101</sup> which formed the basis of legal education for centuries.<sup>102</sup>

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emphasizing that “the origins of the malaise now being experienced in the law schools are to be found not in legal education’s sins . . . but in events and cultural movements that typify our entire social life.” Allen, *supra* note 81, at 451.

98. See *supra* Part III.

99. See Jim Chen, *Truth and Beauty: A Legal Translation*, 41 U. TOL. L. REV. 261, 262 (2010) (“Law schools have a single mission: we train people to become lawyers . . .”); Henderson, *supra* note 54, at 56 (referring to law schools as the “primary gatekeepers for the legal profession”).

100. See Terrell, *supra* note 16, at 16 (stating that “the first tenet of lawyer professionalism . . . is excellence”); Stephanie A. Vaughan, *Persuasion Is an Art . . . But It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 638 (2009) (emphasizing the skills necessary to be effective at persuasion); see also *supra* notes 68, 74–75, 96–97 and accompanying text.

101. SISTER MIRIAM JOSEPH, *THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC: UNDERSTANDING THE NATURE AND FUNCTION OF LANGUAGE* 3 (Marguerite McGlenn ed., 2002); RICHARD, *supra* note 87, at 20. *Trivium* “is Latin for ‘three roads,’ or a place where three ways meet.” LEIGH A. BORTINS, *THE CORE: TEACHING YOUR CHILD THE FOUNDATIONS OF CLASSICAL EDUCATION* 14 (2010). As one modern advocate of teaching the trivium explains, grammar is the study of vocabulary and basic linguistic structures. *Id.* at 48. Logic or dialectic constitutes the skill of abstracting from particulars and inferring from generalities. *Id.* at 52–53. Rhetoric provides the ability to “speak and write persuasively and eloquently about any topic while integrating allusions and examples from one field of study to explain a point in another.” *Id.* at 54; see also EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 16 (4th ed. 1999) (noting that classical rhetoric emphasized “persuasive discourse”); GEORGE A. KENNEDY, *A NEW HISTORY OF CLASSICAL RHETORIC*, at xi (1994) (“[R]hetoric as that term was usually understood throughout classical antiquity [meant] the art of persuasion by words or the art of civic discourse . . .”). Given rhetoric’s civic role and intellectual content, its importance in both ancient and modern law teaching is understandable and unsurprising because a law professor’s first task is to teach students how to use the same legal precedents and material facts available to the opposing party in delivering a persuasive interpretation to the court. See Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 LEGAL COMM. & RHETORIC: JALWD 73, 75 n.4 (2011).

102. See, e.g., JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* 248 (2008) (noting medieval universities’ emphasis on students’ development of persuasive arguments); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 169, 175–76 (2009) (describing the focus on crafting arguments in the early

A. *The History of Legal Education and Rhetoric: A Common Heritage*

Renaissance and early modern Europe witnessed the growth of specialized education for lawyers, and although the curriculums varied from country to country, each centered on the study of rhetoric.<sup>103</sup> Although the dominance of classical education during these eras meant that grammar and logic were a central part of even basic schooling, legal education's emphasis on rhetoric mandated further development of students' grammar and logic skills.<sup>104</sup> Moreover, the Renaissance's rediscovery of the complete rhetorical treatises of Aristotle, Cicero, and Quintilian abetted and intensified legal education's focus on rhetoric.<sup>105</sup>

Thus, early modern-era English legal education merely continued a tradition that stretched back to Greco-Roman antiquity.<sup>106</sup> Indeed, law and rhetoric were so intertwined in classical and medieval times that law did not become an independent university course, distinct from rhetoric, until the twelfth century.<sup>107</sup> The study of rhetoric remained an integral component of English legal education, even when lawyers were trained in the London Inns of Court

Inns of Court). *But see* Lisa A. Perry, *Legal Handbooks as Rhetoric Books for Common Lawyers in Early Modern England*, in *LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF LAW IN ENGLAND 1150–1900*, at 273, 275 (Jonathan A. Bush & Alain Wijffels eds., 1999) (finding the formal study of rhetoric lacking in English lawyers' training in the seventeenth and eighteenth centuries).

The Renaissance reconfigured the medieval trivium by adding the subjects of history, poetry, and moral philosophy, among others, to create the *studia humanitatis*. Donald Phillip Verene, *Vichian Moral Philosophy: Prudence as Jurisprudence*, 83 CHI.-KENT L. REV. 1107, 1108 (2008); *see also* SISTER JOAN MARIE LECHNER, *RENAISSANCE CONCEPTS OF THE COMMONPLACES: AN HISTORICAL INVESTIGATION OF THE GENERAL AND UNIVERSAL IDEAS USED IN ALL ARGUMENTATION AND PERSUASION WITH SPECIAL EMPHASIS ON THE EDUCATIONAL AND LITERARY TRADITION OF THE SIXTEENTH AND SEVENTEENTH CENTURIES* 45–46 (1962) (noting the evolving nature of rhetoric during the medieval renaissance).

103. *See* MICHAEL H. FROST, *INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE* 9 (2005); CHAÏM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 121 (1980); Harold J. Berman, *Introduction* to PERELMAN, *supra*, at ix (“[I]t is no accident that law in the West was once studied as a branch of rhetoric.”); Marianne Constable, *On the (Legal) Study Methods of Our Time: Vico Redux*, 83 CHI.-KENT L. REV. 1303, 1306 (2008) (pointing out that a rhetoric professor's task “was to prepare students for the study of law”).

104. *See* JOSEPH, *supra* note 101, at 9 (stating that rhetoric “presupposes and makes use of grammar and logic”).

105. FROST, *supra* note 103, at 8.

106. *See* J.A. CROOK, *LEGAL ADVOCACY IN THE ROMAN WORLD* 3 (1995); KENNEDY, *supra* note 101, at 103. According to Chaïm Perelman, the tradition necessarily persists to the current era, because “[l]egal reasoning is [only] a specific application of the theory of argumentation, a generalization of the Greco-Roman dialectic and rhetoric.” PERELMAN, *supra* note 103, at 130.

107. Richard J. Schoeck, *Lawyers and Rhetoric in Sixteenth-Century England*, in *RENAISSANCE ELOQUENCE: STUDIES IN THE THEORY AND PRACTICE OF RENAISSANCE RHETORIC* 274, 274 (James J. Murphy ed., 1983).

rather than in the Oxford colleges.<sup>108</sup> Although the primary role of rhetoric in common-law trials receded before the rising tide of new procedures and evidentiary rules during the eighteenth century,<sup>109</sup> the study of rhetoric remained a staple of secondary and collegiate education in England and America well into the nineteenth century.<sup>110</sup> Hence, most British and American lawyers called to the bar between roughly 1750 and 1880 would have been well schooled in rhetoric.<sup>111</sup>

When Dean Christopher Columbus Langdell's Socratic case method of legal education triumphed in American law schools in the early twentieth century,<sup>112</sup> there was no place in the new Langdellian curriculum for a separate rhetoric course.<sup>113</sup> For almost a century after its introduction in the 1870s, the Socratic case method<sup>114</sup> was regarded as a highly efficient and successful means of teaching critical reasoning and argumentation skills, and applying them to difficult legal issues.<sup>115</sup> Hence, it was widely believed that the Socratic case dialogue adequately performed the same pedagogical task once accomplished through the teaching of logic and rhetoric.<sup>116</sup>

### B. Legal Education Today: A Heritage Forgotten

However, all is not well. As previously discussed, law firms and judges persistently have complained that modern graduates cannot write and analyze

108. *Id.* at 275.

109. FROST, *supra* note 103, at 11. For historical treatments of these procedural changes, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 178–80 (2003); ALLYSON N. MAY, *THE BAR AND THE OLD BAILEY, 1750–1850*, at 176–201 (2003).

110. See FROST, *supra* note 103, at 12–13 (noting that classical rhetoric was “relegated to speech departments, rhetoric departments, and English departments” in nineteenth-century universities and that written discourse gained increased predominance over oral rhetoric); RICHARD, *supra* note 87, at 20 (stating that the trivium dominated European and American education into the nineteenth century).

111. *Cf.* FROST, *supra* note 103, at 10–13.

112. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 79, 99, 145, 168 (1994); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* at 36, 39 (1983); Susan Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 511 (2003); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 331–32 (1979); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 540–43 (1991).

113. See, e.g., BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906*, at 213, 220, 226 (2009) (identifying law-school courses such as property, contracts, constitutional law, and wills); LAPIANA, *supra* note 112, at 130 (noting that as Langdell's successor as dean of Harvard Law School, James Barr Ames “was determined to exclude both nonlegal subjects and academics without law degrees from the law school”).

114. See *supra* notes 56–57 and accompanying text.

115. See Weaver, *supra* note 112, at 549–52; *supra* note 57 and accompanying text.

116. Kerr, *supra* note 55, at 117.

adequately.<sup>117</sup> In addition to reasons already examined, one major reason for the declining effectiveness of legal education is the disappearance of the Socratic case method from all stages of law-school instruction.<sup>118</sup> Hence, now is the time for alert reformers to consider one solution, or, more precisely, one crucial component of any true solution: a return to the teaching of the trivium as part of the basic first-year substantive or doctrinal courses.

### C. First-Semester 1Ls Need Cicero More than Laptops

To alleviate the persistent complaints about graduates' poor writing and reasoning talents, a logical first step is to teach and emphasize the cogent use and exposition of both speaking and writing during the first year of law school.<sup>119</sup> Nothing could be more important for the development of crucial linguistic and "critical analysis" skills than prolonged instruction in rhetorical reasoning and discourse.<sup>120</sup> As one professor remarked,

[T]he principal problem with legal writing . . . is that we have not been taught how to create and construct arguments. It is not our writing that is undeveloped or unclear; it is our thinking. In order to develop "clearer" thinking, lawyers need to know something about the rhetorical tradition from which legal argument is derived. Law students, in particular, should be acquainted explicitly with the basics of classical rhetoric: the different modes of persuasion, how to invent and construct arguments, how to identify fallacies in argument . . . . [L]aw professors "should be teaching the sequences of logical reasoning."<sup>121</sup>

This rhetoric prescription makes perfect historical and pedagogical sense because "law is the very profession of rhetoric."<sup>122</sup> That is to say, law is a *champ clos* for the use of linguistic skill and logic to persuade legal decision

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117. See *supra* notes 21–22 and accompanying text.

118. See *supra* Part III.E.

119. See Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 11 (2010) ("Studying the law as rhetoric is essential to begin the complex task of legal interpretation. Rhetoric also is essential for legal composition, perhaps even more naturally so because rhetoric is the historical site of the tools and implements of persuasion and argumentation.").

120. See *id.*

121. Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 489–90 (2002) (footnotes omitted) (quoting Anita Schnee, *Logical Reasoning "Obviously,"* 3 J. LEGAL WRITING INST. 105, 116 (1997)).

122. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1554 (1990); see Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491, 572 (1998) ("Legal practice is rhetoric all the way down, with rhetorical engagements layered upon rhetorical engagements in a dynamic and challenging confluence that cannot be constrained by pretenses of analytical certainty."); see also *supra* notes 103–11 and accompanying text.

makers to favor an advocate's position.<sup>123</sup> In sum, law, both in its means and ends, is a deeply rhetorical endeavor.<sup>124</sup>

This deep connection of law and rhetoric is so widely recognized today that there has never been a moment more propitious for teaching rhetoric during the first semester of law school.<sup>125</sup> For instance, after noting that most law professors "stress the relevance and importance of rhetoric in law school instruction," Professor Alan Watson asks rhetorically, "[W]hy not have a class or classes specifically on rhetoric?"<sup>126</sup> Earlier in his monograph, however, Professor Watson provided good reasons why law schools should *not* teach rhetoric in a special class devoted specifically to that topic.<sup>127</sup> These reasons appear in Watson's account of his unhappy experience teaching professional responsibility when his school needed an emergency volunteer.<sup>128</sup> In his words, "I have never been so miserable in my life. I had to screw up my courage to enter the classroom. The students hated the class. It was not what they wanted."<sup>129</sup>

But why? Although Watson's reflections come from his experience teaching legal ethics, his answer is equally pertinent for an estimation of the likely effectiveness of a discrete first-year rhetoric course. First, as Watson points out, professional responsibility is unlike the other required courses, which all focus on the substance of various commercial- and public-law topics.<sup>130</sup> Second, although legal ethics calls for comparative and historical perspectives, the students "had no interest in wider perspectives."<sup>131</sup> These reasons for student resistance to studying legal ethics in a compulsory, stand-alone course apply with equal or greater force to a separate first-year rhetoric course.

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123. See BRYAN GARSTEN, *SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT* 174 (2006) (noting that rhetoric is integral to the deliberative process); see also PERELMAN, *supra* note 103, at 122 (commenting that the "best lawyers' argument is the one which the judge uses in his own deliberations").

124. See PERELMAN, *supra* note 103, at vii ("In actuality, these methods have long been put into practice by jurists. Legal reasoning is fertile ground for the study of argumentation: it is to the new rhetoric what mathematics is to formal logic . . ."); Vaughan, *supra* note 100, at 636-39.

125. Austin Sarat & Thomas R. Kearns, *Editorial Introduction* to *THE RHETORIC OF LAW* 1, 3-4 (Austin Sarat & Thomas R. Kearns eds., 1994); see also WATSON, *supra* note 15, at 20 (noting that by the second year of law school, it is too late to teach students the introductory aspects of law).

126. WATSON, *supra* note 15, at 20 n.51.

127. See *id.* at xviii.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

*D. Professors Should Teach Legal Rhetoric in Core First-Year Courses: The Iowa Model for a More Effective Legal Analysis and Writing Program*

In addition to Watson's experience with legal ethics, my own experience as a novice contracts professor at Texas Tech University School of Law in the late 1980s—especially in comparison with my later observations of the standard-model discrete Legal Research and Writing (LRW) course<sup>132</sup>—further informs my rejection of rhetoric as a separate course. Texas Tech did not teach legal analysis and writing as a stand-alone course in the 1980s. Instead, in harmony with the “Iowa approach,”<sup>133</sup> legal reasoning and writing were

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132. See Rideout & Ramsfield, *supra* note 21, at 77 (pointing out that in virtually all law schools, formal writing instruction takes place *only* in one first-year course separate from the doctrinal subjects).

133. As explained in Iowa Law School's official history,

[The School's Curriculum Committee] proposed a first-year Small-Section Program in which every beginning student would take one first-year course in a small class taught by a full-time faculty member, and in which there would be special emphasis on the fundamental lawyer skills of legal analysis, research, and writing. These small sections were placed in regular first-year subjects, the substance of which provided the content for the various skill-training exercises created and supervised by the faculty members teaching the courses.

THE HISTORY OF THE IOWA LAW SCHOOL, 1865–2010, at 176 (N. William Hines ed., 2011); see Leigh Hunt Greenhaw, “*To Say What the Law Is*”: *Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861, 861 n.1 (1995) (“The regular law faculties of the University of Iowa, Vanderbilt University, the University of Kansas, and the Dickinson School of Law teach writing through, and with, a substantive first-year course.”). By the time Professor Leigh Hunt Greenhaw's study was published in 1995, Texas Tech Law School had abandoned the Iowa approach some seven years earlier. Surprisingly, in 2005, a decade after Greenhaw's article appeared, the Iowa law faculty abandoned “the College's signature contribution to reform in legal education” by eliminating the small-section writing program taught by the regular, full-time faculty and replaced it with a discrete first-year writing course taught by non-tenure-track professors. THE HISTORY OF THE IOWA LAW SCHOOL, 1865–2010, *supra*, at 293–94. The faculty overwhelmingly supported this change and apparently succumbed to the conventional “faculty fame” model of curricular reform. See *supra* note 77–78; see also THE HISTORY OF THE IOWA LAW SCHOOL, 1865–2010, *supra*, at 293 (“In later years, some faculty chafed under the time commitment required by small-section teaching . . . . [I]n 2004, the door was opened for faculty members who were disenchanted with the program to press openly for a more ‘conventional’ and less faculty-intensive approach to teaching beginning students these basic skills. It was argued that Iowa was out of step with the rest of the legal academy because in the 21st century most other law schools relied on a staff of non-tenure-track professional-skills instructors to teach their first-year basic research and writing courses. Other arguments . . . were that today's entering students needed much greater instruction in analysis and writing than a generation ago, and that this necessitated teachers spending more time with students individually than it made sense for regular faculty members to commit.”).

Perhaps it is just as well that Iowa's “regular faculty members” abandoned the important task of teaching reasoning and writing, given that its arguments for abandonment—ranging from blatantly self-interested pleading to the logical fallacy known as “Hume's Guillotine”—would earn no better than a “C-minus” in any collegiate persuasive writing course. For a brief

embedded and taught within the first-year doctrinal courses. Therefore, the students learned basic analytical skills in a deeply contextualized, relevant fashion.

This is not the case for students taught under the standard LRW model, which devalues legal analysis and writing by removing them from the “real” first-semester doctrinal courses, such as contracts, property, and torts, and depositing them in separate LRW courses.<sup>134</sup> Moreover, untenured, full-time

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discussion of Hume’s Guillotine, see C. FRED ALFORD, NARRATIVE, NATURE, AND THE NATURAL LAW: FROM AQUINAS TO INTERNATIONAL HUMAN RIGHTS 83–84 (2010).

Since 1989, Washington and Lee University School of Law has taught—and swims against the tide by continuing to teach—legal writing and analysis by the Iowa approach. See Grunewald Interview, *supra* note 23, at 1; see also E-mail from Joan M. Shaughnessy, Professor of Law, Washington & Lee Univ. Sch. of Law, to author (Apr. 21, 2011, 14:17 EST) (on file with author). The University of Baltimore School of Law also uses a modified Iowa approach to teach first-year legal reasoning and writing in small satellite courses connected to the first-year doctrinal courses and taught by the doctrinal-course professors, which is very similar to the Texas Tech Law School approach discussed later in this Article. Compare *infra* note 145, with UNIV. OF BALT. SCH. OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW CATALOG, 2011–2012, at 4–5, available at [http://www.law.ubalt.edu/downloads/law\\_downloads/20112012%20catalog%20final%206-29.pdf](http://www.law.ubalt.edu/downloads/law_downloads/20112012%20catalog%20final%206-29.pdf) (“All . . . students will take either Introduction to Lawyering Skills (ILS)/Contracts I, ILS/Torts, ILS/Criminal Law or ILS/Civil Procedure I in their first semester. The ILS course [carries three credits and] will combine instruction on legal writing with a substantive course such as Criminal Law, Torts, Contracts I or Civil Procedure I. The purpose of the ILS course is to teach legal writing skills within the context of a required first-year course. All students, regardless of the ILS course in which they are enrolled, will receive a similar legal writing experience.”). Yale Law School has also used the Iowa approach’s basic features as the foundation for its first-year legal-writing program. See *Yale Law School Expands Legal Writing Instruction*, YALE L. REP., Winter 2011, at 4 (discussing the recent changes to Yale’s “small group” writing program).

134. See Kissam, *supra* note 9, at 1989 (describing the devaluation of legal writing in law schools by highlighting that it is taught as a separate and distinct course, thus signaling that writing is a separate, less important skill than analytical skills taught in substantive courses using the case method); see also Dickerson, *supra* note 24, at 85 (concluding that law schools’ misunderstanding of the current problem and inadequacy in teaching legal writing “is reflected in the existence of courses called ‘Legal Research and Writing’”); Gross, *supra* note 22, at 266 (lamenting that “[l]egal writing often is viewed as a separable and peripheral subject,” when instead it “is not less than the principal medium for the expression of, and hence for practice in, legal analysis”).

An assistant professor in the Legal Practice Program at the University of Michigan Law School correctly discerned that by teaching legal analysis and writing through the standard model of the stand-alone LRW course, students perceive the course as less important than their other substantive courses and, therefore, devote less attention to it. Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 58 (2002). But Professor Kenneth Chestek’s solution is oblique. Rather than endorsing the direct solution of obliterating the “anomaly” by teaching legal analysis and writing within those attention-getting “substantive” courses, Chestek believes the solution is “for the legal writing professor . . . to find a way to capture and retain the attention of first-year students.” *Id.* at 58–59. Nevertheless, as Dean Grunewald, a veteran teacher of “the Iowa approach,” has noted,

instructors<sup>135</sup> or, worse, short-term “fellows” who are only teaching LRW as a temporary way-station on the full-time, tenure-track career path are typically hired to staff these courses.<sup>136</sup> Given these liabilities, it is not surprising to hear the common complaint that the students who learned legal analysis and writing in the standard-model LRW courses never “bridge the gap;”<sup>137</sup> that is, they never make the connections between the reasoning skills taught (supposedly)<sup>138</sup> in their LRW courses and the routine usage of these skills in

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law students are observant and may quickly discern that LRW instruction is less important than other courses if taught in a stand-alone course. Grunewald Interview, *supra* note 23, at 1.

135. See WATSON, *supra* note 15, at 73, 74 (observing that “legal writing instructors are regarded as second-class citizens or not even as citizens but as helots” and that when students reminisce or talk about law school, they “seldom mention” legal-writing instructors). One critic used the Hindu caste designation “untouchables” to describe the typical status of LRW faculty. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 118 (1997); see also Kissam, *supra* note 9, at 1990 (“The basic facts that most writing supervisors are *not full-time professors* and that the research and writing course ‘typically carries less academic credit than any other first-year offering’ surely signal that writing is not to be taken as seriously as substantive law school courses.” (emphasis added) (footnote omitted) (quoting Douglas E. Abrams, *Integrating Legal Writing into Civil Procedure*, 24 CONN. L. REV. 813, 817 (1992))); Mootz, *supra* note 84, at 1301 (“[T]he law school has banished rhetoric to a first year writing course that is too often taught by faculty who are regarded as less important than the research faculty.”).

136. My current institution combines the bad and worse alternatives of non-tenure track *and* part-time LRW teachers, as do many law schools that have a “Teaching Fellows” program for staffing the first-year LRW course. At Loyola University (New Orleans) College of Law, non-tenure-track fellows, who also teach advanced electives and seminars, teach the first-semester LRW course, which thereby renders them “part-time” writing-and-analysis teachers. That Loyola’s LRW course is the only course using 2Ls and 3Ls as teaching assistants further diminishes the status of Loyola’s LRW course. Hence, as one perceptive Loyola student pointed out to me, the LRW course “is taught by assistants assisted by more assistants.”

Moreover, Loyola’s LRW fellows, like so many others in American law schools, have short-term appointments of one to three years. Therefore, just as the LRW fellows are beginning to gain their sea legs, they ship out to full-time jobs elsewhere, and a whole new crew of novices is brought aboard to begin on-the-job self-training in the teaching of legal analysis and writing. Cf. Kissam, *supra* note 9, at 1990 (“Even when full-time [LRW] instructors are employed, they are often young lawyers . . . who are neither recognized nor paid as law professors and who experience rapid turnover.”). For a summary of the findings of the 2002 *Survey of Legal Writing Programs*, jointly conducted by the Association of Legal Writing Directors and the Legal Writing Institute, in regard to the staffing of LRW courses, see Kristin B. Gerdy, *Continuing Development: A Snapshot of Legal Research and Writing Programs Through the Lens of the 2002 LWI and ALWD Survey*, 9 J. LEGAL WRITING INST. 227, 235 (2003) (stating that seventy-seven percent of the 154 school participants use full-time, non-tenure-track teachers who work under short-term employment contracts of one to five years).

137. See, e.g., Grant, *supra* note 80, at 384–85 (decrying the rise and dominance of the “skills/substance dichotomy” in law schools, which strictly distinguishes between skills courses and substantive courses); Greenhaw, *supra* note 133, at 863–67; see also *infra* note 141.

138. See Kate O’Neill, *But Who Will Teach Legal Reasoning and Synthesis?*, 4 J. ASS’N LEGAL WRITING DIRECTORS 21, 30–31 (2007) (explaining that professors assigned to first-year

the students' daily preparation for and participation in the substantive courses.<sup>139</sup>

On the other hand, Texas Tech students had every reason to take analysis and writing seriously as skills to be used in their substantive courses because the course professors—presumably the faculty members most talented and experienced in teaching these core skills—taught legal reasoning and writing as a component of those courses.<sup>140</sup> By teaching these as an integrated component of core courses, students made the connections between learning doctrine and analysis automatically.<sup>141</sup> Thus, through instructional synergy, the school achieved a pedagogical integration that paid dividends in class, on final examinations, and presumably also later in upper-level courses.<sup>142</sup> This spillover into the large-section classrooms occurs due to the basic psychology of confidence building through achievement: students who have achieved success in their small-section writing assignments are more likely to try the same successful rhetorical arguments and techniques again in different settings; therefore, the large classroom will be less likely to restrict student expression to pedestrian or obvious arguments.<sup>143</sup> As a result, the end-of-semester blue books are more likely to contain analytically felicitous answers.<sup>144</sup>

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doctrinal courses no longer teach much about legal reasoning and largely rely on the legal-writing instructors to do the job).

139. See *infra* note 141.

140. See John A. Lynch, *Teaching Legal Writing After a Thirty Year Respite: No Country for Old Men?*, 38 CAP. U. L. REV. 1, 17 (2008) (“Legal education’s doctrinal faculty unquestionably possess an enormous reservoir of legal writing talent. Diverting at least some of this talent from law review articles and treatises would be great benefit to law students, who, after all, have purchased the services of these professors.”).

141. As Dean Grunewald remarked, one really cannot teach legal writing and analysis separate from legal substance, as proved by the content of legal-writing textbooks, which include case- and statute-based exercises. Grunewald Interview, *supra* note 23, at 2. But when writing and analysis are taught through those LRW textbooks in separate LRW courses, the instruction is disconnected from their daily, substantive learning, and the students thus miss the chance and incentive to apply their legal-writing and analysis skills on a regular basis, unlike the students taught under the Iowa approach.

142. In his discussion of the “Iowa approach,” Dean Grunewald referred to this educational synergy as “cross-fertilization,” arguing that the overlap of doctrinal studies and writing and analytical skill development will be mutually beneficial. *Id.* at 3. Unfortunately, as Professor Greenhaw has complained, very few schools integrate legal writing and substantive coursework. Greenhaw, *supra* note 133, at 861–62; see also Henderson, *supra* note 54, at 77 (criticizing contemporary law schools’ tendency “to teach skills [like analysis and writing] in separate courses from doctrine” and suggesting, for example, that “a course in contracts could include students’ drafting a contract for . . . [a hypothetical] client”).

143. Cf. James E. Moliterno, *The Secret of Success: The Small-Section First-Year Skills Offering and Its Relationship to Independent Thinking*, 55 MO. L. REV. 875, 881 (1990).

144. *Id.*

*E. The Logistics of a Modified Iowa Model*

The logistics of the modified Iowa model that I used while at Texas Tech in the 1980s<sup>145</sup> were quite simple: a cohort of ten to twelve students in each first-semester course received two units of credit for separately meeting with one of their substantive-course professors an extra two hours per week to study legal analysis and writing.<sup>146</sup> For example, during the first three weeks of the first semester, the criminal-law professor would use criminal attempt cases in the assigned casebook to teach case briefing and case synthesis to ten of her criminal-law students in two special reasoning-and-writing classes per week, whereas I used several of my contracts casebook's "consideration" cases to teach those same analytical skills to a cohort of my contracts students. At semester's end, all students would receive two separately graded credit units in legal analysis and writing, with the final grade being based on the accumulated grades earned on the written exercises.

As an added benefit of this modified Iowa approach, neophyte 1Ls were not thrown into the deep end of the basic first-semester study-techniques pool to sink or swim on their own. For example, because they needed to read, brief, and synthesize all of the assigned cases in their core classes under professors' supervision throughout the semester, students practiced these skills repeatedly during their first semester, which inculcates the importance of improving those

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145. Texas Tech's version of the Iowa approach differed from the original in that there were no small sections of the basic first-year substantive courses. The Iowa faculty taught writing and analysis in the regular class sessions of the small-section substantive courses, as does Washington and Lee School of Law. See THE HISTORY OF THE IOWA LAW SCHOOL, 1865–2010, *supra* note 133, at 252; Grunewald Interview, *supra* note 23, at 1. In Texas Tech's version, however, legal-reasoning-and-writing instruction took place in additional, specific class sessions devoted only to those skills, with a specific two-credit "line item" grade appearing on each student's transcript to reflect his or her work in that course. A moment's reflection by anyone who has spent a decade or two in law-faculty lounges likely will reveal that Texas Tech's variation is superior to Iowa's approach: less opportunity for "gold-bricking." When the students and the professors have to spend an extra two hours per week in a course with a different catalogue name and number than the underlying substantive course, there will be less ability to give short shrift to the labor-intensive instruction in analysis and writing and to make up for that shortage by spending more time on case-law or doctrinal instruction in the substantive class sessions. Such short shuffling and shifting would be easy to camouflage in the Iowa model. Dean Grunewald's observation that maintaining rough equality of effort and work among the various small "Iowa" sections is an ever-present, vexatious task for law deans at Washington and Lee confirmed this ease. *Id.* at 3.

146. The perfectly sensible notion behind excluding research from the regimen is that novice law students need to know how to read critically, reason, and write before they can be expected to have any understanding or appreciation of the various research techniques and tools. See Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 LAW LIBR. J. 431, 441 (1989) (maintaining that effective instruction of legal research can be best achieved in students' second and third years of law school).

skills.<sup>147</sup> Indeed, students improve and practice—even “over practice”<sup>148</sup>—these skills by receiving professors’ individualized written feedback, as well as through the general guidance provided through lecture and discussion in the separate weekly two-credit cohort class.<sup>149</sup> Thus, unlike the standard-model students to whom I have taught contracts and torts since leaving Texas Tech School of Law, my Tech “cohort” 1Ls had no trouble transferring their legal analysis and writing skills to their substantive law classes because those skills had been taught, taught again, practiced, learned, and perfected as an integral part of studying and writing about the topics and cases covered in the substantive classes.<sup>150</sup>

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147. As “skills” teachers have noted, repetition of a professional skill not only develops and improves the skill but also embeds the skill as a habit, an implicit understanding of the skill so deep and instinctive that it can be used in different contexts. See, e.g., David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 200–01 (2003); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 80–81 n.37 (1996).

148. See BORTINS, *supra* note 101, at 43–44.

149. Besides helping the students to correct and improve their analysis and writing, doctrinal professors’ tangible feedback will also help to alleviate one of the leading causes of law students’ diffidence and anxiety: not receiving periodic, concrete, individualized guidance from their professors, *before final examinations*, as to whether they are properly learning what needs to be learned. See SULLIVAN ET AL., *supra* note 56, at 177–78; see also Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 416 (1997) (emphasizing law students’ complaints about the lack of feedback throughout the semester). Professor Paul Bateman argues that written assignments in first-year courses produce several benefits. For example, stress about exams is lessened because they have “early and concrete” feedback on assignments during the course of the semester. *Id.* at 416–17. Additionally, a substantive-course teacher is able to learn from his or her students’ written assignments in which “students may have misunderstood material, which in turn enables the professor to correct misconceptions a class might have before the [final] exam.” *Id.* at 417. This latter corrective benefit is but one specification of the general educational benefit described by Dean Grunewald as “cross-fertilization.” See Grunewald Interview, *supra* note 23, at 3; see also Day, *supra* note 49, at 344–45 (recommending, as a better way to prepare students for bar examinations, that law faculties improve students’ analytical writing abilities by teaching students how to formulate solutions to old exam questions for every course and then provide feedback to students about their practice answers); Stephanie Roberts Hartung & Shailini Jandial George, *Prompting In-Depth Analysis: A Three-Part Approach to Teaching Analogical Reasoning to Novice Legal Writers*, 39 CUMB. L. REV. 685, 687 (2009) (“[S]tudents benefit from specific, constructive feedback as to how to fully develop a legal analysis . . . .”); Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 418, 418–21 (1999) (offering efficient ways for law professors to provide effective feedback).

150. See Binder & Bergman, *supra* note 147, at 202 (explaining that “feedback that provides students with the opportunity to revise their thinking as they work on tasks . . . is likely to be particularly effective”); Greenhaw, *supra* note 133, at 867 (arguing that, as key components of rhetoric, legal writing and substantive legal education should be learned together); Kissam, *supra* note 27, at 1987 (concluding that legal analysis and legal writing “should be integrated exercises in order that students will experience and understand the vital, often tacit interconnections between . . . the analysis of problems that often shifts as research and writing progresses, and the

*F. Educational Attributes of the Iowa Model (with a Comparison to the Standard-Model LRW Course)*

Such supervised repetition of reading, briefing, and case synthesis skills is crucial given both the basic “building block” nature of these skills<sup>151</sup> and the daunting difficulty of these tasks for contemporary first-semester law students.<sup>152</sup> Because these basic tasks are second nature for law professors, we easily forget how mystifying case briefing and synthesis and legal reasoning were for most of us as students.<sup>153</sup> Indeed, the typical first-semester LRW class errs by trying to teach too much (library research, computer training,

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rethinking and rewriting of documents that so often informs effective research and analysis”); see also *supra* notes 136–37 and accompanying text.

151. See Cohen, *supra* note 21, at 492 (“To provide competent representation, a lawyer must communicate effectively.” (footnote omitted)); Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. LEGAL EDUC. 245, 245–46 (2011) (“[R]ule synthesis . . . has application throughout the law school experience. . . . Rule synthesis has obvious utility for clinicians and others who supervise interns. Mastering synthesis skills can help students integrate doctrinal material and succeed on law school exams.” (footnotes omitted)); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 474 (1993) (listing written and oral communication skills as the most important legal skills).

152. See CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 19 (6th ed. 2011) (explaining that first-semester 1Ls are typically mystified by judicial opinions on account of their unfamiliarity with legal terms and judicial methodology); Figley, *supra* note 151, at 246 (commenting on the difficulty of understanding rule synthesis in the first year of law school); Hartung & George, *supra* note 149, at 691 (“[L]egal analysis can seem foreign and mysterious to first-year law students.”); Provenzano & Kagan, *supra* note 16, at 164 (noting that many 1Ls have great difficulty in grasping the theory and technique of case synthesis).

153. See Day, *supra* note 49, at 342 (maintaining that law professors must remember that the law is not intuitive for many law students and that they must patiently teach important doctrines without lowering expectations). Perhaps one reason 2Ls and 3Ls are so reluctant to continue briefing cases (whether long-form or book-briefing) is that they learned neither how to do it well nor how to use their briefs during class dialogue. One emeritus professor, who described a faculty meeting devoted to a discussion of that law school’s low pass rate on the state bar examination, describes one cause of this problem. Barbara Taylor Mattis, *Teaching Law: An Essay*, 77 NEB. L. REV. 719, 722 n.3 (1998). At this meeting, a student indicated that he only had to brief cases in one course because no other classes required it. *Id.* The student questioned whether the faculty was “challenging students as much as you used to, and if not, why not?” *Id.* (internal quotation marks omitted).

One solution, as previously suggested, is for doctrinal-course professors to provide extensive written and oral feedback on their students’ case briefs. See *supra* text notes 138–141 and accompanying text. One scholar observed that first-semester briefs are typically “either too long (the student has not recognized the material from the immaterial) or . . . too short (the student leaned . . . toward knowing only rules without a clue about their limits and peculiarities).” See Bateman, *supra* note 149, at 413. Only the professor’s marginal blue-penciling of the case briefs and individual or small-group discussions can impart and explain the skill of properly constructing and proportioning case briefs. These small-group discussions also convey to students that their case briefs will aid in their class participation and help them understand class discussions even if the professor is not questioning them. *Id.*

style-sheet formatting, and *Bluebook* drills, among others),<sup>154</sup> which thereby shortchanges the building-block skills and the repetition required for their mastery.<sup>155</sup> Thus, in many versions of the standard-model LRW course, instructors spend little time (if any) on supervised case briefing, case synthesis, and hypothetical case solutions because instructors must have enough time to cover the course's introduction-to-legal-research component and move on to the "real" assignments, such as writing opinion letters and memoranda.<sup>156</sup>

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154. See Dickerson, *supra* note 24, at 86 ("We have further demeaned legal writing by trying to crowd too much into single, elementary courses.").

155. See Grant, *supra* note 80, at 394–95 (encouraging professors to assign writing assignments in substantive courses and to provide feedback to students on initial drafts). One veteran law professor usefully analogized the acquisition of critical reading and analytical skills to learning how to ride a bicycle:

[The] real learning of skills is accomplished experientially: one acquires problem-solving skills only by attempting to perform them. Knowing the issue and developing basic tools for analysis and problem-solving are much like learning to ride a bicycle. Quite simply, the skill of balancing a bike cannot be learned through books and lecture, or by observation. Balancing on two wheels demands active participation. One must attempt to ride without expectation of instantaneous success. One must fall, get up, try again, get up, try again, and over time succeed. One gets the hang of it only by actually doing it and, if necessary, doing it over and over and over again.

David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 474 (2001).

Another equally suggestive metaphor describing the experiential learning of the Socratic dialogue is the teeter-totter or seesaw. This popular trope may be traced back to the encomium for a college professor revered by President James A. Garfield. At an 1871 Williams College alumni banquet, Garfield honored his favorite teacher, Professor Mark Hopkins, by saying that he could think of no better educational experience than to have one-on-one interaction with the professor: "The ideal college," Garfield declaimed, "is Mark Hopkins on one end of a log and a student on the other." See JAMES R. DAVIS, *BETTER TEACHING, MORE LEARNING: STRATEGIES FOR SUCCESS IN POSTSECONDARY SETTINGS* 5 (1993).

Moreover, even John Dewey's behaviorist educational theory proceeds from the fundamental tenet of "the experiential character of learning." Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 645–46, 661 (2007). From this tenet, Professor Edward Rubin concludes that "[a] modern approach to legal education would integrate experiential learning into the regular educational program. Every first-year course could have a skills component." *Id.* at 663. The integrated Iowa approach, of course, provides one such component by teaching the legal reasoning and writing advocated by this Article. See *supra* Part V.D–E.

156. See John A. Lynch, Jr., *The New Legal Writing Pedagogy: Is Our Pride and Joy a Hobble?*, 61 J. LEGAL EDUC. 231, 241–42 (2011) (discussing the memo as the set-piece of modern LRW classes). My law school seems to be typical in its lack of programmatic attention to case briefing and synthesis. At the beginning of their first semester, the LRW faculty assigns Loyola 1Ls to read and study the LRW textbook's excerpts on briefing and synthesis; however, faculty never provides students with a how-to lecture, written critiques of their briefs, or graded assignments on these skills. My school's *laissez vous faire* approach to teaching these crucial gateway skills to legal analysis does not seem consistent with the ABA standard for teaching legal writing, which requires substantial instruction in "legal analysis and reasoning[.] . . . problem

Moreover, these “real” first-semester LRW assignments seem to be necessitated by the second semester or subsequent component of the typical LRW course, which is devoted to the appellate moot and brief.<sup>157</sup>

A better approach would be to extend the first semester’s reasoning and analytical training to the second semester and place appellate work, as do some law schools, in the third semester.<sup>158</sup> In this second semester of analysis, the writing assignments should gradually become longer and more complex—from the drafting of contracts or statutes, to opinion letters and office memoranda based on hypothetical problems from the assigned cases, to pre-trial briefs and proposed jury instructions for the same hypotheticals<sup>159</sup>—and at each step, these assignments solidify the core skills of legal analysis. Of course, substantive-course professors should continue to teach these various second-semester writing assignments to small cohorts of students,<sup>160</sup> and they

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solving, . . . [and] writing in a legal context.” AM. BAR ASS’N STANDARDS FOR LAW SCHOOLS, *supra* note 23, § 302(a)(2)–(3).

157. See, e.g., Robert R. Stratchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 238 (2011–2012) (noting the historic emphasis on appellate litigation in legal-writing courses); Bonny L. Tavares & Rebecca L. Scalo, *Teaching After Dark: Part-Time Evening Students and the First-Year Legal Research & Writing Classroom*, 17 J. LEGAL WRITING INST. 65, 95 n.133 (2011) (noting that the second-semester LRW focuses on trial and appellate briefs).

158. See Gerdy, *supra* note 136, at 237 (noting that according to the 2002 *Survey of Legal Writing Programs*, “[v]irtually all writing programs extend over [the] two semesters” of the first-year of law school). However, as of 2003, more than thirty law schools added a required third semester in the fall of the 2L year. *Id.* at 237, 240. In 2007, the same survey disclosed that of the 173 participating law schools, 151 have a required “moot” or “advocacy” course in the first year, whereas twenty-three have a similar course required in the second year. See PHIL FROST ET AL., ASS’N OF LEGAL WRITING DIRS., LEGAL WRITING INST., 2007 SURVEY RESULTS 7 (2007), available at <http://www.lwionline.org/survey/surveyresults2007.pdf>.

159. See Grant, *supra* note 80, at 394 (recommending that doctrinal professors assign short writing exercises based on the various topics and issues in the doctrinal courses and stating that the professors’ written feedback would develop and support students’ ability to produce competent written analysis of legal issues); Kissam, *supra* note 9, at 1967–68; Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 164 (1987) (advocating for short writing assignments in doctrinal courses).

160. As one early proponent of using the problem method in substantive classes noted, “The intensity of the problem method and the development of skills that can result from its use require small classes for the sake of both teacher and student.” Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 664 (1984). Foreign law professors who have studied the American system of legal education have remarked the labor-intensiveness of teaching with problems. In discussing the problem method, to be distinguished from the case method in that any result or solution arose not from the focused discussion of cases but instead “had to be developed by the students [before class] on the basis of the assigned materials,” Professor Pnina Lahav concluded that this method requires “intense work on the part of both teachers and students.” 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, 675 (2009). Students also have remarked the augmented labor demands of the problem method. See James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in*

should base these writing exercises and problems on the course's topics and materials.<sup>161</sup> Again, the resulting synergy will permit students to learn the doctrinal content of their substantive classes more efficiently while simultaneously strengthening their writing, reasoning, and problem-solving skills.<sup>162</sup>

An additional benefit of the modified Iowa approach is that the Socratic instruction in the substantive classes will be energized by the cohort students who have learned the assigned cases thoroughly enough to synthesize their doctrines and apply them to the hypothetical problems in the writing assignments.<sup>163</sup> Thus, the cohort students will be improving their case-method thinking skills as they work on those writing assignments, and these improved skills will enrich the Socratic classroom dialogue.<sup>164</sup> Once again, too, another semester of integrated pedagogy overcomes the artificial distinction between the substantive courses' content and the stand-alone LRW course's legal analysis and writing, all to the betterment of the student's basic mastery of doctrine, reasoning, and writing.<sup>165</sup> Moreover, this Iowa approach fosters the

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*Legal Education*, 32 GONZ. L. REV. 389, 405 (1996–1997) (noting that “students must often take more time to prepare [for class] when the problem method is used” (footnote omitted)).

161. See *supra* note 133 and accompanying text.

162. See *supra* notes 140–43 and accompanying text. An additional benefit for first-semester students in an Iowa-approach program is that they will have practiced, in writing and with professorial feedback, the sort of comprehension and application of material facts to solve core-course problems that standard-model 1Ls do not deal with until the first set of final examinations. See Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 286–300 (2008) (describing success in improving 1L students' legal analysis and writing skills through a series of writing exercises accompanied by professorial feedback); Joseph C. Dimperio, *Some Reflections on Teaching the Law: Better Lawyers from Better Law School Instruction*, JURIS, Fall 1996, at 14, 15 (“For most students, the [first-semester final] examination is too late to deal with the comprehension and application of content for the first time.”).

163. This additional benefit is, of course, another instance of “cross-fertilization.” See *supra* notes 15–16.

164. See Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 596–98 (2009) (explaining that using skills exercises in “the doctrinal classroom would benefit students in all the ways suggested by the [Carnegie and Best Practices] Reports” by connecting thought and action, thereby preparing the student mind for practice). Dean Grunewald explains that in the doctrinal classroom, he is able to focus Socratically on students who need extra practice in framing arguments or analyzing cases because he knows their weaknesses from reading their written exercises. See Grunewald Interview, *supra* note 23, at 3–4.

165. It is heartening that other law professors also have lamented the standard-model's disjoining effect of separating instruction in legal reasoning and writing from instruction in substantive doctrine. See *supra* notes 137–39 and accompanying text.

precise integration of skills and doctrinal teaching recommended by the most recent *Carnegie Report* on the improvement of legal education.<sup>166</sup>

Having the cohort students conduct simulated oral arguments based on their writing problems further energizes the substantive-course classroom.<sup>167</sup> The problems, of course, should be based on casebook cases and topics, which will permit every student in the course to follow and learn from the oral arguments. Then, after a few demonstrations by the cohort students, other members of the class can be assigned oral-argument exercises also based on the casebook materials.<sup>168</sup> This teaching mechanism dismantles the learning barriers fostered by the separate LRW class because by using “simulated oral argument exercises in the doctrinal classroom, . . . professors can directly relate analytic learning objectives to practical lawyering skills.”<sup>169</sup>

Finally, and encouragingly, law professors today enjoy a wealth of instructional materials and books adapted<sup>170</sup> or

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166. See SULLIVAN ET AL., *supra* note 56, at 13 (“[W]e propose an integration of student learning of theoretical and practical legal knowledge and professional identity.”); see also Kloppenberg, *supra* note 16, at 1099–1102 (explaining that the University of Dayton Law School’s new “Lawyer as Problem Solver” curriculum features a “more comprehensive integration of lawyering skills” within the foundational doctrinal courses, an “approach [that] reflects many of [the *Carnegie Report*’s] themes”).

167. See McElroy, *supra* note 164, at 593. An additional benefit of classroom oral arguments, as Professor Lisa McElroy recognizes, is that much like the writing exercises in the cohort approach, oral exercises compel students to overcome any tendency to differentiate between the study and practice of legal analysis and the case method of learning substantive law. See *id.* at 595, 599.

168. For useful ideas about designing oral-argument exercises and problems for the first-year classroom, see Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 470 (1995) (describing a range of classroom simulations); Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759, 759 & n.1 (1991) (explaining the use of simulations in a first-year contracts curriculum); McElroy, *supra* note 164, at 607 (noting that simulated oral arguments require an application of rules to the narrative framework); Myron Moskowitz, *From Case Method to Problem Method: The Evolution of a Teacher*, 48 ST. LOUIS U. L.J. 1205, 1209–13 (2004) (outlining an example of a problem method hypothetical).

169. McElroy, *supra* note 164, at 599; see also James R. Beattie, Jr., *Socratic Ignorance: Once More into the Cave*, 105 W. VA. L. REV. 471, 493 (2003) (arguing that role playing can further the Socratic method’s impact); Becker, *supra* note 155, at 475 (“The problem method really involves the same [analytical process] as the case method, only it is more advanced. It focuses on the application of the law—cases, statutes, etc.—within the context of a specific problem and its solution. . . . Indeed, the problem method achieves what teachers of the case method frequently try to accomplish with their hypothetical questions.”); McElroy, *supra* note 164, at 603 (concluding that “a simulated oral argument achieves all of the same objectives as the Socratic method”).

170. See generally, e.g., STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (3d ed. 2007); CALLEROS, *supra* note 152; LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (5th ed. 2010); WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENT (2d ed. 2008); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (6th ed. 2009); KRISTEN KONRAD

adaptable<sup>171</sup> to teaching rhetorical discourse and reasoning in first-year law courses.<sup>172</sup> This abundance of materials did not exist even forty years ago.<sup>173</sup> The authors of these instructional materials have discerned and plumbed the deep connections between legal analysis and rhetoric,<sup>174</sup> and in doing so, they have done much of the necessary spadework for the law schools and faculties using the Iowa approach and thus embedding legal reasoning and writing instruction within the first-year doctrinal courses.<sup>175</sup> Most important of all,

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ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* (2009); DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (2d ed. 2009); PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* (1986); HELEN S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* (5th ed. 2008); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2d ed. 2008).

171. See, e.g., CORBETT & CONNORS, *supra* note 101; JOSEPH, *supra* note 101; CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., 1969); STEPHEN E. TOULMIN, *THE USES OF ARGUMENT: UPDATED EDITION* (2003); RICHARD M. WEAVER, *A RHETORIC AND COMPOSITION HANDBOOK* (William Morrow & Co. rev. 1974) (1957); ANTHONY WESTON, *A RULEBOOK FOR ARGUMENTS* (4th ed. 2009).

172. For an excellent annotated bibliography of monographs and essays about rhetoric and law, see Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129 (2006).

173. A comparison of the 2010 and the 1970 catalogues of Foundation Press, Inc. (one of the two major law-book publishers then and now) discloses a three-fold increase in legal analysis and writing titles over the past forty years. See Telephone Interview by Shan Jiang with Paul Thomson, Senior Account Manager, Found. Press (Mar. 31, 2011) (“There were four books with the title of legal research and writing published [by Foundation Press] in the 1970s. By comparison there are 12 books with the same titles published [by Foundation] in 2009–2010.”).

174. See J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 211, 214 (Peter Brooks & Paul Gewirtz eds., 1996); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1094 (1986); see also James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (explaining that “law is most usefully seen not . . . as a system of rules, but as a branch of rhetoric”).

175. As a preventive first strike against the predictable criticisms that my call for the widespread adoption of the Iowa model is hopelessly naïve, let me record here that as a twenty-five-year veteran of largely unproductive, dispiriting curriculum reform faculty meetings, I have regularly dipped into the relevant literature for its palliative message that the obstacles to and failures of curricular-reform mark all law schools, no matter what *U.S. News & World Report* niche they inhabit. See, e.g., Frederick R. Anderson, *Change, the Law, and Curriculum Reform*, 45 AM. U. L. REV. 967, 979 (1996) (“The conventional reasons [for the lack of curricular reform] that affect other academic departments and institutions apply [in law schools] as well.”); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 103–07 (2010) (noting a variety of reasons for law schools’ resistance to change “[d]espite long-standing recognition of the need for reform of legal education”); John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 329–36 (noting the inherent institutional limits on attempts to reform the law-school curriculum). Thus, I harbor no naïve, optimistic expectations for a widespread shift to the Iowa approach, but I do confess to a stubborn professionalism that avows the duty of a doctor to write the prescription even when the patient refuses the cure.

perhaps, this curricular choice will teach law students how justice can be achieved through the rhetorical arts of rational persuasion,<sup>176</sup> while at the same time rendering them the justice of the education they—and their future employers and clients—most assuredly expect and deserve.

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176. See Berger, *supra* note 119, at 8–9 (“Rhetoric recognizes a constructive role for law students and lawyers by acknowledging that the law is often being interpreted and that interpretations are often contestable. From the rhetorical point of view, law students, law teachers, and lawyers are human actors whose work makes a difference because they are the readers, writers, and members of interpretive and compositional communities who together ‘constitute’ the law.”).

