TEACHING THE ACADEMICALLY UNDERPREPARED LAW STUDENT

FOREWORD

Fourth Colonial Frontier Legal Writing Conference: Teaching the Academically Underprepared Law Student

Jan M. Levine

Kirsha Trychta

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Mary Ann Becker

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Foreword
Fourth Colonial Frontier Legal Writing Conference: Teaching the Academically Underprepared Law Student

Jan M. Levine*

On December 6, 2014, more than 100 teachers from twenty-one states and the District of Columbia, including Duquesne University School of Law faculty members, law school professors from legal writing and academic support programs, and professors from undergraduate schools and colleges, gathered to hear twelve presentations from thirteen professors in a national conference titled “Teaching the Academically Underprepared Law Student.” I planned the conference with my colleagues from the legal writing program, Julia Glencer, Ann Schiavone, and Tara Willke, and our Director of Academic Excellence, Kirsha Trychta. The conference resulted from the financial support of our Dean, Ken Gormley; from the support of our Duquesne alumni, whose contributions have resulted in endowed funds enabling our writing program to put on such events; and three commercial sponsors: Bloomberg Law, Westlaw, and Carolina Academic Press. The editorial board and members of the Duquesne Law Review agreed to publish the proceedings of this conference and helped with the administration of the conference; nine of the presentations resulted in the articles in this volume of the Duquesne Law Review. The theme of this conference was inspired by the excellent article titled Bringing a Knife to a Gunfight: The Academically Underprepared Law Student & Legal Education Reform, which was written by two of the December 2014 presenters, Professors Ruth Vance and Susan Stuart.¹ The following remarks are adapted from my welcoming speech at the start of the conference.

***

I’d like to start us off with a bit of an overview, and so I guess I should start at the beginning, at least my beginning. I was born in

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1954, so I’m a Baby Boomer, one of the group of persons born between 1943 and 1960. I started teaching legal writing in 1980 as an adjunct professor, two years after I graduated from law school. I was teaching students who were about five to six years younger than I was; they were the tail end of the Baby Boom generation and were not very different from me in their schooling, outlook, perspective on the world, and use of technology (such that it was at the time). Since then, over almost thirty-five years, including full-time teaching for thirty years at four schools, I’ve taught Boomers, Gen-X students, Millennials, and our most recent students, who are showing some of the characteristics of the Net-Gens.

So I have seen, close-up, more changes in law students than most of you at this conference. Over those years I have had to adjust my expectations of my students, and modify my teaching methods, because of changes in our society, the advent and proliferation of computer-based technology, a transformed educational environment that focuses more on business than on learning, and a bleak economic outlook for all but the wealthiest one percent of America. What I now see in many of my students has scared me, and I believe it has scared many of you; that fear and concern probably accounts for the presence of more than 100 attendees at this conference today.

Most of us know that students now come to law school without having developed their critical thinking skills in college. Richard Arum and Josipa Roksa, in their books, *Academically Adrift: Limited Learning on College Campuses* and *Aspiring Adults Adrift: Tentative Transitions of College Graduates*, have shown that most college graduates do not show any progression in critical thinking skills, and writing and reasoning abilities, after four years of college. Arum and Roksa report that undergraduate education has become more of a social experience than an academic or intellectual experience, and that universities are largely responsible for catering to, and even accelerating, this change in perspective on college life.²

All of the legal research and writing teachers in this room know that most of our students come to us without knowing how to do research other than by skimming one or two screen’s worth of Google search results. We know that many of our students struggle to read text closely and are unaccustomed to reading anything requiring deep thinking and reflection. Many new law students have

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not written anything before that was longer than five pages, rarely
read books for pleasure, and are strangers to structured analysis.
Many of our students are unused to focusing their attention on a
complex task, and have never experienced sustained periods of
studying. They have trouble reading and writing, to a degree we
have never seen before.

As Nicholas Carr reports in his book, *The Shallows: What the In-
ternet is Doing to Our Brains*, too many of our students have never
had the ability to think and read deeply, as our brains adapt to the
addictive stimulus of instant yet superficial results and quickly
changing and beguiling text snippets, images, and videos on the
screens of our computers and smart phones; and we, their teachers,
are losing those abilities as we also use that technology.\(^3\) Carr
notes:

\[A\]s the time we spend scanning Web pages crowds out the
time we spend reading books, as the time we spend exchanging
bite-sized messages crowds out the time we spend composing
sentences and paragraphs, as the time we spend hopping
across links crowds out the time we devote to quiet reflection
and contemplation, the circuits that support those old intellec-
tual functions and pursuits weaken and begin to break apart.\(^4\)

We’ve all seen changes in how our students conduct research to
answer legal problems; we’ve all seen the superficial results and
lack of understanding from doing online research as compared to
using print–based materials. Carr addresses that too, when he re-
ports on “a comprehensive review of thirty–eight past experiments
involving the reading of hypertext,” which found that “the prepon-
derance of evidence indicated that ‘the increased demands of hyper-
text reading impaired reading performance,’ particularly when
compared to ‘traditional linear presentation.’”\(^5\)

We all know that many of our students have been strangers to
failure. Many have high self–esteem. But all too often that self–
esteeem has not been based on significant efforts and true accom-
plishments. A large percentage of our students seem bound to their
parents’ support and are unwilling to grow up themselves.

Too many of our students believe that cheating is prevalent, nor-
mal, and expected; they are used to seeing their peers and our social

\(^3\) Nicholas Carr, *The Shallows: What the Internet is Doing to Our Brains* (2010).

\(^4\) *Id.* at 120.

\(^5\) *Id.* at 129 (quoting Diana DeStefano & Jo–Anne LeFevre, *Cognitive Load in Hyper-
and political leaders lie and cheat, and get away with it. A growing number of our students have long been medicated for real or imagined disabilities and disorders, particularly attention deficit disorders and anxiety. Tragically, we have plenty of evidence that our students' excessive and regular consumption of alcohol while partying in college, and their illicit use of attention-enhancing drugs for last-minute exam preparation and taking, are behaviors that have not been left behind when they came to law school.

All of this makes it increasingly difficult for us to train lawyers in the fundamental analytical and writing skills necessary for members of the profession that is critical to a society based on the rule of law. These skills have never been more profoundly needed by our nation. Lawyers are expected to come from among our best and brightest; they have long been the source of our political leadership. We believe lawyers should be well-educated, thoughtful, articulate, and prepared; and we hope they are honest, reliable, and trustworthy.

The challenges presented by our incoming students' difficulties in learning those skills and demonstrating those characteristics have never been greater. These challenges come at a time when our law schools are reeling in the face of mounting student debt, declining enrollment, budget cuts, poor legal employment forecasts, and continuous attacks on higher education generally, and legal education in particular.

On a more positive note, however, when we are able to reach our current students, when they realize how short-changed they have been by their previous schooling, when they see that they are capable of doing far more work and far better work than they've ever been asked to do before, and when they learn how far we are willing to go to help them, they are perhaps the most appreciative group of students we have ever taught.

We are here today to talk about these issues and problems, to learn what we can do to better teach our students, and perhaps begin to see how we may be able to change the environment in which our law schools operate and we teach. There are no more optimistic, yet realistic, faculty members in law schools than you who are sitting here today. No one works harder at trying to make up for the educational neglect from which our students suffer, no one cares more about our students, and no one is more appreciated by those students for what we try to pour into them and how we try to mold them to become what they, and we, hope they can be.

I know we are going to have some wonderful presentations today from thirteen committed teachers who have been struggling to face
these challenges. We will hear some great ideas and gain more insights into our task. We will commiserate with each other and realize we are not alone in the challenges we face. My hope is that we will all take from this conference some new hope about the future of our students, the legal profession, and our calling as teachers.
Foreword

Kirsha Trychta*

I transitioned into a full–time Academic Support position last year, after teaching as an adjunct in the Legal Research & Writing (LRW) program for several years. For me—as I imagine it is for many of the scholars who contributed to this edition of the Duquesne Law Review—legal writing and academic support are inextricably intertwined. Some of the articles focus on the personality characteristics and skills of this “new generation” of law students, while others offer solutions about how to best support the academically underprepared. All of the articles, however, celebrate the relationship between academic support and legal writing. The synergy between LRW and academic support is nothing new, however. Here is my story.

During my first semester of law school, I struggled—a lot. I was, at least initially, overconfident, yet underprepared for the rigors of law school. My undergraduate degrees in psychology and Latin American studies had not prepared me for the Socratic Method. I quickly found myself nervous to speak in class, worried that my confusion would become apparent to my classmates. To complicate matters further, I began to resent my other classmates whose parents were already leaders and lawyers, irrationally blaming them for my struggles. Needless to say, my first–semester grades were dismal.

I returned in January determined to do better, but not quite sure how. We did not have an academic support program at the time,

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and all of my classes had more than eighty students—well, all except for one: Legal Research & Writing. I decided to put all my eggs into that small LRW basket.

I fully immersed myself in the spring appellate brief. I read all the cases; I tried to figure out how they all fit together. I questioned everything. “Where were the gaps in the law?” “How can I win?” “What will make my argument stronger?” All the hard work paid off. I wrote a solid brief and received a lot of positive feedback from my LRW professor and my LRW classmates. I thought to myself “so that’s what law professors want.” It was my light bulb moment.

I still remember standing on the third floor of this building, just outside the Courtroom. It came to me in an instant—if I analyzed the law on my exams like I did in my appellate brief, then there was a chance I could improve my other grades. I took my spring exams with a new plan and a sense of purpose. It worked. I earned the highest grade in LRW and improved all of my other grades. I never looked back.

As a person born in October 1980, I’m just a few months shy of qualifying for the Millennial moniker we’ve all heard so much about. But my own personal experience tells me that Millennial, Net–Gen, or whatever snappy new label the future holds, there is hope. We—as legal writing professors and academic support professionals—have the power to turn even the most academically underprepared students into lawyers, judges, scholars, and even professors.
Understanding the Tethered Generation: Net Gens Come to Law School

Mary Ann Becker*

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I. INTRODUCTION

Young Americans are no less intelligent, motivated, ambitious, and sensitive than they ever were, and they are no less adolescent and fun-loving either. It’s not the under-30-year-olds who have changed. What has changed is the threshold into adulthood, the rituals minors undergo to become responsible citizens, the knowledge and skill activities that bring maturity and understanding.¹

* The author, Clinical Professor of Law and Associate Director of Writing Programs and Academic Support at Loyola University Chicago College of Law, thanks the participants of the 2013 Legal Writing Institute Writers Workshop and the 2013 Central States Association of Legal Writing Directors Scholars Forum for their critical feedback, their helpful guidance, and their continued support of legal writing professors.

Prior generations are often seen as romanticized versions of what young people coming of age during that time period actually experienced. Through movies and literature, for instance, Americans have glamorized the Lost Generation of the 1920s, picturing Ernest Hemingway and F. Scott Fitzgerald writing in Paris cafes and attending extravagant parties with flappers while listening to the new sounds of jazz. But the young people that shaped this generation had survived two world wars and the Depression, and their generation “reflected a variety of emotions and mannerisms: weary cynicism at a young age, risk-taking, binge-like behavior, [and] disdain for a pompous ‘older generation.’” As such, individuals coming of age in the 1920s became known as the Lost Generation.

Every generation has a peer personality that reflects the common events and occurrences of that generation, even though not every member of that generation possesses all of those generations’ attributes. The youngest generation in the United States, “Net Gens,” born at the earliest in 1994, are currently receiving a bad rap from the media, teachers, and employers for being constantly connected to their smartphones and being overprotected by their parents. Net Gens are a tethered generation: they are tethered to technology, social media, and their parents. Even though each member of that generation may not be deserving of some of the negative connotations given to them by the older generations, each member of Net Gen has experienced the same cultural phenomena related to online media, educational reforms, and societal changes. Each one of them grew up as a digital native, never knowing what it means not to have easy, constant access to online resources; and, they are also all experiencing the effects of a terrible job market even though they are one of the most educated generations in history—with the student loans prove it. Every member of Net Gen shares a set of unique cultural events, and, though they are all

3. Id. at 58.
4. Gertrude Stein supposedly told Ernest Hemingway, “You are all part of a lost generation,” and Hemingway quoted her in the epigraph for The Sun Also Rises. See id. at 250. Thus, the Lost Generation was born. See generally Ernest Hemingway, The Sun Also Rises (Scribner 2006).
5. “A peer personality is a generational persona recognized and determined by (1) common age location; (2) common beliefs and behaviors; and (3) perceived membership in a common generation.” Strauss & Howe, supra note 2, at 64.
6. Id. at 8–9.
unique individuals, they are collectively bound by the effects these events have had on their generation.\(^9\)

The first wave of Net Gens could start their 1L year as early as Fall 2015.\(^{10}\) For professors to best teach these students and understand a generation with such a different historical and social context, professors must first know what events comprise Net Gens’ unique viewpoint and why those events are different from the combined experiences of prior generations. Therefore, this article examines Net Gens’ relevant cultural experiences so educators can better understand the students that will be entering our schools and begin to think about how we might want to, or need to, change some of our methodology based on their unique cultural markers.\(^{11}\)

The Net Gens are the fourth generational cycle that, combined with the three prior generations, completes the current Millennial cycle of American generations. To that end, Part II of this article briefly describes the three other generations in the Millennial Cycle: Baby Boomers, Gen X, and the Millennials. Part II also examines how the developing Net Gens fit into that Millennial cycle. Then, Part III identifies the unique cultural markers that define the Net Gens’ peer personality. Part III is divided into multiple sections, each one analyzing a different cultural marker. To begin with, Net Gens are the first group of students to be part of No Child Left Behind, a sweeping educational reform that mandated testing in public schools that had unintended consequences on students’ ability to write and think critically. Second, they have seen writers, athletes, and business men ignoring ethics and rules to get ahead

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9. See Strauss & Howe, supra note 2, at 8–9 ("[Y]our generation's collective mind–set cannot help but to influence you . . . .").

10. See Dyer, supra note 7, at 171. Dyer identifies 1994 as the first year of birth for the youngest Net Gens. Id. Therefore, 2015 would be their first year of law school, assuming they started at the age of 21. Strauss and Howe's work, however, suggests that the Net Gen generation likely started in the late 1990s or early 2000s depending upon the prior generational cycle's length. This indicates that 2020 would be the first year Net Gens enter law school. See generally infra notes 22–28. Because a generation's cycle is determined after it has come to completion, the exact start and finish of the Net Gen generation will only be known in the future. See, e.g., id. But see Strauss & Howe, supra note 2, at 39 (predicting 2004 in a 1991 publication); William Strauss & Neil Howe, The Fourth Turning 272, 296 (1997) [hereinafter The Fourth Turning] (predicting in a publication six years later that this generation would have already entered early childhood by the beginning of 2000). Therefore, this article notes that 2015 is the first potential year when Net Gens will enter their 1L year of law school, but their 1L year could start later depending upon future studies that further define the parameters of each generation in the Millennial cycle.

11. This is the first article in a series of articles analyzing the upcoming generation of students entering law schools. The next articles will focus on how law schools currently teach ethics and the problems that will arise given this generation’s different viewpoints on ethics and cheating as analyzed in this article, and what teaching methods should change based upon the research on this generation’s unique cultural viewpoint.
without suffering any negative consequences, which has created a lack of understanding of what constitutes cheating. Third, Net Gens perceive education’s purpose to be a purely consumer transaction, a means meant only to get to the next step in life. Finally, Net Gens are the only generation to have grown up in a completely wired culture with constant access to social media.

II. The Millennial Cycle: Baby Boomers, Gen Xers, Millennials, and Net Gens

The first three generational cycles in the current Millennial cycle provide context for those shifts and events that are shaping the last generation in the cycle—the Net Gens. Each generation in a cycle is not only defined by a parameter of years, but by the culturally unique experiences that shape it. According to Strauss and Howe’s groundbreaking book Generations: The History of America’s Future 1584–2069, since the beginning of the country, American generations have been moving through discrete cycles that coincide with specific historical events. To date, those cycles are the Colonial from 1584 to 1700, the Revolutionary from 1701 to 1791, the Civil War from 1792 to 1859, the Great Power from 1860 to 1942, and, the current one, the Millennial, which began in 1943. Thus far, the Millennial cycle “has been a cycle of relative peace and affluence, mixed with growing individualism, cultural fragmentation, moral zealotry, and a sense of political drift and institutional failure.”

With the exception of the Civil War Cycle, each cycle has lasted about eighty–five years. Additionally, each cycle contains four

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13. STRAUSS & HOWE, supra note 2, at 85.
14. Id. at 84.
15. Id. at 288. Notably, in 1997, Strauss and Howe predicted that around 2005, Americans would experience a terrorist attack, an impasse over the federal budget, and growing anarchy throughout the former Soviet republic. THE FOURTH TURNING, supra note 10, at 272–33.
16. The Civil War Cycle lasted only sixty–four years because it is the only cycle without the third generation type, the Civic type. See generally STRAUSS & HOWE, supra note 2, at 84–85, 90–92.
17. Id. at 85.
generational types that always occur in the same order. These generational orders start with a dominant generation\(^{18}\) and then a recessive\(^{19}\) generation, in the following order: (1) idealist generation (dominant), (2) reactive generation (recessive), (3) civic generation (dominant), and (4) adaptive generation (recessive).\(^{20}\) In this way, the three prior generations in the current Millennial cycle—the Boomers, Generation X, and the Millennials—lay the ground work for the Net Gen’s generational characteristics. In the Millennial Cycle, Baby Boomers are the idealist generation, Gen Xers are the reactive generation, Millennials are the civic generation,\(^{21}\) and, therefore, Net Gens will be the adaptive generation.\(^{22}\)

A. Baby Boomer Generation

The first generation of the Millennial cycle, the Baby Boomer Generation, born between 1943 and 1960,\(^ {23}\) is most identified with the sweeping changes of the 1960s that triggered “America’s most furious and violent youth upheaval of the twentieth century.”\(^ {24}\) This generation begins the four–part cycle of personality types, as an idealist generation, which means that this type of peer personality “grows up as increasing indulged youths after a secular crisis;\(^ {25}\) comes of age inspiring a spiritual awakening;\(^ {26}\) fragments into narcissistic rising adults; cultivates principles as moralistic midlif-
ers; and emerges as visionary elders guiding the next secular crisis.”

27. Strauss & Howe, supra note 2, at 74.

28. Id. at 302.

29. Id. at 305. Baby Boomers were born to both young Silent Generation parents and older G.I. Generation parents. Id.

30. Id.

31. Id. at 308.

32. See id. at 307.

33. Id. at 305.

34. Id. at 306 (as opposed to the numbers that actually did serve in Vietnam).

35. Id. at 317. Several well-known members of this generation include Jon Bon Jovi, Tom Cruise, Tracy Chapman, Mary Lou Retton, and Michael Jordan. Id. at 318.


37. See generally Strauss & Howe, supra note 2, at 317. As Tracy McGaugh explains in her article analyzing Gen X’s learning styles and educational differences:

If the Boomers had a front row seat to America’s greatness, Xers have had a front row seat to its decline. Some of the seminal events for Xers were Watergate, the energy crisis, the introduction of the personal computer, Three Mile Island, the Iran hostage crisis, the Challenger disaster, the stock market crash of 1987, the savings and loan

B. Generation X

The second generation in the Millennial cycle, Generation X, encompasses the years 1961 to 1981, and its name comes from the Douglas Coupland’s 1991 novel Generation X: Tales for an Accelerated Culture. This generation was born after all the upheaval of the 1960s, but with none of the benefits associated with those changes. Gen X constitutes the second personality type, the reactive generation, which “grows up as underprotected and criticized

27. Strauss & Howe, supra note 2, at 74.

28. Id. at 302.

29. Id. at 305. Baby Boomers were born to both young Silent Generation parents and older G.I. Generation parents. Id.

30. Id.

31. Id. at 308.

32. See id. at 307.

33. Id. at 305.

34. Id. at 306 (as opposed to the numbers that actually did serve in Vietnam).

35. Id. at 317. Several well-known members of this generation include Jon Bon Jovi, Tom Cruise, Tracy Chapman, Mary Lou Retton, and Michael Jordan. Id. at 318.


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youths during a spiritual awakening; matures into risk–taking alienated rising adults; mellows into pragmatic midlife leaders during a secular crisis; and maintains respect (but less influence) as reclusive elders.”

This generation’s youth experienced one of the most divorced generations in America and the greatest increase in working mothers than any prior generation. While Gen X teenagers faced a significantly lower risk of dying from disease than prior generations, they had a much higher risk of dying from accidents, murders, and suicide. Further, Gen X is also the most heavily incarcerated of any prior generation. This generation came of age in an era that was “a nightmare of self–immersed parents, disintegrating homes, schools with conflicting missions, confused leaders, a culture shifting from G to R ratings, new public health–dangers, and a ‘Me’ decade economy that tipped toward the organized old and away from the voiceless young.”

C. Millennials

The Millennials are the third generation type, born approximately from 1982 to the late 1990s. At the time Strauss and Howe published Generations in 1991, they had identified that the Millennials would be a civic generation, the third personality type, based on the prior generational cycles. The civic generation “grows up as increasingly protected youths after a spiritual awakening; comes of age overcoming a secular crisis; unites into a heroic and achieving

scandals, the fall of the Berlin wall, the Rodney King beating, the L.A. riots, and the O.J. Simpson criminal and civil trials. In the words of Dennis Miller (a Boomer): “It's no wonder Xers are angst–ridden and rudderless. They feel America's greatness has passed. They got to the cocktail party twenty minutes too late, and all that's left are those little wiener and a half–empty bottle of Zima.”


38. STRAUSS & HOWE, supra note 2, at 74.
39. A Gen X child in the 1980s had a two times higher likelihood than a Boomer child in the 1960s and three times higher than a Silent child in the 1950s. Id. at 324.
40. Id. at 325. Further, as teenagers, Gen Xers committed suicide more frequently than any other previous generation, except the Lost Generation. Id. at 326–27. And, both Gen X and the Lost Generation, according to Strauss and Howe, are reactive generations. Id. at 84.
41. Id. at 326.
42. Id. at 326–27.
43. Id. at 321.
44. The Millennials have also been called Generation Y or Generation Me. Twenge et al., supra note 12, at 1045.
45. At the time of Strauss and Howe’s book in 1991, they estimated the Millennials’ generation began in 1981. STRAUSS & HOWE, supra note 2 at 84; see also Twenge et al., supra note 12, at 1045 (defining Millennials as born between 1982 and 1999).
46. See STRAUSS & HOWE, supra note 2, at 84.
cadre of rising adults; sustains that image while building institutions as power midlifers; and emerges as busy elders attacked by the next spiritual awakening.”

At the time of publication, Strauss and Howe did not have the necessary information to fully analyze the Millennial generation as it had only just begun. However, civic children typically grow up with idealist parents who “look upon these children as special, an instrument through which their inner visions can be achieved or defended.” Further, “[t]he child environment, now perceived to be dangerous, is pushed back toward greater protection and structure.”

Prior to the Millennials, the G.I. Generation from the Great Power cycle, born between 1901 and 1924, was the last civic generation to occur. This generation, as might be suspected from its name, was identified by strong and high youth spirit despite being born into the Great Depression and the First World War. This generation is also known for coming together during World War II, especially after the bombing at Pearl Harbor. The G.I. generation came after the reactive Lost Generation, which in many ways had experiences similar to Gen X’s experiences, and the G.I. Generation “shunned the Lost cynicism and instead looked forward to solving problems.”

D. Net Gens

Currently, the Net Gens are in their youth, and they were not even in existence at the time of Strauss and Howe’s 1991 publication. However, according to Strauss and Howe’s predictions, Net Gens will be an adaptive generation and the beginning of the fourth generation in the Millennial Cycle. An adaptive generation “grows up as overprotected and suffocated youths during a secular crisis; matures into risk averse, conformist rising adults; produces indecisive midlife arbitrator-leaders during a spiritual awakening;
and maintains influence (but less respect) as sensitive elders.”

They are the children of a more dominant generation, meaning they are raised in an “intensively protective, even suffocating style of nurture. Children are expected to stay out of the way of harm—and of busy adults. Though assured of their collective worth, children are told their individual needs take a low priority as long as the community is struggling for survival.”

To gain some perspective on the fourth personality type, the most recent adaptive generation was the Silent Generation, the fourth generation in the Great Power cycle. During the Silent Generation’s coming of age, American youth had never “been so withdrawn, cautious, unimaginative, indifferent, unadventurous—and silent.” In 1949, when this generation was just completing college, Fortune magazine wondered whether the Silent Generation was “so tractable and harmonious as to be incapable twenty or thirty years hence of making provocative decisions.”

Though Strauss and Howe did not have access to the unique cultural markers that would make up these last two generations, Part III of this article examines the historical events and occurrences impacting the peer personality of the Net Gen generation. Part III also analyzes Net Gens by using research on the Millennials because the line where one generation starts and the other ends is still not clear to researchers.

Morevoer, the Millennials are the most recent youth generation and some of the key cultural markers of the Millennial generation have continued and are magnified in the Net Gen generation.

57. Id. at 74. Other adaptive generations include the Enlightenment, 1674–1700 from the Colonial time; the Compromise, 1767–1791, from Revolutionary time; and, Progressive, 1843–1859, from Civil War time. Id. at 84.

58. Id. at 363. Further, “[n]ot old enough to participate in the crisis as adults, they fail to experience a cathartic rite of passage—and fail to acquire the self–confidence of their next–elders . . . . [These] young adults infuse popular culture with new vitality and provide encouraging mentors to new youth movements that hit too late for them to join.” Id.

59. Id. at 84 (born between 1925 and 1942).

60. Id. at 279 (quoting WILLIAM MANCHESTER, THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932–1972 (1974)).

61. STRAUSS & HOWE, supra note 2, at 283. However, women from the Silent Generation made up nearly half of America’s prominent feminists, most likely because during that time there were virtually no women in engineering or architecture despite women’s advances during World War II. Id. at 284. Similarly, this generation produced many major figures in the Civil Rights Movement, such as Martin Luther King, Jr., Malcolm X, Cesar Chavez, and the youth at the Greensboro lunch counter. Id. at 285.

62. See supra note 10.

63. Depending upon the events occurring during overlapping or back-to-back generations, certain personality shifts can be seen increasing or decreasing across the Millennial cycle. For instance, in a study that examined life goals of American first–year college students from the Boomers, Gen Xers, and Millennials, psychologist Jean Twenge found that the importance of being well off financially increased through the generations with 44.6% of
III. THE FINAL MILLENNIAL GENERATION: NET GENS AND THEIR UNIQUE CULTURAL VIEWPOINT

This generation’s unique cultural context comes from several different social and historical changes. First, this generation grew up under No Child Left Behind, a sweeping educational reform intended to bridge the education gap for all children that, ultimately, taught them how to take tests, but not how to make judgments in ambiguous situations that require critical thinking and writing.\(^\text{64}\) Second, this generation of students has grown up seeing cheating as an acceptable, and perhaps necessary, way to survive in the modern world.\(^\text{65}\) As a result, they have a different understanding of what constitutes cheating and whether cheating is really even wrong. Third, Net Gens often view higher education as a commodity, not as an educational experience, but as a transaction that takes place between expensive colleges and universities and their customers, the students.\(^\text{66}\) Finally, the Net Gen students are really in a unique position because of their constant access and familiarity to online resources and their developed “horizontal peer groups” from these online tools.\(^\text{67}\) Basically, these students have been able to form an entirely constricted peer group based on their Facebook friends, texting, and other social forums with little to no interaction with a “vertical” group consisting of more experienced people.

A. Testing Measures Learning Instead of Assessing Critical Thinking through Writing

Net Gens are the first generation coming out of the federal No Child Left Behind policy, which encouraged a testing culture in schools and devalued critical thinking and reasoning.\(^\text{68}\) These students have been trained to study for a test and rewarded for choosing the correct answer in a multiple choice exam; however, the time spent preparing students for a multiple choice exam took away from

Boomers indicating it was important while 70.8% of Gen Xers did and Millennials continued that trend with 74.4% finding it to be important. See Twenge et al., supra note 12, at 1049 (Table 2). Similarly, Twenge’s study found that developing a meaningful philosophy decreased across the generations: 73% of Baby Boomers said it was a priority; while 46.9% of Gen Xers responded that it was a priority; and only 44.6% of Millennials thought it to be one. Id. at 1049 (Table 2).

64. See infra notes 68–90 and accompanying text.
65. See infra notes 91–127 and accompanying text.
66. See infra notes 128–152 and accompanying text.
67. See infra notes 153–165 and accompanying text.
learning that encouraged writing and working with students on problems that do not have a clear answer. Furthermore, teachers have said that they felt forced to “teach to the test” because their compensation and school’s funding were tied to the yearly assessment test and, as a result, many of them have focused on memorization and testing strategies for the yearly assessment test instead of comprehension, critical thinking, or applied learning.

In 2002, when the oldest potential Net Gens would have just been entering grade school, President Bush signed the No Child Left Behind legislation, which expanded the federal government’s influence and oversight to over 90,000 public schools. The purpose of No Child Left Behind was “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.”

Though the Act lists twelve ways that its purpose may be met, perhaps one of the most controversial measures and the most relevant to Net Gens was the legislation’s requirement that states conduct yearly student assessments so that they could identify schools failing to make the appropriate progress. The Act then provides

69. Id.


71. Thomas S. Dee & Brian Jacob, The Impact of No Child Left Behind on Student Achievement, 30 J. OF POL’Y ANALYSIS AND MGMT. 418, 418 (2011).

72. 20 U.S.C. § 6301 (2013). No Child Left Behind’s goal was to have all children showing math proficiency by 2013–2014. Dee & Jacob, supra note 71, at 418. And, in particular, No Child Left Behind’s legislative goal was to close the gap between children from different socio–economic backgrounds within the schools, districts, and states. 20 U.S.C. § 6301.

73. 20 U.S.C. § 6301.

74. See Dee & Jacob, supra note 71, at 418.
for sanctions and rewards based on a school’s adequate yearly progress as measured by a state’s accountability system. The hope was that by publicizing school performance and imposing sanctions, public schools would become more productive.

Twelve years after its implementation, many teachers’ and critics’ greatest fears have materialized. When No Child Left Behind was first introduced, teachers worried that they would be required to “teach to the test” to meet the yearly state assessment instead of teaching broader cognitive skills or other subjects that are not tested by the state. Teachers were concerned about “students becoming passive learners and task-oriented ‘do–ers’... students expecting answers to be handed to them, rather than learning the methods to discover answers for themselves.”

Though it is still too early to fully measure the effects of No Child Left Behind, for students who have been taught solely for the test, their expectations can present dissonance for students who have been rewarded throughout primary and secondary education for performing well on standardized tests and are now expected to think critically, contextualize learning, and clearly write about their learning in the college classroom.” One study showed that students who were taught largely in this testing culture engaged in a “performance-oriented classroom structure,” which resulted in poor forms of adaptive coping when in the presence of a challenge or the possibility of failure, a

75. 20 U.S.C. § 6311; see also Trolian & Fouts, supra note 68, at 2 (breaking down the Act into five main components: accountability for results, flexibility and local control of funds, scientifically proven teaching methods, expanded options for parents, and defining a “high quality” teacher).

76. See Dee & Jacob, supra note 71, at 418.

77. See id. at 420. As one teacher stated to the California Teachers Association: “[There is] no time for art, no time for P.E., no time for them to use their imagination. Then I spend a great amount of time teaching testing strategies and how to fill a bubble properly.” Trolian & Fouts, supra note 68, at 4.

78. Trolian & Fouts, supra note 68, at 4.

79. Dee & Jacob, supra note 71, at 418–19. Dee and Jacob’s study showed gains in elementary school math that were modest compared to the legislation’s goal of universal proficiency, particularly with respect to reading proficiency, and it showed only moderate impacts on disadvantaged groups in math. Id. at 419. Though, the Common Core requirements adopted by many states indicate that No Child Left Behind has not met its intended goals. See, e.g., Kenneth Chang, With Common Core, Fewer Topics But Covered More Rigorously, N.Y. TIMES, Sept. 2, 2013, http://www.nytimes.com/2013/09/03/science/fewer-topics-covered-more-rigorously.html (Forty–four states have adopted the more rigorous Common Core standards).

80. Trolian & Fouts, supra note 68, at 5. And, in response to an increase in student’s inability to engage in this type of critical thinking, some university faculty are now using standardized or multiple choice tests as well. Id. at 6.
lack of intrinsic motivation, and an inability to abstractly process information.81

The problem with a testing culture is that students have largely been told what to learn and how to learn it.82 A 2008 study by the National Committee on Writing found that only 50% of students say their school work requires writing every day and a mere 35% write several times a week.83 Of the students writing in high school, an alarming 82% report that their typical writing assignment is only one paragraph to one page long.84 Further, the 2012 report from U.S. Department of Education reported that only 3% of high school seniors performed at the advanced level of writing, 24% were deemed sufficient, and a shocking 54% performed at the basic level, which means only partial mastery of the skills necessary for a high school senior.85 Students no longer do a long research paper requiring them to critically analyze texts because teachers no longer have time to grade these papers.86 Ultimately, poor writing is indicative of a failure to think logically, clearly, and critically, which are essential skills for students entering graduate school or even the work force.87 All this testing is problematic for law professors too because it means that many students are entering graduate school with little experience writing, researching, and learning on their own—the critical component of a legal education.88

81. Id. at 5 (citing Judith Meece at al., Classroom Goal Structure, Student Motivation, and Academic Achievement, 57 ANN. REV. OF PSYCHOL. 487, 487–503 (2006)).
82. Id.
84. Writing, Technology & Teens, supra note 83, at iv.
85. Nation’s Report Card 2011, supra note 83, at 10, 28. The NAEP results are based on nationally representative samples of 28,100 twelfth–graders from 1220 schools. Id. at 6.
86. Id. at 7.
87. While the task of teaching writing has to be shoehorned into the time available during the day, the sheer number of students facing the elementary teacher is not an insuperable obstacle to teaching writing. Many upper–level teachers, on the other hand, face between 120 to 200 students, weekly if not daily. Teachers of English (or history or biology) who ask simply for a weekly one–page paper are immediately overwhelmed with the challenge of reading, responding to, and evaluating what their request produces.
88. Stephen Lippman et al., Student Entitlement, Issues and Strategies for Confronting Entitlement in the Classroom and Beyond, 57 C. TEACHING 197, 199 (2009). As a result of
Another unforeseen result of No Child Left Behind’s yearly test score assessments has been that teachers have changed “student responses on answer sheets, providing correct answers to students, or obtaining copies of the exam illegitimately prior to the test date and teaching students using knowledge of the precise exam questions.”\textsuperscript{89} Students may have seen this behavior and may view it as part of the academic culture, which means that they would continue to do it in college and beyond.\textsuperscript{90} This type of educational experience, indelibly, reinforces Net Gen’s flexible viewpoint of cheating.

\textbf{B. Cheating is Not Cheating Anymore}

Recently, Harvard was rocked by a cheating scandal when, in August 2012, it announced that almost half of the 279 students registered for an introductory class had cheated on the final.\textsuperscript{91} The students had either collaborated on answers on a take–home test, despite a prohibition from working with another person, or blatantly plagiarized their answers.\textsuperscript{92} Many of those students admitted to impermissibly collaborating “with fellow students, despite explicit instructions on the test not to do so, but [they] said that behavior was widely accepted”\textsuperscript{93} and, therefore, a justification for cheating.

The Harvard cheating scandal illustrates that the Millennials and Net Gens have a different understanding of what constitutes cheating because many of the students stated that they did not think they were “really” cheating. In a recent survey, only 32\% of

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\textsuperscript{89} Troulian & Fouts, supra note 68, at 5 (quoting B.A. Jacob & S. D. Levitt, \textit{Rotten Apples: An Investigation of the Prevalence and Predictors of Teacher Cheating}, 118 Q. J. OF Econ. 843, 844 (2008)). As a result of No Child Left Behind, a “pervasive culture of high stakes testing that [public school activists and teachers’ unions] say can contribute to cheating because educators fear the consequences if they do not raise scores.” Motoko Rich & John Hurdle, \textit{Erased Answers on Tests in Philadelphia Lead to a Three-Year Cheating Scandal}, N.Y. TIMES, Jan. 24, 2014, at A16. For additional examples of teachers engaging in cheating related to standardized testing, see supra note 70.

\textsuperscript{90} Troulian & Fouts, supra note 68, at 5.


\textsuperscript{92} Id. On the first page of the exam, under exam protocol, the professor wrote: “More specifically, students may not discuss the exam with others—this includes resident tutors, writing centers, etc.” Rebecca D. Robbins, \textit{Harvard Investigates “Unprecedented” Academic Dishonesty Case}, THE HARV. CRIMSON (Aug. 30, 2013), http://www.thecrimson.com/article/2012/8/30/academic-dishonesty-ad-board/

\textsuperscript{93} Id. (some students also attributed the identical answers to shared notes or help from graduate students, which they also thought was allowed). \textit{Id.} As noted in Section II.A., many students may have also seen their teachers cheating.
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undergraduates thought that “working with others on an assignment when asked for individual work” was a serious offense though 82% of the faculty thought it was.  

Perhaps, more shocking to older generations, a survey conducted from 2002 to 2005 on fifty undergraduate campuses found that out of 50,000 students, 70% of them had cheated.  

This flexible attitude toward cheating does not end in undergraduate programs, but continues directly into graduate school programs. For instance, one study found that 56% of MBA students had cheated and 47% of students in non–business programs admitted to cheating, while another 25% of graduate students admitted to unauthorized collaboration, “cut and paste plagiarism,” and fabricating or falsifying a bibliography.

Given these studies, do the incoming Net Gens even understand cheating as earlier generations and their professors define it? Most likely not, given what they have seen occurring in this country during their lifetime. Culturally, David Callahan argues that Americans on the whole have become a cheating culture for four main reasons: (1) a competitive marketplace; (2) big payoffs; (3) temptation; and (4) a trickle–down effect.

First, Callahan posits that the competitive marketplace causes Americans to cheat because they believe it is necessary to keep their jobs and stay ahead. Similarly, Net Gen students will be entering into a competitive marketplace, both when they enter graduate school and when they graduate into jobs. As the survey on graduate school cheating shows, the large number of students cheating may be related to the competitive nature of these programs and a “me

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94. Dyer, supra note 7, at 174 (emphasis added).
95. Daniel Owunwanne et al., Students’ Perceptions of Cheating and Plagiarism in Higher Institutions, 7 J. C. TEACHING & LEARNING 59, 59 (2010). A 2002 study at Texas A&M University found similar results with 80% of their students admitting to cheating. See Twenge et al., supra note 12, at 27.
96. Owunwanne et al., supra note 95, at 60 (survey based on responses from 5331 students at thirty–two graduate schools).
97. Donald L. McCabe, Cheating Among College and University Students: a North American Perspective, 1 INT'L J. FOR EDUC. INTEGRITY 3, at 5 (2005). For undergraduates, the study found that it was one–quarter to one–half. Id. Some of these habits may also be a result of prior educational experience:

As an elementary school principal told me last year, when the fifth–grade teachers assign a topic, the kids proceed like this: go to Google, type keywords, download three relevant sites, cut and paste passages into a new document, add transitions of their own, print it up, and turn it in. The model is information retrieval, not knowledge formation, and the material passes from Web to homework paper without lodging in the minds of students.

BAUERLEIN, supra note 1, at 94.
99. Id. at 20.
first” attitude prevalent in these programs. Consequently, students are also cheating more in school because they view a successful education as the first step in acquiring the right kind of job.

Second, the rewards for cheating are huge, students have grown up in a culture where they have witnessed CEOs who make bad decisions or engage in unethical behavior being protected by a golden parachute. These big payoffs may be why 56% of MBA students feel justified cheating or, at least, are willing to take the risk, particularly after having work experience and viewing the “bottom line” as the best measure of success.

And, even with respect to writing and plagiarism, modern American culture rewards those writers who lie. For instance, Jonah Lehrer, The New Yorker writer who was caught plagiarizing and fabricating Bob Dylan quotes in his book Imagine: How Creativity Works, recently received a lucrative book deal with Simon & Shuster to write about his plagiarism. And Lehrer is hardly the first to reap financial rewards from plagiarism. Jayson Blair, a former writer for The New York Times, and Stephen Glass, a former writer for The New Republic, both received six–figure book deals after they had reported lies and plagiarized their articles. It should not be unexpected, then, that Net Gens would balk at “doing your own work” when they have not seen the benefit of adhering to the rules of honesty and have even seen financial benefits for failing to do so.

Third, Callahan argues that people cheat because the temptation to do so has increased greatly and the safeguards against cheating have grown weaker or more lax. For today’s students, their access to technology has made it very easy for cheating to occur at universities and graduate schools because the information is quick

100. Owunwanne et al., supra note 95, at 60.
101. Callahan, supra note 98, at 60; see also Twenge et al., supra note 12, at 27 (noting Worldcom and Enron scandals show that lying to make money works). “Because GenMe grew up with this kind of ruthlessness, it should not surprise us that they think little of some occasional homework copying.” Id.
102. See Callahan, supra note 98, at 20–21. Financial rewards exist outside of the business community as well. For instance, Callahan points out that after being part of the attack on Nancy Kerrigan right before the Olympics, Tonya Harding received a $160,000 fine and 500 hours of community service. Id. at 257. But, within a year, she had received $600,000 for her confession on Inside Edition and was named one of People’s and Esquire’s favorite people for the year. Id.
103. Owunwanne et al., supra note 95, at 62 (“Success in the workplace is achieved through adhering to the bottom line.”).
105. Callahan, supra note 98, at 256.
106. Id. at 21.
and easily accessible. Additionally, as a result of information being widely available on the Internet in this free and shareable format, they have very different views from prior generations about what constitutes ownership and the boundaries of collaboration and, therefore, plagiarism. For example, in a 2006 survey of 125 private higher education schools in New York, New Jersey, and Pennsylvania, out of the 90% of students that had admitted some sort of cheating, not one of them thought that digital cheating constituted an academic violation. In essence, unlike most professors, these students do not view online cheating as an academic violation.

Finally, Callahan theorizes that Americans have become a cheating culture because of “trickle-down corruption.” For Net Gens, it means that they will level the playing field any way they possibly can in order to get ahead, particularly when they see everyone around them cheating and reaping the rewards. Many Net Gens will not throw out their own moral code in order to stay competitive, but that “means playing by our own rules rather than the prevailing rules, [and it] makes life harder in the process.” Former professional cyclist Jonathan Vaughters regretted doping because he “lived his dream” but “killed his soul;” yet he still did it because he felt that it was the only way to remain competitive when he saw all the other cyclists doing it:

107. Owunwamme et al., supra note 95, at 61–62; see also Dyer, supra note 7, at 169 (studies suggest that an increase in technology use relates to increased unauthorized and prohibited collaborations).

108. Dyer, supra note 7, at 173. “In a file–sharing, cut–and–paste world, the distinctions between creator, owner and consumer information are fading. The operative assumption is often that if something is digital, it is everyone’s property . . . there is no distinction between the owner, the creator, and the user information.” Id.

109. See id. at 170.

110. Id. And, in light of these difficulties, many schools have chosen not to enforce academic standards that deter cheating. More and more professors say that they do not get the support from their schools that they need to stop and curb this type of cheating because most academic cheating goes unpunished. See CALLAHAN, supra note 98, at 229. In 1999, a survey conducted at twenty–one colleges interviewed one thousand professors, and one–third of them stated that they knew their students were cheating, but they did nothing about it. Id. Professors cited the bureaucratic hassle of dealing with a cheating incident and, increasingly, fear that parents might sue them. Id.

111. CALLAHAN, supra note 98, at 23.

112. Id. at 23–24. “[I]n America, cheating has become an accepted way to get what you want and to get ahead, and if you don’t do it, you’re a chump.” Dyer, supra note 7, at 177 (quoting Jennifer Salopek, Cheaters & Chumps, in AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES (2004)).

113. CALLAHAN, supra note 98, at 26.

Then, just short of finally living your childhood dream, you are
told, either straight out or implicitly, by some coaches, men-
tors, even the boss, that you aren’t going to make it, unless you
cheat. Unless you choose to dope . . . . I wasn’t hellbent on
cheating; I hated it, but I was ambitious, a trait we, as a soci-
ety, generally admire. I had worked for more than half my life
for one thing. But when you’re ambitious in a world where
rules aren’t enforced, it’s like fudging your income taxes in a
world where the government doesn’t audit. Think of what you
would do if there were no Internal Revenue Service.\textsuperscript{115}

Likewise, students might feel entitled to cheat because, if they do
not do it, other students who did cheat will get the higher grades.
Researchers call this the “cheating effect.” In other words, the
“knowledge that some students are cheating creates angst on the
part of other students and may fuel their own cheating.”\textsuperscript{116}

Though the Millennials and the upcoming Net Gens have been
heavily criticized for being a cheating culture, both in the media
and anecdotally, they really are mimicking the current American
environment in which they grew up. “Ethics is defined as an indi-
vidual’s personal beliefs about whether a behavior, action, or deci-
sion is right or wrong. Ethical behavior is defined as behavior that
conforms to generally–accepted social norms.”\textsuperscript{117} So, Net Gen stu-
dents will have essentially modeled their behavior on what has be-
come acceptable American behavior during their youth: Wall Street
executives walking away with a golden parachute,\textsuperscript{118} iconic athletes
doping,\textsuperscript{119} and plagiarizers getting book deals.\textsuperscript{120}

\textsuperscript{115} Id. Though, as Callahan points out, many law abiding, upstanding citizens do cheat
the IRS or steal cable. In Chicago alone, it is estimated that 100,000 houses steal cable
service. CALLAHAN, supra note 98, at 189. Many might feel they deserve it given a single
cable company’s vice–like grip on the city. See id. at 190. Callahan lists out many other
infractions of cheating for a variety reasons, including lying about credentials, diagnosing
learning disabilities for cash for standardized admissions tests, and stealing music off the
Internet. Id. at 8–12.

\textsuperscript{116} CALLAHAN, supra note 98, at 202. In defense of his brother, George O’Leary, who had
a seven figure deal to coach Notre Dame football until the school discovered that he lied on
his resume about having his masters, Tom O’Leary told Sports Illustrated: “Is anyone trying
to tell me that resumes are truthful? In the America we live in, the willingness to lie on a
resume is an indication of how much you want the job.” Id. at 221 (quoting Gary Smith,

\textsuperscript{117} Owunwanne et al., supra note 95, at 61.

\textsuperscript{118} David M. Herszenhorn, \textit{Congress approves $700 billion Wall Street bailout}, N.Y.
\textit{TIMES} (Oct. 3, 2008), http://www.nytimes.com/2008/10/03/business/worldbusiness/03iht-
bailout.4.16679355.html?pagewanted=all.

\textsuperscript{119} Associated Press, \textit{Lance Armstrong: “Impossible” to win Tour de France without dop-
ing}, \textit{USA TODAY} (June 28, 2013), http://www.usatoday.com/story/sports/cy-
cling/2013/06/28/lance-armstrong-impossible-win-tour-de-france-doping/2471413/.

\textsuperscript{120} See infra notes 105–106 and accompanying text.
Moreover, beyond what they have seen occurring in American society, this cheating behavior may also be the natural consequences of the continual positive reinforcement this generation has received, whether or not they have genuinely accomplished something. Net Gens are growing up in an environment in which positive reinforcement has overridden the need for winners and losers. As a result, when Net Gens experience failure or rejection for the first time later in life, they turn to cheating. Carol Dweck, a psychology professor at Stanford, found that children that have been overpraised, when they have not actually accomplished anything, often emotionally crumble the first time that they experience failure.\footnote{121} Therefore, these children say that they would rather cheat than experience failure again.\footnote{122} Cheating then becomes a natural coping mechanism, used commonly by their peers as well, to avoid the harsh reality of failure. Because they have not yet been allowed to fail, they never developed a “psychological immunity” to the difficult emotions that come with not succeeding.\footnote{123}

As an example of this type of overabundant positive reinforcement, a youth soccer league in Washington, D.C., does not keep score so that none of the kids “feel bad” by losing a game.\footnote{124} All of the competition has virtually been wiped out in favor of higher self-esteem. As one coach explained:

At the end of the season, the league finds a way to “honor each child” with a trophy. “They’re kind of euphemistic,” the coach said of the awards, “but they’re effective.” The Spirit Award went to “the troublemaker who always talks and doesn’t pay attention, so we spun it into his being very ‘spirited,’” he said. The Most Improved Player Award went to “the kid who has not an ounce of athleticism in his body, but he tries hard.”

\footnote{121}{Ashley Merryman, Losing is Good for You, N.Y. TIMES (Sept. 24, 2013), http://www.nytimes.com/2013/09/25/opinion/losing-is-good-for-you.html.}
\footnote{122}{Id. Further, this type of continual praising, often creates lower self–esteem. Instead of acknowledging flaws and learning how to work around them or with them, children find it hard to measure up to the perfect and successful image that they have been given. Lori Gottlieb, How to Land Your Kid in Therapy, ATLANTIC MONTHLY (June 7, 2011), http://www.theatlantic.com/magazine/archive/2011/07/how-to-land-your-kid-in-therapy/308555/. And, the parents’ desire to eradicate competition amongst their children also eliminates part of the fun for children. Twenge et al., supra note 12, at 67. Some hypothesize that it may be part of the reason that many people of this generation are suffering from such high rates of depression. See id. at 117–18.}
\footnote{123}{Dan Kindlon, a child psychologist and lecturer at Harvard, argues that children need to develop “psychological immunity” by experiencing difficult and painful emotions while growing up in his book Too Much of a Good Thing: Raising Children of Character in an Indulgent Age. Gottlieb, supra note 122.}
\footnote{124}{Id.}
Coaches’ Award went to “the kids who were picking daisies, and the only thing we could think to say about them is that they showed up on time. What would that be, the Most Prompt Award? That seemed lame. So we called it the Coaches’ Award.” There’s also a Most Valuable Player Award, but the kid who deserved it three seasons in a row got it only after the first season, “because we wanted other kids to have a chance to get it.” The coach acknowledged that everyone knew who the real MVP was. But, he said, “this is a more collaborative approach versus the way I grew up as a competitive athlete, which was a selfish, Me Generation orientation.”

This team’s experiences are not isolated instances. One Maryland summer program gives awards every day and every hour to participants; in Southern California, a branch of the Youth Soccer Organization gives every player at least one award while at least a third of them receive two awards. This type of positive reinforcement also adds to students’ increasing sense of education as a consumer transaction because they have not had to earn grades and praise, but have instead been rewarded for their perceived effort.

C. Education as a Commodity

Consistent with their prior educational experiences and the modern culture of cheating, it is not surprising that Millennials and Net Gens are more likely to view their college education as a consumer transaction, instead of a means to intellectual growth or learning. For their generation, college tuition has almost doubled since the

125 Id.
126 Merryman, supra note 121. In fact, trophies and awards are now big business in the United States, an estimated $3 billion–a–year industry in North America. Id.
127 Lippman et al., supra note 88, at 198; see also BAUERLEIN, supra note 1, at 87 (noting that there is no longer room for self–reflection and thinking). Harvard’s Office of Admissions posts an essay written by the Dean of Admissions and an adjunct faculty member in psychology on its Admissions home page encouraging students to take a year off before attending university and warning them about the fast track that they have been on in an effort to secure the right job. In part, the letter states:

Of course, the quest for college admission is only one aspect of a much larger syndrome driving many students today. Stories about the latest twenty–something multimillionaires, the astronomical salaries for athletes and pop–music stars, and the often staggering compensation packages for CEOs only stimulate the frenzied search for the brass ring. More than ever, students (and their parents) seek to emulate those who win the “top prizes” and the accompanying disproportionate rewards. William R. Fitzsimmons et al., Time Out or Burn Out for the Next Generation, HARV. C., http://www.admissions.college.harvard.edu/apply/time_off/index.html (last visited June 10, 2013).
mid–1970s, so it is understandable that students want a measurable and positive outcome in relation to the money they are spending. However, this consumerism has altered students’ perception of the classroom dynamic and how and why grades are earned. Grades are seen more as part of an economic exchange for tuition, not as part of an earned education that requires learning how to synthesize complex information, reflect on their preconceived beliefs, and challenge their resulting analysis.

Unfortunately, universities are compounding the problem when they treat students like consumers by touting new fitness centers, luxury student living, and gourmet food service in an effort to keep or boost their enrollments despite a decrease in federal funding. “As a result, some students may see themselves as customers, their instructors as service providers, and good grades as something they deserve as a matter of course and as part of the exchange, not something to be earned through diligent and insightful work subjected to careful faculty review.” As tuition continues to rise and student loans are readily available, schools are giving students what they want in order to continue to generate necessary tuition dollars.

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128. Lippman et al., supra note 88, at 199.
129. Id. at 198. Many professors have heard the argument from students that one dean reported: “[B]ecause I paid for it and I’m going to class, I deserve[] an A.” Bauerlein, supra note 1, at 193.
130. See id. (“Education requires . . . a modicum of self–doubt, a capacity for self–criticism.”). And, this view is not merely anecdotal, but part of a larger generational shift from the Boomers to the Millennials. Arthur Levine & Diane R. Dean, Generation on a Tightrope: A Portrait of Today’s College Student 39 (2012) (Table 2.1 shows a 21% decline since 1961 in undergraduates rating “formulat[ing] life values and goals for [their] life” as a reason for attending college).
132. Lippman et al., supra note 88, at 199. More professors are also showing cynicism and less job satisfaction because “students now see professors less as intellectual leaders who are to be respected and more as simply gatekeepers (even impediments) on the students’ path to educational completion and the desired better job.” Id. at 200. And, when students do not get the result they want, they act as they would in any other breach of contract or business situation: Many of them go to court. Levine & Dean, supra note 130, at 92 (at least one of eight schools surveyed experienced grievances against faculty and staff members or were taken to court).
133. See Geoffrey L. Collier, We Pretend to Teach, They Pretend to Learn, WALL ST. J. (Dec. 26, 2013), http://online.wsj.com/news/articles/SB1000142405270230353120457920420.183996182 (arguing that the students end up “holding the bag” in a consumerist education culture). In 2012, the average price for the fifty most expensive colleges was $186,000 for four years; private tuition at a four–year college averaged $140,000; and, public tuition for
Further, this consumerism culture has become even more prevalent as a result of anonymous faculty evaluations. “Although this policy gave students a needed voice in their own education, it also may have conveyed upon them a degree of power that has not been entirely positive.”\[134\] Some of the professors who do not have job security, such as untenured or adjunct professors, have admitted that they have made a course easier to be liked by the students and to increase the ratings on their evaluations.\[135\]

As a result, many faculty members have spoken anecdotally about “students’ increasing sense of entitlement—their attitude that good grades should not be too hard to come by and that teachers should give them a ‘break,’ often accompanied by what teachers see as disrespectful and unreasonable behavior.”\[136\] This behavior includes demanding higher grades and expecting professors and teacher’s assistants to do whatever is necessary to meet their unique needs.\[137\] Some of this behavior may be a coping mechanism when, for the first time, these students see that they are not receiving the grades they think they deserve because they are in a more rigorous academic environment and they are competing with a more selective pool of students.\[138\] But, this behavior also helps to explain the entitlement culture that has developed around grades and the turn to viewing a degree as something that is purchased in a business transaction, instead of understanding it as evidence of a completed learning experience.

For instance, in the following email, this student argued that she deserved an A, instead of the B+ she received, for doing the bare minimum of what a course required:

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four–year colleges averaged $72,000. Jon Meacham, *The Class of 2025*, *TIME*, Oct. 7, 2013, at 44. These costs are often higher than a single–family home, which averages $177,000. *Id.*


135. *Id.* Mark Collier, a psychology professor at South Carolina State University, states: It is well known that friendly, entertaining professors make for a pleasant classroom, good reviews and minimal complaints. Contrarily, faculty have no incentives to punish plagiarism and cheating, to flunk students or to write negative letters of reference, to assiduously markup illiterate prose in lieu of merely adding a grade and a few comments, or to enforce standards generally. Indeed, these acts are rarely rewarded but frequently punished, even litigated. Collier, *supra* note 133.

136. Greenberg et al., *supra* note 134, at 1201. Part of this culture may also have resulted from email, which provides seemingly constant access to professors and which has given students the perspective that their professors should respond to them as quickly as their parents and peers. *Id.* at 1202. In addition, email “seems to have diminished status distinctions and the respectfulness of communications from students to teachers.” *Id.*

137. *Id.* at 1194.

138. *Id.*; see also *supra* notes 122–127 and accompanying text.
After getting my grade for your class a couple of days ago, I keep going over and over what exactly you expected out of your [sociology] students. I’m questioning who/what sets the standard for your class . . . . To me, if a student does/hands in all assignments, misses class no more than two times, participates during lecture, takes notes, attentively watches videos, and obviously observes/notes sociology in his/her life, it would make sense for that student to receive a respectable grade—an A. It seems like the work and time that I (and I’m assuming other students) put into this class didn’t create the results that I (or you) wanted. Personally, I can’t comprehend how my performance in your class equated to an 87 percent.139

This student’s focus was on what she perceived to be her hard work and dedication as opposed to what her work actually showed. Unfortunately, for law school educators, if universities treat students as consumers and acquiesce to their desires as opposed to imposing the standard for excellence, then the Net Gens entering law school may likely exhibit similar expectations and be quite surprised to find that many law school’s curves cannot accommodate all the As they believe they deserve.140 In fact, Millennials have received more As compared to Boomer high school students in 1967, and twice as many high school students in 2010 graduated with A averages than prior generations—even though their testing scores have decreased or remained stable, and they report studying for fewer hours.141

This consumerism, however, is not entirely the students’ fault because many Millennials and Net Gens are part of the “helicopter parent” generation.142 These are the parents that hovered over their children like a helicopter protecting them from any possible

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139. Lippman et al., supra note 88, at 197.
140. Some of this attitude is most likely also compounded by the self–esteem movement. “The self–esteem movement . . . is popular because it is sweetly addictive: teachers don’t have to criticize, kids don’t have to be criticized, and everyone goes home feeling happy. The problem is they also go home ignorant and uneducated.” Twenge et al., supra note 12, at 67. Millennials coming of age during this period have been told that they do not have to change any part of their understanding or understand something contrary to their viewpoint as long as they feel good about themselves. Id. at 67. In contrast, “Boomer children in the 1950s and 1960s gained self–esteem naturally from a stable, child–friendly society;” whereas, “[the Millennials’] self–esteem has been actively cultivated for its own sake.” Id. at 55.
141. Id. at 66–67.
142. See LEVINE & DEAN, supra note 130, at 79. These parents have also been called lawnmower and snowplow parents because they “roll everything in their paths to ‘defend’ their cubs.” Id.
They argued over their children’s grades, chose their classes, and blamed the teacher for their children’s poor performance. For that reason, since 2001, a study of higher education schools shows that 90% of four year colleges show an increased frequency of parental involvement. One vice–president from student affairs at a university described the phenomenon:

We don’t want our kids to suffer so we get involved. So they don’t learn how to deal with disappointment and frustration . . . So that when they come to college, when they’re hurt, they don’t know what to do with it because they have never had to walk through pain. We have a big population of students [who] haven’t grown up with the coping skills, the problem–solving skills because of the parent involvement growing up.

Some college deans actually now refer to these students as “‘tea-cups” because they’re so fragile that they break down anytime things don’t go their way.” And, this type of “achievement anxiety” further places the focus on grades instead of the learning process and the feeling of accomplishment that comes with learning.

The effect of this consumeristic attitude towards education affects law schools because many of the changes occurring at the undergraduate level indicate that Net Gens entering law school have discovered that they do not need to work as hard to get the higher grades in their classes when they, or most likely their parents, are

143. Id.
144. Twenge et al., supra note 12, at 150, 153–54. In a Time magazine article, “[t]eachers described parents that specified that their children were not to be corrected or ‘emotionally upset,’ who argued incessantly about grades, and even one father who, after his daughter was reprimanded, challenged a teacher to a fist–fight.” Id. at 154–55 (quoting Nancy Gibbs, Parents Behaving, TIME, Feb. 21, 2005). In one study, new teachers ranked dealing with parents to be the most challenging part of their job. Id.
145. LEVINE & DEAN, supra note 130, at 80 (Table 4.1). Some of the examples given by student affairs officers of parental involvement include a parent calling fifteen times a day because her son was having trouble getting wifi in his dorm room, a mother who wanted to spend the night in the dorms with her son for the first week, a parent who called facilities (instead of the student) when the student became stuck in an elevator, and parents moving students out of resident halls when the students were not present. Id. at 81–82.
146. Id. at 90; see also notes 122–127 and accompanying text.
147. Gottlieb, supra note 122.
148. Greenberg et al., supra note 134, at 1194; see also Gottlieb, supra note 122 (noting the high number of adult patients she has that are confused, unhappy, and anxious because of all that their parents did for them). This helicopter parenting may be why deans at universities have also reported that these students are “very needy” and that between 2001 and 2008 counseling services increased 90% at the four–year colleges surveyed. LEVINE & DEAN, supra note 130, at 89.
paying a high price for education.\textsuperscript{149} And, as law school tuitions continue to rise and students are often taking out loans amounting to $100,000 or more\textsuperscript{150} to attend law school, this sense of education as a commodity will likely become even more pronounced in graduate school.

D. Social Media Friends are the New Advisors

Lastly, Net Gens comprise the first generation to be truly insulated by their horizontal peer group, largely created online and through social networking sites. As a result of their horizontal modeling, when they do need to seek advice on an issue, this generation is more likely than any other to seek out the answers from an unreliable source—each other—because they have insulated themselves through their Internet connectivity. While Millennials are often called “digital natives” because they are the first generation to grow up with access to information through Google and to use social media from a young age, including Facebook, Twitter, and blogs,\textsuperscript{151} Net Gens are really the “tethered generation” for their constant connectivity through phone apps, digital music, social media, and even school research. Researchers found that Millennials spend “[seventy–two] hours per week of connect time by phone and IM, seeking advice and input on the smallest decisions.”\textsuperscript{152} And, like Millennials, that means that young Net Gens are spending an average of ten hours a day online.\textsuperscript{153}

\textsuperscript{149} Id.


\textsuperscript{151} Jean M. Twenge & Stacy M. Campbell, Who Are the Millennials? Empirical Evidence for Generational Differences in Work Values, Attitudes, and Personality, in MANAGING THE NEW WORK FORCE: INTL. PERSPECTIVES ON THE MILLENNIAL GENERATION 1, 3 (Eddy S. Ng et al., eds., 2012).

\textsuperscript{152} Dyer, supra note 7, at 172. Another study found that freshman undergraduate women spend twelve hours a day using social media, mainly texting, music, the Internet and social networking. Texting, social networking and other media use linked to poor academic performance, SCIENCE DAILY (Apr. 11, 2013), http://www.sciencedaily.com/releases/2013/04/130411131755.htm.

\textsuperscript{153} Dyer, supra note 7, at 172. Further, a 2011 study of Millennials in undergraduate programs showed that 38% of those surveyed said that they could not go ten minutes without checking their phone. Digital Dependence of Today’s College Students Revealed in New Study from CourseMart, PR NEWSWIRE (June 1, 2011), http://www.reuters.com/article/2011/06/01/idUS1411122+01-Jun-2011+PRN20110601.
Although social media is a very powerful tool that connects people from all over the world and opens information for anyone with access to an online connection, most Net Gens are using these sites as a continual, nonstop connection to their peer group:

And so, apart from all the other consequences of digital breakthroughs, for the younger users a profound social effect has settled in. Teens and young adults now have more contact with one another than ever before. Cliques used to form in the school yard or on the bus, and when students came home they communicated with one another only through a land line restricted by their parents. Social life pretty much stopped at the front door. With the latest gadgets in their own rooms and in the libraries, however, peer–to–peer contact never ends.

While every teenager and many young adults go through these phases, the Net Gens’ situation is unique in that they are able to maintain endless contact through an established online peer group. Unlike prior generations, Net Gens do not have to worry about their parents monitoring phone usage as they own their own smartphones, they talk to friends in chat groups unknown and inaccessible to their parents or teachers, and they often have a wide reaching group of friends—online—that they may have personally never met.

In essence, Net Gens have created a uniquely, solely peer focused horizontal group that continually reinforces their own sensibility and belief system. Undergraduate schools are already experiencing problems as a result of this online horizontal peer group. For example, university student affairs staffs have reported that these students cannot communicate face to face anymore, even within their peer group. In fact, it is becoming common for them to hear about students living in a room together who do not talk, but, instead, text each other non-stop or students coming into the dean’s

154. See, e.g., Rebecca J. Rosen, So, Was Facebook Responsible For the Arab Spring After All?, ATLANTIC MONTHLY, Sept. 3, 2011 (describing Facebook and Twitter’s part in the Arab Spring revolution); Jennifer Preston, Republicans Sharpening Online Tools for 2012, N.Y. TIMES, Nov. 19, 2012 (discussing candidates’ use of YouTube, Facebook, and Twitter in the 2012 election).
155. BAUERLEIN, supra note 1, at 134; see also Dyer, supra note 7, at 171 (noting that Millennials are “constantly connected to each other”). And, in fact, many Millennials and Net Gens may carry more than one device—such as smartphones, kindles, tablets, and laptops—to maintain this constant connection. See id. at 172.
156. BAUERLEIN, supra note 1, at 133–34.
157. Id.
158. LEVINE & DEAN, supra note 130, at 74.
office asking them to fix problems with a roommate when the student had never actually spoken to the roommate.159

Perhaps, more troubling, they post every aspect of their lives on social media for their peer groups because they feel a comfort level and connection with this online social peer group, without truly understanding the potential long-term ramifications of posting private information on a public forum. One researcher discovered that:

[A] number of students interviewed were surprised when they or a friend were confronted by a potential employer with their Facebook profile, were rejected for a job, or were even fired from the job because of their Facebook content. The fact that an employer secured their profile was greeted as almost a magic trick.160

Because students are so insulated by their horizontal peer group, it had never occurred to them that someone from an older generation, part of what would have been their vertical group in the Boomer or Gen X generation, could just as easily access that information.

Although online peer communities may be large and expansive given their Internet reach, they are really very narrow in scope because a student who spends most of her days with her peer group could also be limiting herself only to the horizontal group that she creates through social media, while never getting the benefit of interacting with other viewpoints, ages, or experiences. Consequently, she will never know that posting those pictures from the party where she did her first keg stand may result in her not getting hired for a clerking position at a conservative law firm because she has no vertical peer group—no adults—and her horizontal peer group—her contemporaries—see no problem with it. As these studies show, real life education often happens when students engage in other activities and with people outside of their limited social group:161

Maturity comes, in part, through vertical modeling, relations with older people such as teachers, employers, ministers, aunts and uncles, and older siblings, along with parents, who impart adult outlooks and interests . . . . The Web . . . , though, encourages more horizontal modeling, more raillery and mimicry of

159. Id.
160. Id. at 77.
161. BAUERLEIN, supra note 1, at 138.
the people the same age, an intensification of peer consciousness.\footnote{Id. at 136.}

Most young people form strong peer groups; but, the difference for Net Gens, as compared to other generations, is the availability to be online anywhere at any time and their resulting tendency to use this technology for large parts of the day starting at a young age. Younger individuals are, both virtually and literally, able to isolate themselves in their peer group. The fact that many of them suffer from diphobe, which is the fear of being without a digital device that gives them immediate access to their friends and parents through texts, emails, and postings,\footnote{LEVINE & DEAN, supra note 130, at 75.} demonstrates how this younger generation’s intense connections to their peers may be limiting them in their ability to navigate adulthood.

IV. CONCLUSION

Although a generation’s personality cannot be scientifically predetermined, Strauss and Howe’s generational studies evidence that many traits can be predicted based on repeating cyclical generations. As is typical of prior adaptive generations, the Net Gens have been “overprotected”\footnote{See supra note 58 and accompanying text.} and “suffocated”\footnote{Id.; see supra note 57 and accompanying text.} by parents and society’s efforts to limit the fear of failing in an “intensively protective, even suffocating style of nurture.”\footnote{Id.} As predicted, Net Gens, in many ways, are “maturing into risk averse, conformist rising adults”\footnote{See supra notes 153–164 and accompanying text.} by the nature of entering adulthood later and relying on their horizontal peer groups for advice as opposed to experiencing the world outside of their self-created online groups.\footnote{See supra notes 68–90 and accompanying text.}

Further, their experiences with a testing culture have only reinforced a lack of creative and abstract thought by not allowing them to experience academic failure or originality in writing.

Net Gens, more than any other generation, are growing up in a place where reality is only a construction of perception:

We have phony rich people (with interest only mortgages and piles of debt), phony athletes (with performance-enhancing drugs), phony celebrities (via reality TV and YouTube), phony
genius students (with grade inflation), a phony national economy (with $11 trillion of government debt), phony feelings of being special among children (with parenting and education focused on self-esteem), and phony friends (with social networking explosion). All this fantasy might feel good, but, unfortunately, reality always wins.\textsuperscript{170}

These students will enter higher education having lived their youth surrounded by these misrepresentations, so the reality of the expectations that they must meet at law school could be shocking, overwhelming, and completely unexpected.

Yet, at the same time, Net Gen students have also shown positive traits, including the ability to be uniquely creative based on their ability to use and adapt the Internet, their sympathetic nature towards their classmates as a result of their horizontal peer groups, and their acceptance of differences. This makes them one of the most diverse generations thus far:

As the first global generation ever, the Net Geners are smarter, quicker, and more tolerant of diversity than their predecessors. They care strongly about justice and the problems faced by their society and are typically engaged in some kind of civic activity at school, at work, or in their communities. Recently in the United States, hundreds of thousands of them have been inspired by Barack Obama’s run for the presidency and have gotten involved in politics for the first time.\textsuperscript{171}

And, as Strauss and Howe indicated, adaptive generations grow into a “sensitive” older generation\textsuperscript{172} that may result in a very stable and upwardly mobile generation as seen in the last adaptive generation, the Silent Generation. As the legal community continues to consider its future and its identity, it should take note at the beneficial and civic strides that the last adaptive generation made. The Silent Generation had the century’s highest per capita income per household increase of any other generation and they accounted for the “surge” of helping professionals in the 1960s, including teaching, medicine, ministry, government, and public interest advocacy groups.\textsuperscript{173}

\textsuperscript{171} DON TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD 6 (2009).
\textsuperscript{172} STRAUSS & HOWE, supra note 2, at 74.
\textsuperscript{173} Id. at 284–85.
Net Gens will approach the world quite differently than prior generations based upon their unique cultural experiences. Boomer and Gen X law professors should try to understand these differences so that they recognize why Net Gens may not know the expectation of academic integrity and inquiry that professors expect from students in law school. In reality, law professors have the unique opportunity to work with students in fully explaining what older generations will expect from them in the practice of law and to prepare them to meet those expectations and succeed as a lawyer.
Changing Gears to Meet the “New Normal” in Legal Education

Courtney G. Lee*

ABSTRACT

The course of legal education is changing. Many law schools are downsizing, accepting classes with lower entering credentials, and encountering a new demographic of law student. A product of standardized federal education policies like the No Child Left Behind Act and the Common Core State Standards Initiative, this student has fewer or less refined critical thinking skills than most first–year law professors have come to expect. Part I of this Article explores the landscape of this “new normal” in legal education, examining the effects of new law school admissions policies, changes in K–12 and undergraduate education, and the link between law student entering credentials and critical thinking skills. Part II suggests ways in which law schools might change gears to ensure the success of these new law students and of the law schools themselves. Among other things, it emphasizes the importance of addressing both the current economic structure of law schools and the need for major curricular reform that creates more opportunities for student assessment. Part III explores the positive outcomes likely to result from a timely, smooth shift to this new approach in legal education.

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INTRODUCTION

Growing up, I spent most of my summers at drag strips and racetracks. Before I even had my driver’s license, my brother introduced me to the concept of a manual transmission: the sensitive give and take between the clutch and the gas, and the importance of smoothly changing gears at the right moment. I watched closely as drivers won and lost races based on that precise timing, and I carried that awareness with me as I myself began to race.

Legal education is much like car racing, at least in one sense. Like professional drivers, law professors and administrators need to be aware of variations in the track—a hairpin curve, a shift in elevation—and change gears and speed to suit the conditions before losing control and skidding into the barriers, or worse. Now is one of those moments.
The course of legal education is changing. Many schools are downsizing, accepting classes with lower credentials, and otherwise adjusting to a decrease in applications and a weak legal economy.¹ Moreover, students who are a product of federal education policies like the No Child Left Behind Act and the Common Core State Standards have started entering law school, many arguably with fewer or less refined critical thinking skills than most first-year law professors have come to expect.² These factors combine to create a very different student body than most law schools have seen in recent decades, and it is time to change gears to meet the needs of this “new normal.”

Part I of this Article explores the landscape of the “new normal” in legal education, and background influencing the gap between the critical thinking skills entering law students are expected to have and those most current students actually possess at matriculation. It examines the link between entering credentials (Law School Admissions Test score and undergraduate grade point average) and critical thinking skills, the outcomes of new admissions policies, and the effects of national pre–college educational issues on undergraduate learning, including the initial preparedness of law school applicants. Part II briefly suggests ways in which law schools might consider changing gears in order to ensure the success of these new law students, and the success of law schools themselves. Finally, Part III explores the positive outcomes that are likely to result from a timely, smooth shift.

I. CHANGES CONTRIBUTING TO THE NEW NORMAL IN LEGAL EDUCATION

“Law schools will be crushed if they don’t remake themselves . . . ‘This is Detroit in the 1970s: change or die.’”³

There are many, many evolving aspects of what scholars have termed the “new normal” in legal education—from budgets to class size, to tuition to tenure, to student debt to campus use and so on—

and there is a wealth of research and articles examining those issues.\textsuperscript{4} This Article focuses mainly on the new demographic of students entering law school classrooms, and the lasting effects this change will have on legal education.

One of the primary functions of law school is to train students to think like lawyers, which includes critical reading, analysis, and writing.\textsuperscript{5} Legal educators generally operate under the assumption that entering law students already have some foothold on these skills via their formative and undergraduate education.\textsuperscript{6} Some scholars refer to this notion as the “skills deployment assumption,” which may, for example, lead to the belief that students’ post-college literacy skills include the ability to read and comprehend complex legal opinions.\textsuperscript{7} Although the term is used to describe reading skills in particular, it could be applied just as easily to the other analytical and writing skills legal educators assume students possess upon matriculation to law school.\textsuperscript{8}

It follows logically that most legal educators view their roles as refining—rather than introducing—these skills, which is not unreasonable. Recently, however, many law professors have observed that their new students greet them with significant and often surprising deficiencies in basic critical reading, thinking, analysis, and writing skills, usually manifesting as an overall lack of preparedness.\textsuperscript{9} There are several possible explanations for this phenomenon, some of which are described below; but it seems fairly certain that the situation is unlikely to change anytime soon. Instead, legal education itself must change to meet these new challenges.

\begin{itemize}
\item \textsuperscript{4} See Brian Z. Tamanaha, Failing Law Schools (2012); see also Deborah L. Rhode, Legal Education: Rethinking the Problem, Reimagining the Reforms, 40 PEPP. L. REV. 437 (2013) (explores new challenges to legal education, including lack of consensus regarding the problem itself, and financial, structural, curricular, and value issues); Paul Campos, The Crisis of the American Law School, MICH. J. L. & REFORM (Oct. 2012) (examining the reasons for and consequences of the increased cost of legal education in the U.S.).
\item \textsuperscript{5} Paul T. Wangerin, Skills Training in “Legal Analysis”: A Systematic Approach, 40 U. MIAMI L. REV. 409 (1986) (describing the essential skills to enable thinking like a lawyer, including identifying and using facts effectively, interpreting statutory law, creating legal synthesis, using analogies and public policy, and reconciling contradictions).
\item \textsuperscript{6} Michael Jordan, Law Teachers and the Educational Continuum, 5 S. CAL. INTERDISC. L.J. 41, 59 (1996).
\item \textsuperscript{7} Leah M. Christensen, Legal Reading and Success in Law School: An Empirical Study, 30 SEATTLE U. L. REV. 603, 605–06 (2007).
\item \textsuperscript{8} Id. at 605.
\item \textsuperscript{9} Nancy B. Rapoport, Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools, 116 PENN ST. L. REV. 1119, 1143–44 (2012); see also Jordan, supra note 6, at 41.
\end{itemize}
A. Changes in Law School Admissions

In 2008, the national economy began a steep decline into the Great Recession, dragging most legal education programs along with it.\(^{10}\) Worsening economic conditions impacted law school applications steadily across the nation, resulting in fewer applicants and, consequently, a decrease in the levels of applicant entering credentials accepted at many law schools.\(^{11}\)

1. Fewer Law School Applications

These economic shifts resulted in less demand for attorneys entering private practice in firms, which in prior decades formed the foundation of the legal industry and the primary feed from which most new law school graduates found jobs.\(^{12}\) To meet new budgetary demands, private law firms and even some public employers reduced hiring, downsized, merged and laid off employees, or in some circumstances simply closed their doors.\(^{13}\) From 2004 to 2010, for example, there were 47,000 fewer employees in U.S. law offices, and these numbers continue to decline.\(^{14}\) In contrast to this downward trend in legal employment opportunities, during the same time period law schools saw relatively constant, or even increased, applications and enrollment.\(^{15}\)

Despite this decrease in entry-level jobs in private practice, many researchers argue that the overall demand for lawyers has not lessened—in fact, if anything, it has increased—but the demand comes from low-income clients who cannot afford legal services, and who often are found in rural markets without many lawyers.\(^{16}\)

\(^{10}\) Patrick M. Kelly, What can, or should, lawyers do about the decline in law school enrollment?, THE DAILY J. (Jan. 2, 2014).


\(^{13}\) See Organ, supra note 11, at 897–98; see also Caplan, supra note 3.

\(^{14}\) Henderson, supra note 12, at 473.

\(^{15}\) Organ, supra note 11, at 888 (“As further evidence of the market dysfunctionality, first–year enrollment increased in 2009 and 2010 to record levels, even as 2009 and 2010 law school graduates found the job market for law school graduates in decline.”); see also Law School Admissions Council, End of Year Summary 2003—Present (ABA Applicants, Applications, Admissions, Matriculants, Enrollment, Tests, CAS), LSAC.ORG, www.lsac.org/lsacresources/data/lsac-volume-summary (last visited Feb. 6, 2014) [hereinafter LSAC End of Year Summary 2003—Present].

Although applicants often decide to pursue law school with the intent to help the less fortunate and serve these underrepresented clients, most law school graduates have crushing student loan debt\(^\text{17}\) that prevents them from following these dreams.\(^\text{18}\)

A law school graduate’s total debt could range from $160,000 to $250,000, depending on the school, while the median salary for a typical entry-level legal job is roughly $60,000 per year.\(^\text{19}\) This is provided that the graduate can even secure such a job, which upwards of 45% of recent law graduates, especially those in the bottom halves of their classes, cannot.\(^\text{20}\)

Recently updated government loan forgiveness programs, such as Income-Based Repayment, Public Service Loan Forgiveness, and Pay as You Earn (PAYE), might alleviate some students’ financial woes; but loan repayment still may be a struggle, especially for low-performing students and graduates of lower-ranked law schools who may have difficulty finding a job at all.\(^\text{21}\)

The PAYE program, in particular, shows promise because payment obligations are conditioned solely on the borrower’s income.\(^\text{22}\) There are concerns with PAYE, however, due to the likelihood of a large tax obligation at the time of the final payment, the susceptibility of the program to governmental budget cuts, and ethical issues stemming from a failure to incentivize law schools to limit tuition or students to limit borrowing.\(^\text{23}\)

Additionally, some researchers worry that the government may significantly reduce its funding of higher education tuition, given its financial vulnerability when faced with student loan defaults.\(^\text{24}\)

These researchers fear that the Department of Education will start
conditioning its subsidization on the projected employment and income potential of certain fields or certain schools, or that the Department may not provide federal funds to schools that use tuition dollars to support initiatives that do not directly impact teaching, such as research and scholarship.  

25 If these fears are realized, the impact on law school programs and enrollment could be devastating.  

These financial burdens and the decrease in the availability of traditional legal jobs have been widely broadcasted by the mainstream media in recent years.  

27 Some law schools added fuel to the anti–law–school media firestorm by reporting job placement numbers that were misleading at best and blatantly incorrect at worst.  

28 Some disillusioned graduates started popular blogs venting their dissatisfaction with their legal education, and others filed highly publicized lawsuits against their alma maters, essentially alleging false advertising.  

29 News stories concerning law schools that might only have been of local or regional interest in the past, if they were of any newsworthy interest at all, go national with the click of a mouse button.  

31 All of this negative attention is complicated by the fact that much of the public blames the government—and the powerful, often–wealthy lawyers that influence politics and finance—for the economic downturn.  

32 Moreover, it is becoming easier and more common for non–lawyers to complete basic legal tasks without

25. Id.  
26. See id.  
27. Carrie Menkel-Meadow, Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing, 45 McGeorge L. Rev. 133, 133 (2013); Organ, supra note 11, at 899.  
30. Rhode, supra note 4, at 444 (citing to specific complaints and explaining that “[t]he suits allege that the schools’ reports of placement rates failed to disclose how many positions [for which graduates were reported to have been hired within nine months of graduation] required a legal degree or were funded by the school, and that their reports of salary figures failed to disclose response rates”).  
31. Matasar, supra note 24, at 166–167 (“Except for a handful of schools, whose turn has not yet come, there are two emerging story lines: (1) ‘look at this outrage—schools lie’ and (2) ‘something is fishy here, but we haven’t caught them yet.’”).  
hiring an attorney; for example, creating a simple will with a template found on the Internet.\textsuperscript{33}

A combination of these factors has affected national applications to law school, leading to historic lows.\textsuperscript{34} The Law School Admission Council, the entity that administers the Law School Admissions Test (LSAT), reports that fall 2014 test applications have dropped 12.6\%, down 13.7\% from 2013.\textsuperscript{35} This reflects a similar downward trend over the past few years.\textsuperscript{36}

Even when prospective law students complete the LSAT, many are not moving forward and applying to law school.\textsuperscript{37} This troubling decline in interest appears more prevalent with applicants who score the highest on the LSAT\textsuperscript{38}—the students who reportedly are most likely to succeed in the first year of law school.\textsuperscript{39} Overall, lower-performing applicants still seem to view a legal career as a viable option,\textsuperscript{40} and many law schools feel obligated to adjust their entrance criteria to admit these students in order to fill their classrooms and thus ensure that they can pay the bills.\textsuperscript{41}

2. Subsequent Changes in Admissions Policies

Before the number of applicants began to decline, nearly a quarter of U.S. law schools already were accepting half or more of their applicants.\textsuperscript{42} As fewer and fewer application files made their ways across admissions deans’ desks, law schools found themselves faced

\begin{itemize}
\item \textsuperscript{34} Id.; see also LSAC End of Year Summary 2003—Present, \textit{supra} note 15.
\item \textsuperscript{36} Id.; see also LSAC End of Year Summary 2003—Present, \textit{supra} note 15 (detailing percentage shifts over roughly a decade, including significant decreases beginning in 2011).
\item \textsuperscript{37} TAMANAH, \textit{supra} note 4, at 162–165.
\item \textsuperscript{40} Weissmann, \textit{supra} note 38.
\item \textsuperscript{41} See Organ, \textit{supra} note 11, at 899–901.
\item \textsuperscript{42} TAMANAH, \textit{supra} note 4, at 164.
\end{itemize}
with difficult choices: Either reduce the number of students admitted, thus maintaining the academic quality of the entering class but decreasing revenue (perhaps dramatically); or maintain revenue by admitting roughly the same number of students as in past years—meaning that the school likely would admit students whose entering credentials previously would not have qualified them for a seat in the class.\(^{43}\) Another option is to increase the amounts and quantities of scholarships offered to prospective students, decreasing revenue but hopefully attracting a high–enough caliber of student to maintain the school’s national ranking.\(^{44}\)

Most law schools are tuition–driven.\(^{45}\) Opting for choices that reduce entering class sizes and revenue would not be economically sustainable for more than a few years, at best.\(^{46}\) On the other hand, opting for choices that maintain entering class sizes and revenue but reduce the academic credentials of the student body implicates a host of different challenges, from the need for often–significant curricular reform to ethical issues concerning whether those students will be able to graduate and pass the bar exam, or whether they will leave saddled with tens (or hundreds) of thousands of dollars of debt and little hope of paying it back.\(^{47}\)

Facing these obstacles, different law schools have tried different options.\(^{48}\) Some failed.\(^{49}\) Others were marginally successful, though that “success” meant major structural changes for many schools, such as layoffs, faculty reduction incentives, and hiring freezes.\(^{50}\)

With the exception of perhaps the highest–ranked schools, by this point most law schools have been forced to start accepting students with lower credentials than they would have accepted ten or even five years ago.\(^{51}\) Fewer applications from fewer high–LSAT appli-
cants means fewer opportunities for schools to maintain past standards. This change might negatively impact a law school’s ranking and the academic quality of its entering classes on paper, but does it mean that these students really are any less capable of mastering the skills that make good lawyers?

3. Do LSAT and UGPA Numbers Accurately Reflect Critical Thinking Abilities?

Even the administrators of the LSAT recognize that it, “like any admission test, is not a perfect predictor of law school performance.” The LSAT is a roughly half-day, entirely multiple-choice test. Its validity and its ability accurately to assess the abilities of potential law students have been questioned over the years, and consequently, the LSAT has undergone scrutiny and study. According to the Law School Admission Council (LSAC), the entity that produces and administers the LSAT, studies show that, despite its limitations, the test helps ascertain whether applicants will succeed in law school.

Congruently, studies show that the LSAT is correlated, at least to some statistically significant degree, to success in the first year of legal study. Some researchers argue, however, that an applicant’s LSAT score is not reflective of her actual abilities and thus is not an accurate predictor of law school success, whether in the first

52. Bronner, supra note 33; see Organ, supra note 11, at 901–02; TAMANAH, supra note 4, at 160–66.
53. See Bronner, supra note 33; Organ, supra note 11, at 901–02; TAMANAH, supra note 4, at 160–66.
54. Law School Admission Council, supra note 39.
55. Law School Admission Council, About the LSAT, LSAC.ORG, http://www.lsac.org/jd/lsat/about-the-lsat.asp (last visited Feb. 13, 2014). The LSAT does include a thirty-five-minute writing component at the end, but that segment does not count toward the overall score. Id.
57. Id. This study evaluated 189 law schools. The correlations between LSAT scores and first-year law school grades varied from school to school, but the median correlation was .36 on a scale of 0.00 to 1.00 (where 0.00 no more than a coincidental relationship and 1.00 is perfect correlation).
58. Lisa C. Anthony, Susan P. Dalessandro & Lynda M. Reese, Predictive Validity of the LSAT: A National Summary of the 2011 and 2012 LSAT Correlation Studies, L. Sch. ADMISSION COUNCIL LSAT TECHNICAL REP. 13–03, 1, 19, (2013); Curcio et al., supra note 56, at 285–86 ("[T]o the extent the LSAT has predictive value for first-year grades, this value likely results because the LSAT attempts to measure the same narrow subset of skills considered to be the focus of most first-year law school exams," because test-taking speed is a factor in both contexts, and because success in both formats is a learned skill).
year or later. These scholars suggest that the timed nature of the test favors some individuals over others, and thus, the correlation of LSAT score to first–year law school success may be at least partially attributable to test–taking speed, as opposed to general analytical and critical thinking ability.

The LSAT purports to test skills that are highly relevant to legal study, however:

The LSAT is designed to measure skills that are considered essential for academic success in law school: the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to think critically; and the analysis and evaluation of the reasoning and arguments of others.

Law schools also give significant consideration to LSAT scores when evaluating a student’s potential admission due to the skills tested, and likely also due at least in part to the fact that LSAT scores are weighted rather heavily, at 12.5%, in *U.S. News & World Report* law school rankings. Additionally, since the LSAT is a standardized test, it provides an objective measure to consider for all applicants, which is helpful as law school admissions teams sift through piles of subjective materials like recommendation letters and personal statements. Even undergraduate grade point aver-

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59. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test–Taking Speed*, 82 Texas L. Rev. 975, 985–1000 (2004) (questioning whether “part of the predictive validity of the LSAT may be attributable to test–taking speed rather than a loading of acquired verbal reasoning and reading skills, which is the construct the LSAT is designed to measure”); see also Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 Cumb. L. Rev. 33 (2007) (noting that an applicant who reads slowly and carefully—valuable traits in a lawyer—and therefore is forced to guess on a segment of questions could score extremely high on the questions she had a chance to read, though still get the same overall score as another applicant who reads more quickly but less carefully and finishes the exam).

60. Henderson, supra note 59; see also Jolly–Ryan, supra note 59.

61. Law School Admission Council, supra note 55.


age (UGPA) numbers are subjective to a certain degree, since different undergraduate institutions employ different grading curves and standards, and the rigor of students’ chosen courses and majors vary widely, as well.64

Even more predictive than a law school applicant’s LSAT score alone, however, is her LSAT score combined with her UGPA.65 Although this combination is somewhat less objective than the LSAT considered alone, it still produces a much higher correlation for first–year law school success: .48 on a scale of 0.00 to 1.00.66

While LSAT and UGPA credentials help predict whether a law student will succeed in her first year, they do not appear to be connected to bar passage or to students’ success in professional practice.67 The LSAT measures cognitive test–taking skills that often mirror those evaluated in most first–year law school courses, such as reading fact patterns, spotting and analyzing issues, and assembling arguments under time constraints.68 Those skills do not link to many of the factors that contribute to lawyer effectiveness in practice, however, such as integrity, creativity, passion, engagement, networking and business development, the ability to negotiate, etc.69 Additionally, studies have found that the LSAT’s predictive value regarding first–year law school success diminishes when law professors employ alternative grading tools, such as take–home exams or papers, that require students to demonstrate more practical skills.70

65. See, e.g., LSAT Scores as Predictors of Law School Performance, supra note 39; Edward G. Haggerty, LSAT: Uses and Misuses, 70 N.Y. St. B. J. 45, 45 (1998); Organ, supra note 11, at 901–02. Like the LSAT itself, the combination of LSAT and UGPA is not a perfect predictor, but it is widely considered the best data available to determine a potential law student’s success in the first year.
66. LSAT Scores as Predictors of Law School Performance, supra note 39; see also Shultz & Zedeck, supra note 63, at 622 (summarizing several studies over more than two decades that support the predictive value of LSAT and UGPA regarding first–year law school success).
68. Shultz & Zedeck, supra note 63, at 622.
69. Id. at 622–23, 632–33.
One study proposes that even first–year law school GPA (LGPA), while relevant to bar passage, is not as strongly correlated as upperclass LGPA. This suggests that “nurture dominates nature” in the path to a successful law career, meaning that strong analytical training and student engagement in law school might be even more important than teaching substantive knowledge.

It follows that critical thinking and analysis are learned skills; they are not simply innate. A student who earns a lower LSAT score and thus offers less attractive credentials nonetheless could, with good analytical training, proceed to pass the bar exam on the first attempt and enjoy a successful legal career. This is consistent with studies that show that an applicant can improve her LSAT score by taking a review course. Law schools therefore should consider a potential student’s less–than–ideal LSAT score along with other relevant information, including the student’s relevant work experience, the difficulty of the course load the student carried in college, etc.—a difficult task in light of the score’s weight in U.S. News rankings.

When all is said and done, despite the criticisms, do LSAT and UGPA credentials accurately reflect potential law students’ critical thinking abilities? No evaluation scheme is perfect, and although this one is not without its deficiencies, it appears to be the best and most accurate available. Despite the fact that LSAT and UGPA are not perfect predictors of law school success, various data support that they at least provide a generally accurate picture of where

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71. Georgakopoulos, supra note 67, at 7–12.
72. Id. at 12–13. Professor Georgakopoulos lays out three theories that might explain why upperclass LGPA is more closely related to bar passage than first–year LGPA: course shopping (upperclass students deliberately choosing courses that seem “easy” or have less stringent grading/exam requirements); grade inflation in upper–level courses; and learning (students in small upper–level elective courses often are more engaged due to smaller class size and interest in the elected subject). He debunks the first two theories as unsupported by the data; if easy grading or grade inflation is what drives upperclass course selection, then higher grades would not reflect learning and would either have no effect or perhaps even a deleterious effect on bar passage. He concludes that the learning theory is fully consistent with the data. Of course this is one study conducted at one school, but the potential curricular implications are interesting.
73. Curcio et al., supra note 56, at 285–86.
74. See id.
75. Id. (citing Jay Rosner, an expert witness, in Grutter v. Bollinger, 137 F. Supp. 2d 821, 860 (E.D. Mich. 2001), rev’d on other grounds, 539 U.S. 306 (2003), who stated that LSAT preparation courses can improve an applicant’s score by approximately seven points).
an applicant stands with respect to critical thinking skills at the beginning of law school.\textsuperscript{77}

4. \textit{Implications for Law School Teaching}

Since these entering credential levels are in decline at most law schools, legal educators must make adjustments to compensate if they expect their students and programs to succeed. The case is far from hopeless, but it requires a retooling of traditional legal education to foster student engagement and focus on analytical skills beyond a predominantly substantive teaching agenda.\textsuperscript{78}

Further, the recent shifts in undergraduate, high school, and earlier education suggest that the students starting to apply and matriculate to law school now are very different as a whole, regardless of falling entering credential criteria at specific schools.\textsuperscript{79} Even if economic conditions were to revert to their prior states and allow law schools to restore previous admissions policies—an unlikely scenario\textsuperscript{80}—these changes in pre–graduate education suggest that entering law students still will have very different academic skills and needs than what law professors have seen from students in recent decades.

B. \textit{Changes in Pre–Graduate Education}

"This is nuts. We have a national policy that is a theory based on an assumption grounded in hope. And it might be wrong,

\textsuperscript{77} Id.

\textsuperscript{78} See Shultz \& Zedeck, \textit{supra} note 63, at 622–23 (concluding that skills tested on the LSAT and in first–year law school courses that traditionally focus almost exclusively on substantive law do not reflect skills necessary for successful legal practice); \textit{see also} Georgakopoulos, \textit{supra} note 67, at 12–13. Professor Georgakopoulos posits a theory that law students in upper–division courses who increase their GPAs do so because students choose their own classes, which also tend to be smaller, leading to greater motivation and engagement, and thus "a better educational outcome for the student[s]." If this study is correct that upper–division courses engage law students more effectively and thus encourage more true learning, then some legal educators may presume that this analytical development is sufficient and traditional first–year courses can remain focused solely on teaching foundational legal doctrine. This may not be enough, however, since many modern first–year law students are entering with deficiencies in critical thinking skills. Leaving the responsibility for making up lost ground to upper–division courses could have disastrous consequences, such as higher first–year attrition than what is sustainable and lower bar passage for those students who progress to the third or fourth year.

\textsuperscript{79} \textit{See ACADEMICALLY ADrift}, \textit{supra} note 64, at 1–2.

\textsuperscript{80} Matasar, \textit{supra} note 24, at 163–64 (noting that changing demographics in past decades provided boosts to law school enrollment—for example, returning veterans enticed to higher education by government initiatives like the G.I. Bill, and increased gender and ethnic diversification efforts—but that "the future holds the perfect demographic storm: more poor students [due to a higher birth rate among poorer families], fewer family assets [due to the erosion of home equity], and no new demographic population to stir demand.").
with disastrous consequences for real children and real teachers.”

1. K–12 Education

Clearly, changes in the economy have had a profound effect on legal education and the apparent academic caliber of most law schools’ entering classes. But even if the economy recovers, law school professors should not expect the basic skill level of their entering students necessarily to recover along with it. Fundamental changes in teaching from elementary schools to the university level—not all of which are considered positive—are affecting the critical thinking ability and preparedness of students, many of whom just now are beginning to apply to graduate school. Disturbingly, many of these students claim that they have not been challenged in their undergraduate education, and that they do not invest much effort in their academic endeavors.

i. The No Child Left Behind Act

In 2002, President Bush signed the No Child Left Behind (NCLB) Act into law. NCLB was intended to ensure that all children are able to meet minimum state proficiency requirements in education, with the goal of improving overall academic achievement. Although states may develop and administer tests in additional subjects, NCLB requires standardized testing in reading, math, and science. As a condition for federal funding, public schools’ test scores must meet NCLB benchmark accountability standards. If

82. See, e.g., TAMANAH, supra note 4; 2014 ABA Report and Recommendations, supra note 16, at 6.
83. See ACADEMICALLY ADrift, supra note 64, at 1–2.
86. Id.; see also No Child Left Behind Act of 2001 (NCLBA), 20 U.S.C. § 6301 (Statement of Purpose).
they do not, the government imposes heavy penalties, from changes in funding to allowing parents to transfer their children to different public schools, to major curricular reform and, in extreme cases, school closure.\textsuperscript{89}

Whether NCLB is succeeding is debatable.\textsuperscript{90} Although premised on good intentions, NCLB reforms yielded unintentional negative consequences, particularly in relation to students’ basic critical thinking skills.\textsuperscript{91} For example, the high-stakes nature of NCLB testing arguably created an incentive for schools to cut corners by diluting proficiency standards, thus lowering the bar to reach students rather than building students’ skills to reach the bar.\textsuperscript{92} Proficiency scores also vary from state to state, as does the rigor of the tests themselves.\textsuperscript{93} Further, NCLB and other similar standardized testing requirements—for example, high school Advanced Placement testing—encourage an environment of teaching to the test, moving schools away from curriculums that develop fundamental critical thinking skills.\textsuperscript{94}

The ultimate goal of NCLB was gradual improvement over twelve years of education, ultimately leading to 100\% of students reaching proficiency.\textsuperscript{95} Though laudable, this goal presented problems, as measurement methods evaluated schools as a whole rather than considering individual student improvement.\textsuperscript{96} Some critics argue it also ignored a school’s history, its racial and ethnic makeup, its percentage of students who are not native English speakers, and its


\textsuperscript{94} Strauss, \textit{supra} note 2; Jewell, \textit{supra} note 91, at 62.

\textsuperscript{95} Jewell, \textit{supra} note 91, at 62.

\textsuperscript{96} Id.
student population participating in special education programs.\textsuperscript{97} This further contributed to the temptation to game the system.\textsuperscript{98}

Students bearing the full effect of NCLB are just now starting to enter colleges and graduate schools.\textsuperscript{99} For more than a decade, they have been subject to education built around primarily multiple choice questions and essay questions that require only unstructured, largely unsupported arguments—and that refers just to the subjects tested under NCLB.\textsuperscript{100} As for other subjects, such as history, art, music, and writing—subjects that are directly linked to critical thinking skills—some schools’ resources might be eliminated altogether.\textsuperscript{101} If resources are not eliminated altogether, teachers are forced to teach vast amounts of content to large amounts of students, detracting substantially from their ability to delve deeper into topics to hone students’ analytical skills.\textsuperscript{102} Many Americans feel that NCLB made no improvement to high school education, and a significant number believe it actually made things worse.\textsuperscript{103}

\textit{ii. Common Core State Standards}

With a new presidency came new changes to national education policy, and the opportunity to try to fix the faults of NCLB.\textsuperscript{104} In 2009, President Obama signed into law the American Recovery and Reinvestment Act, which contained four billion dollars to distribute to schools through the Race to the Top Fund (RTT).\textsuperscript{105} RTT is a competitive grant program that rewards states that implement comprehensive and innovative elementary and secondary education

\begin{itemize}
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} See id. at 62–63.
\item \textsuperscript{99} Strauss, \textit{supra} note 2; Goodwin, \textit{supra} note 89.
\item \textsuperscript{100} Goodwin, \textit{supra} note 89; Linda Darling–Hammond, \textit{Evaluating “No Child Left Behind”}, \textit{THE NATION} (May 2, 2007), http://www.thenation.com/article/evaluating-no-child-left-behind#axzz2ffoAzxni.
\item \textsuperscript{101} Darling–Hammond, \textit{supra} note 100; see \textit{Stronger Accountability}, \textit{supra} note 87.
\item \textsuperscript{102} See \textit{Stronger Accountability}, \textit{supra} note 87.
\item \textsuperscript{103} Lydia Saad, \textit{No Child Left Behind Rated More Negatively Than Positively}, \textit{GALLUP POLITICAL} (Aug. 20, 2012), http://www.gallup.com/poll/156800/no-child-left-behind-rated-negatively-positively.aspx (noting that by August 2012, 29% of Americans believed NCLB made education worse; 38% did not think it made much difference; 16% thought it made education better; and 17% were not familiar with NCLB or did not have an opinion).
\item \textsuperscript{104} See Strauss, \textit{supra} note 81.
\end{itemize}
reform. The Department of Education awards grant money to winning RTT school applicants based upon compliance with several “priorities” and “selection criteria,” including development of a common set of educational standards and assessments for students from kindergarten through twelfth grade (K–12).

To provide an example of such standards and encourage uniformity and clarity in student achievement goals, the National Governors Association Center for Best Practices and the Council of Chief State School Officers collaborated with various teachers, school administrators, parents, and experts to create the Common Core State Standards (CCSS). The CCSS comprise a set of K–12 educational standards in English language arts and mathematics that are meant to prepare high school graduates for success in entry-level, credit-bearing two or four-year college courses, or to enter the workforce. Proponents claim that the standards prepare students for college or work, provide clear and consistent guidance for schools across the country, are rigorous and evidence-based, and stem from global best practices while built upon working state standards that are currently in place.

Forty-three states, the District of Columbia, four territories, and the Department of Defense Education Activity have implemented the CCSS.

Like NCLB, the CCSS Initiative is a national effort that relies heavily on regular, standardized testing. Also like NCLB, the program began with admirable intentions but faced intense debate and controversy in practice. Much of the scrutiny focuses on that standardized testing. Opponents of the CCSS claim that adoption of these standards promotes the over–testing of students and

109. Id.
110. Id.
112. Strauss, supra note 81.
113. Id.; Eitel, supra note 105, at 20 (“[T]he only evidence in support of Common Core” comes from entities with a conflict of interest in favor of the CCSS, such as panels of experts funded by the Gates Foundation, a major financial backer of the CCSS Initiative itself).
114. Strauss, supra note 81.
the valuation of teachers based primarily upon student scores, ignoring the fact that teachers of affluent students likely will earn higher ratings than teachers of poor students, students with disabilities, and students who are not native English speakers, regardless of their actual teaching abilities.115 Further, students devote more time to trying to beat these tests than they do engaging in academic and extracurricular activities, such as music, art, etc., that contribute to a well-rounded undergraduate, work, and life experience.116

The tests themselves also are suspect: They are overly long, so students tend to give up before finishing; they only test a narrow set of skills; they do not consider cultural or financial bias; they carry great financial costs in terms of administration and curriculum adjustment; and many believe that the bar for a passing score is set unreasonably high.117 If a teacher’s students do not perform well on these tests, she faces a very real possibility of losing her job, and her school might even close.118 Thus, like NCLB, the CCSS Initiative and RTT encourage schools to place much greater emphasis on standardized test performance than on true student engagement and learning.119

But adoption of the CCSS is voluntary.120 RTT officially requires only that a school develop “a common set of K–12 standards,” not the CCSS specifically.121 This autonomy does not appear truly to exist in practice, however, as common understanding indicates that to receive funding a state must implement the CCSS itself, not some other set of common state educational standards, even if different

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115. Id. (noting that no other “high–performing nation” judges the quality of its teachers based on the test scores of their students).
117. Strauss, supra note 81 (citing as an example New York state, which administered the CCSS tests and only saw a 30% passage rate (3% pass rate for English language learners, 5% pass rate for students with disabilities, and under 20% pass rate for African American and Hispanic students)); Valerie Strauss, quoting Marion Brady, Eight Problems with the Common Core Standards, WASH. POST (Aug. 21, 2012), http://www.washingtonpost.com/blogs/answer-sheet/post/eight-problems-with-common-core-standards/2012/08/21/821b300a-e4e7-11e1-8f62-58260e3940a0_blog.html. “The Common Core Standards are a set-up for national standardized tests, tests that can’t evaluate complex thought, can’t avoid cultural bias, can’t measure non-verbal learning, can’t predict anything of consequence (and waste boatloads of money).” Id.
118. Strauss, supra note 81.
119. Id.; see also Strauss, supra note 117.
120. CCSS FAQ, supra note 108.
121. RTT FAQ, supra note 107.
standards would fit better within a particular state’s school system. A state earns more points under RTT—and thus a greater chance of winning grant money—if it adopts a set of standards that a majority of other states also adopt. Conversely, a state earns fewer points if its standards are shared by half of the country or less. The need for that funding is desperate, especially in light of the economic downturn, which is the time when RTT and the CCSS were conceived. Consequently, all twelve state winners of RTT funding from the 2010 application cycle either adopted or indicated their intention to adopt the CCSS.

iii. Decline in ACT and SAT Writing Scores

Most professors will agree that good writing skills are closely linked to good critical thinking. Unfortunately, national college admissions tests report stagnant or declining scores in high school graduates’ writing and reading skills, which is especially troubling when considering the link between these skills and the critical thinking required in law school and legal practice.

For example, the ACT, which alongside the SAT is one of the nation’s most popular college entrance exams, measures student

122. Strauss, supra note 81 (noting that some states adopted the CCSS sight–unseen, “even though their own standards were demonstrably better and had been proven over time”); Eitel, supra note 105, at 21.
123. Id.
125. Eitel, supra note 105, at 21.
126. See ACADEMICALLY ADRIFT, supra note 64, at 93 (“[H]aving demanding faculty who include reading and writing requirements in their courses (i.e., when faculty require that students both read more than forty pages a week and write more than twenty pages over the course of a semester) is associated with improvement in students’ critical thinking, complex reasoning, and writing skills.”); see also Bryan A. Garner, Three Years, Better Spent, N.Y. TIMES (July 25, 2011), http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better  (arguing for the restructuring of legal education to include more rigorous writing requirements and noting that “clear writing equates with clear thinking, and judges and employers cry out for both”).
128. See ACADEMICALLY ADRIFT, supra note 64, at 93.
129. Layton & Brown, supra note128.
progress in the context of college readiness. In a 2013 report, the ACT found that 64% of high school graduates who took the ACT that year met benchmark levels in English, and only 44% met those levels in reading, not showing much change for the past five years. Although there were small increases in math and science scores, more than one quarter of students did not meet benchmark levels for college readiness in any of the four tested subjects: math, reading, English, or science. Writing scores have remained the same since 2010, showing a gradual decrease since that optional portion of the test was introduced in 2005.

As for the SAT, originally known as the Scholastic Aptitude Test, there are strong parallels between the skills assessed on that test and those needed to be successful in law school. The SAT measures reading, math, and writing knowledge, as well as “how a student reasons, communicates, and solves problems.” The reading section of the exam assesses skills such as the “ability to draw inferences, synthesize information, [and] distinguish between main and supporting ideas.” The writing portion of the test “requires students to communicate ideas clearly and effectively; improve writing through revision and editing . . . and improve coherence of ideas within and among paragraphs.” Disturbingly, SAT writing scores have fallen almost every year since that portion of the exam was introduced in 2006. Reading scores in 2013 were the lowest in forty years, capping off a steady decline. Math scores were relatively constant over the last six years, but show slight improvement over the last decade.

131. ACT REP., supra note 128, at 1 (These benchmarks, derived from actual grades earned by ACT test takers in college, are the minimum scores necessary to show that “a student has a 75 percent chance of earning a grade of C or higher or a 50 percent chance of earning a B or higher in a typical credit-bearing first-year college course in that subject area.”).
133. ACT REP., supra note 128, at 1.
134. Id.
137. Id.
138. Id.
139. Id.
140. Layton & Brown, supra note 128.
141. Id.
142. SAT Report, supra note 136.
As seems to be the case with most standardized tests, the SAT in particular is not without its critics.\textsuperscript{143} For instance, a recently–retired director of writing at M.I.T. claimed that he could train students to score in the highest percentiles simply by filling up both available pages, using a few big, “fancy” words, and including a quotation or two from prominent figures, whether they applied to the content of the essay or not.\textsuperscript{144} Further complaints come from students, who feel they do not know what to expect on the test; parents, who feel pressured to spend money for their children to complete expensive test–prep courses, thus creating an achievement gap between poor but capable students who cannot afford the prep courses and wealthier students who can; and finally, teachers, whose performance often is measured by their students’ SAT scores, much like the CCSS standardized tests.\textsuperscript{145}

As a result of such criticisms, the College Board, which administers the SAT, has begun implementing major changes to the test.\textsuperscript{146} The new SAT, to be administered starting in spring 2016, will feature more evidence–based content that more directly tests what high school students are, or should be, learning in their classrooms.\textsuperscript{147} The rules will be more transparent and the questions will focus on the reading and math that the students likely will encounter in work or undergraduate education.\textsuperscript{148} The writing portion will be optional and scored separately.\textsuperscript{149}

While these changes to a widely used test like the SAT seem to be a step in the right direction, some educators are skeptical.\textsuperscript{150} The president of the College Board, David Coleman, was very involved in shaping the CCSS, and his intent to fashion the SAT into a test that more directly reflects what students are learning in high school creates a direct parallel to the CCSS and the problems that may accompany it.\textsuperscript{151} Further, some critics worry that this gives Mr. Coleman too much power over K–12 education, and that even more focus on standardized testing compromises worthy educational

\begin{itemize}
  \item[143.] Balf, \textit{supra} note 116.
  \item[144.] \textit{Id.}
  \item[145.] \textit{Id.}
  \item[146.] \textit{Id.}
  \item[147.] \textit{Id.}
  \item[148.] \textit{Id.} (explaining that the new SAT will replace current reading and writing questions with those that pertain to “pieces of writing–from science articles to historical documents to literature excerpts–which research suggests are important for educated Americans to know and understand deeply”).
  \item[149.] \textit{Id.}
  \item[150.] \textit{Id.}
  \item[151.] \textit{Id.}
\end{itemize}
goals and widens the achievement gap between rich and poor students.

Regardless of these alleged improvements, the outlook regarding students' writing skills does not appear to change much, considering that SAT writing scores are in decline, even though the writing portion apparently was so easy to pass with high marks. It is possible that great student writers did not earn scores reflective of their talent because they did not know how to game the system properly—i.e., that it helped to fill both pages or use big words and famous historical quotations—but, in light of other research pointing to educational focus on standardized testing as opposed to reading and good analytical writing, this is unlikely.

It is possible that the slight increases in math and science scores on standardized tests like the SAT show a modicum of promise, since the quantifiable, so-called “hard” sciences do require certain critical thinking skills; but a decline in non-quantifiable, “soft” skills like novel and adaptive thinking is troublesome. In a 2011 national survey, more than one thousand hiring decision-makers ranked novel and adaptive thinking as one of the most sought-after skills in their organizations, along with social intelligence, which is the ability to connect with others in a deep and direct way, and de-
sign mindset, which is the ability to work processes for desired outcomes. These are the same skills that also are important for success in law school and legal practice. The surveyed managers reported a significant discrepancy, however, between the necessity of these skills and job applicants’ competence in them.

Essentially, students are not graduating from high school with the skills necessary to succeed in college-level reading and writing courses. This poses subsequent problems for undergraduate educators who must try to make up that lost ground.

2. Undergraduate Education

In a study of over two thousand high school seniors, 46% agreed with the statement, “[e]ven if I do not work hard in high school, I can still make my future plans come true.” Because many modern high school graduates proceed to college without sufficient critical thinking skills, it falls to college educators to fix the problem if those students are to advance to law school with the fundamental skills first-year law professors generally expect. Although readiness for professional school may not be a primary goal at some colleges, most faculty members agree that teaching students to think critically—arguably one of the most important foundational skills for legal study—is. Due to deficiencies in the standardized K–12 curricula described above, students entering colleges and universities around the country arguably are less prepared than their predecessors, forcing college professors to try to compensate somehow.

Another study, including over one thousand U.S. college and university presidents, found that 58% think public high schools are worse at preparing students for college than they were a decade ago.

158. Id.
159. ACADEMICALLY ADRIFT, supra note 64, at 56 (“Forty percent of college faculty agree with the statement: ‘Most of the students I teach lack the basic skills for college level work’” (emphasis in the original)).
161. See ACADEMICALLY ADRIFT, supra note 64, at 121.
162. Id. at 2, 35.
The outlook is even more negative at for-profit institutions, where 52% of presidents claim public high school graduates’ performance has declined in the last ten years. Only 6% of all undergraduate institution presidents surveyed think public high schools are doing a better job now.

Despite the lack of preparedness of entering college and university students, or perhaps because of it, undergraduate students may not sufficiently develop such basic skills as critical thinking, complex reasoning, and writing. For example, in one study that followed 2300 undergraduate students at twenty-four universities, researchers gave the students a “Collegiate Learning Assessment” (CLA) test before and during their college education. The CLA tests skills including analytic reasoning, critical thinking, and written communication. Results showed that as many as 45% of the students involved in the study did not show any significant improvement in higher-level skills like critical thinking, analysis, and writing in the first two years of college, the time span when most gains in general skills occurs. Of the students that did show improvement, gains were only modest. Other studies using measuring instruments other than the CLA show similar findings, and suggest that these disappointing results are quite different from those in recent decades.

Complicating matters, current students’ academic motivation, interest, and engagement—factors crucial to effective learning—also appear to decrease in the first year. The CLA study found that 32% of college students each semester did not enroll in classes in

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164. Id. at 5.
165. Id.
166. Id.
167. ACADEMICALLY ADRIFT, supra note 64, at 35.
168. Id. at 20.
169. Id. at 21; see also CLA+ Overview, COUNCIL FOR AID TO EDUC., 2013, http://cae.org/performance-assessment/category/cla-overview/ (last visited Nov. 12, 2014).
170. ACADEMICALLY ADRIFT, supra note 64, at 30, 35–6 (noting that “freshmen who enter higher education at the 50th percentile would reach a level equivalent to the 57th percentile of an incoming freshman class by the end of their sophomore year,” representing an improvement of only 0.18 standard deviation).
171. Id. at 35.
172. Id. at 36 (describing another study, by Charles Blaich at the Wabash National Study of Liberal Arts Education, that analyzed over three thousand students from nineteen schools and found no significant improvement in critical thinking skills in the first two years of college).
173. Id. at 35–6 (comparing the skills development 0.18 standard deviation to 0.5 in the 1990s and 1.0 in the 1980s—almost twice as high).
174. Id. at 36.
which they were assigned forty or more pages of weekly reading.\footnote{175} Further, half of the students did not take a course requiring more than twenty pages of writing.\footnote{176} Since critical reading and writing are key skills to hone prior to entering law school,\footnote{177} these trends suggest that law schools will not see much improvement in the skills level of their entering classes anytime soon.

Adding to this lack of academic rigor, students do not appear to be studying as much as they did in past years.\footnote{178} Over half of U.S. college presidents believe their students study less than they did ten years ago, and only 7\% think their students study more.\footnote{179} Undergraduate students spend an average of only twelve to fourteen hours per week studying.\footnote{180} Over a third of these students reported studying for only five or fewer hours per week.\footnote{181} Further, this studying occurs mostly in groups, in social settings inappropriate for learning.\footnote{182}

Other research confirms these findings. One study, using the Collegiate Assessment of Academic Proficiency instead of the CLA, found that 33\% of undergraduate students surveyed did not show significant gains in learning fundamental skills, and 40\% did not write papers of at least twenty pages in their classes.\footnote{183} These students spent fifteen hours per week studying.\footnote{184} Comparably, the National Survey of Student Engagement, also known as the NSSE or “Nessie,” surveyed over two million students during the last ten

\footnote{175. Scott Jaschik, ‘Academically Adrift’, \textit{INSIDE HIGHER EDUC.} (Jan. 18, 2011), http://www.insidehighered.com/news/2011/01/18/study_finds_large_numbers_of_college_students_don_t_learn_much; see ACademically ADrift, \textit{supra} note 64, at 70–71, Table A3.5; see also George D. Kuh, \textit{What We’re Learning About Student Engagement from NSSE, CHANGE}, March/April 2003, at 27 (noting that most students begin college expecting to read and write more than they actually do).}

\footnote{176. Jaschik, \textit{supra} note 175.}

\footnote{177. See id. at 93; Gamer, \textit{supra} note 127.}

\footnote{178. \textit{Is College Worth It?}, \textit{supra} note 163, at 5; see, e.g., ACademically ADrift, \textit{supra} note 64, at 69, 97–98; Kuh, \textit{supra} note 175, at 27 (noting that about a fifth of both college freshmen and seniors participating in the National Survey of Student Engagement reported “frequently” arriving to class unprepared, and the belief that their schools do not put much emphasis on studying and spending time on academic endeavors).}

\footnote{179. \textit{Is College Worth It?}, \textit{supra} note 163, at 5.}

\footnote{180. ACademically ADrift, \textit{supra} note 64, at 69, 97; Kuh, \textit{supra} note 175, at 27.}

\footnote{181. Id.}

\footnote{182. Id. at 68–70, 100–102. Although study groups can be helpful learning tools when used properly, this study found that most students studying in groups did so in environments not conducive to learning, and experienced diminished performance on CLA tests compared to their counterparts who studied primarily alone.}


\footnote{184. Id.}
years and found that over half of them reported that they did not write papers more than twenty pages long during the current academic year, even at top schools. Full–time students also reported spending about thirteen to fourteen hours per week studying. So how are these students graduating from college with grades strong enough to earn admission to law school, even regardless of the changes in admissions practices noted above? Lack of engagement between students and faculty is one possible answer.

Although most college and university professors are dedicated to their students and want to help them succeed, other demands and obligations, such as scholarship and service, compete for their time. Further, in response to the economic downturn many undergraduate institutions are laying off support staff, faculty, or both, meaning that remaining professors are stretched even more thinly. This all contributes to what one author calls the “disengagement compact:” an unspoken agreement between professor and student that “I’ll leave you alone if you leave me alone.” If a professor does not assign as much reading or writing, then she will not have to grade as much. If she does not grade as much, students probably will not come talk to her individually as often. She saves precious time, and the students are likely to leave her course with a decent grade without having to work too hard to get it.

Undergraduate grade inflation has been the subject of much debate. One study of over 100 four–year colleges and universities

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185. Arum et al., supra note 84, at 2.
186. Id. at 3.
187. Kuh, supra note 175, at 25, 28.
188. See id. at 28.
189. *See Scott Jaschik, Layoffs Without 'Financial Exigency',* INSIDE HIGHER EDUC. (Mar. 2, 2010), http://www.insidehighered.com/news/2010/03/02/exigency (noting that even tenured university faculty positions may not be safe from layoffs); *see also ACADEMICALLY ADRIFT, supra* note 64, at 5–6 ("[T]he percentage of full–time instructional faculty in degree–granting institutions declined from 78 percent in 1970 to 52 percent by 2005").
193. Kuh, *supra* note 175, at 28; ACADEMICALLY ADRIFT, *supra* note 64, at 5–6. This is not to say that all college professors run their programs like this; certainly there are professors who devote themselves fully to the success of their students and do an excellent job of developing their students’ academic abilities. The author herself had the privilege of working with several such wonderful educators during her college years, and knows many others as colleagues and friends. Various national studies, surveys, and scholarship do show, however, that in general, lack of rigor in undergraduate education is a problem.
found that 43% of grades given were at the “A” level.\textsuperscript{195} Other studies note, fairly, that many factors beyond just quality of teaching and academic rigor can affect a student’s UGPA, such as how many credits the student completes, or how many “in progress” or pass/fail grades the student receives.\textsuperscript{196} Even keeping that in mind, however, there still is a disproportionate amount of undergraduate students who earn higher grades despite not reading and writing as much as students in the past.\textsuperscript{197}

Students who receive higher grades also tend to write more positive course evaluations.\textsuperscript{198} To the extent that a faculty member’s teaching skills are relevant to tenure decisions—admittedly, that extent may be small compared to considerations like scholarship production—reviewing committees usually measure quality teaching by student satisfaction as conveyed on course evaluations.\textsuperscript{199} Practices like this further encourage professors to focus more on making their students happy, for example, by reducing student workload and/or distributing higher grades, than on academic rigor and student learning.\textsuperscript{200}

3. Implications for Law School Teaching

Although these changes directly affect education at the K–12 and undergraduate levels, the implications for legal education are very real. For example, in states that have adopted the CCSS, which is most of them, the standards play a major role in curricular decisions and reform.\textsuperscript{201} If programs like NCLB and the CCSS Initiative force schools to focus on training for specific, narrowly-focused standardized tests in order to survive, then high school educators cannot

\textsuperscript{196} Jaschik, supra note 175; see LESTER H. HUNT, GRADE INFLATION: ACADEMIC STANDARDS IN HIGHER EDUCATION (2008).
\textsuperscript{197} Rojstaczer et al., supra note 195; see ACADEMICALLY ADrift, supra note 64, at 4–5 (noting that college and university students’ lack of academic focus has not negatively impacted their grades, because they are able to manipulate their schedules and workloads in order to evade rigorous academic work and/or grading).
\textsuperscript{198} ACADEMICALLY ADrift, supra note 64, at 7.
\textsuperscript{199} Id. (pointing out that this is true despite the fact that student course evaluations do not adequately evaluate student learning).
\textsuperscript{200} Id.
\textsuperscript{201} See Strauss, supra note 2.
spend adequate time building foundational critical thinking skills.\textsuperscript{202} As one recently–retired high school teacher lamented:

I would like to believe that I prepared [my students] to think more critically and to present cogent arguments, but I could not simultaneously prepare them to do well on that portion of the test and teach them to write in a fashion that would properly serve them at higher levels of education.\textsuperscript{203}

If students do not receive adequate training in critical thinking and writing in high school, they arrive to college underprepared.\textsuperscript{204} If they arrive to college underprepared, that suggests that they will leave less prepared for graduate school, since undergraduate professors will have to devote more time to teaching fundamental skills than to refining nuanced critical thinking, reading, and writing.\textsuperscript{205} Graduate professors then must make up this lost ground if they want their students, and their institutions, to succeed in practice.\textsuperscript{206}

Moreover, the shifts in pre–graduate education mean that the decreased critical thinking skills of many law schools’ entering classes will continue over years to come, even if the economy improves, more students apply to law school, and schools can return to previous admissions standards and procedures. In the unlikely event that such a return to past practices becomes feasible, legal educators still must adjust their teaching to meet the needs of students who are a product of NCLB, the CCSS, and other national standardized testing programs.

\textsuperscript{202} See Eitel, \textit{supra} note 105, at 21 (arguing against the migration to a nationalized curriculum; the difficulty teachers have in adapting is especially present if the testing requirements change from presidency to presidency, as some critics complain that they did between President Bush’s NCLB Act and President Obama’s RTT and CCSS programs).


\textsuperscript{204} See \textit{ACADEMICALLY ADrift}, \textit{supra} note 64, at 55–56 (“A sizable proportion of students enter higher education unprepared for college–level work.”).

\textsuperscript{205} See id. at 57 (conceding that some students do see significant skills improvement in college, but concluding that “the higher–education system as a whole is failing to improve many students’ critical thinking, complex reasoning, and writing skills at desirable levels”).

\textsuperscript{206} See Goodwin, \textit{supra} note 89.
II. MEETING THE NEEDS OF NEW NORMAL LAW STUDENTS

“What students do in higher education matters. But what faculty members do matters too. Faculty are most directly involved in shaping student experiences, although the support and incentives advocated by their deans, provosts, and presidents will influence whether and how they engage in activities that facilitate student learning.”

Law school professors must meet the needs of this new demographic entering their classrooms; they cannot simply continue teaching as they have for years and expect their students and their schools to succeed. The cost of legal education is high and rising. Legal educators are morally bound not to take hundreds of thousands of dollars from students without believing those students are capable of succeeding, and at least trying to help them do so. Furthermore, lawyers already suffer from a high degree of depression and substance abuse, and this may increase if schools produce mediocre attorneys with no other options to repay their debts than to take jobs they hate—if they can find legal jobs at all.

A. Fostering a Culture of Innovation

Change is not easy, especially in an established law school with tenured professors who may have been teaching for decades. Most professors have the best intentions, and are dedicated to their craft and to helping their students succeed using what they believe are the best methods possible; resultantly, they may not be open to drastically changing those methods, or in some cases, even changing them at all. To rise to the challenge of adapting to the “new normal” in legal education, however, law schools must foster a culture of innovation and openness to meaningful change.

The purpose of this article is to help readers understand the background behind this need for changing gears in legal education and the fact that the situation is unlikely to revert back to the “old normal,” not necessarily to address the shift itself. Still, there are basic

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207. ACADEMICALLY ADrift, supra note 64, at 117.
208. Bronner, supra note 33.
212. Id. at 2, 15–16.
ideas legal educators should embrace as they foster this culture of innovation, a few of which are noted briefly here.

1. Changing the Financial Structure

Most importantly, law schools must address their financial structure, as many already have out of necessity since the economic downturn. But more than just cutting costs in order to keep the doors open, legal educators must seriously reconsider the value they provide to their students, particularly since potential applicants are more skeptical now than in the past, when many blindly entered their legal studies based upon the assurance of high-paying law jobs available for everyone at the end.

2. Curricular Reform

This reconsideration may result in major curricular reform, from restructuring graduation requirements to incorporating alternative revenue streams not based on tuition, to drastic measures such as transforming the structure of legal education itself. For example, several schools have instituted revenue-producing legal training programs for people who do not need or want a J.D., such as foreign attorneys, health professionals, and those working in other highly regulated fields. Other changes intended to help schools produce more perceived value for J.D. students’ tuition dollars include integrating significant periods of off-campus practical training into the curriculum; embracing more online and distance learning opportunities; and providing opportunities for students to earn a J.D. in fewer than the typical three years. Some law schools also de-

213. See TAMANAH, supra note 4.
214. See Matasar, supra note 24, at 202–03 (noting the importance of justifying tuition cost by providing a unique approach to education keyed to student learning outcomes, and that in order to survive, “[m]any schools will have to occupy a value-oriented niche”).
215. See id. at 201–05.
218. Id. at 202–04.
velop programs for undergraduate students to spur interest in attending law school, as well as continuing legal education programs to keep graduates engaged with their alma maters.  

3. Individual Assessment

In addition to reconsidering finances, curricula, and other aspects of the big picture of legal education, law professors also must reevaluate their own teaching and assessment practices. Regardless of the delivery format—online, accelerated, clinical, etc.—ultimately it will fall upon individual law professors to reach the new demographic of law students successfully. A thoughtful focus on student learning outcomes and assessment is essential to both student and teacher progress. Yet despite the multitude of research touting the importance of regular, quality, formative assessment, many professors still rely on end–of–course exams to assess their students. To prosper in the new normal, this must change.

Although not all assessment must be graded, periodic assessment exercises with prompt feedback administered throughout a course allow students to evaluate and work to resolve their weaknesses on an ongoing basis. Not only should professors assess their students regularly, but the feedback professors provide on those exercises must equip students to learn and improve. Comments should be specific, constructive, and informational, and they should assist students on the path to becoming self–regulated learners who ultimately can evaluate their own work. This teaching practice results in students who are better able to think critically and solve legal problems. Further, students who are taught in this way are

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J.D. program. It could be argued that students entering law school with fewer basic critical thinking skills might suffer a detriment from participating in an accelerated program, because it allows even less time to establish and hone those skills; but often accelerated J.D. programs are reserved for “highly motivated” (i.e., top) students, and even if not, stronger teaching focused on student learning outcomes and effective assessment will help address these issues.  

220. Matasar, supra note 24, at 204.

221. MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 21, 166 (2009).  

222. ROY STUCKEY & OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 177–78 (2007) [hereinafter BEST PRACTICES].

223. See id.

224. Id. at 93.


226. Manning, supra note 225, at 245–51 (noting the ineffectiveness of common professo- rial feedback such as writing “No” in the margin or drawing a large “X” across as segment of a student’s work product).

227. BEST PRACTICES, supra note 222, at 93.
less likely to suffer from psychological distress issues common among law students and lawyers, such as depression, since they are encouraged to view problems as temporary and solvable.\textsuperscript{228} Supporting students’ autonomy in this manner promotes true learning and psychological well-being, leading to more effective, happy lawyers in practice.\textsuperscript{229}

Of course this is easier said than done in an environment where staffs are shrinking and demands on professors’ time are increasing.\textsuperscript{230} Counter-intuitively, individual class sizes might also increase in the new normal if schools decide to shrink the sizes of their faculties, despite a decrease in overall entering class size.\textsuperscript{231} Accreditation standards that focus on expenditures and selectivity rather than student learning outcomes also may conflict with efforts to change.\textsuperscript{232} Although daunting, these difficulties provide all the more support for the proposition that all aspects of legal education, from individual courses to overall structure, should be subject to reevaluation and adaptation.\textsuperscript{233}

III. \textbf{Positive Implications for the Future}

“This crisis makes it easy to forget that the law attracts pragmatic types, able to handle changed circumstances.”\textsuperscript{234}

Most of the research concerning the new normal in legal education is pessimistic, and admittedly much of this article has been as well. Law is no longer seen as a career that guarantees lucrative employment upon graduation. This has led to a decline in law school applications, the downsizing of law schools, and is a major threat to the current scheme of legal education as a whole.\textsuperscript{235} On top of this, as explained above, students matriculate to law school today with significantly different levels of critical thinking skills than they did in the past, in turn requiring different professorial

\begin{itemize}
  \item \textsuperscript{228} Manning, \textit{supra} note 225, at 227, 245.
  \item \textsuperscript{229} \textit{Id.} at 331–32; see also Kennon M. Sheldon & Lawrence S. Krieger, \textit{Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test and Extension of Self Determination Theory}, 33 PERSONALITY \& SOC. PSYCHOL. BULL. 883, 894 (2007) (concluding that law student autonomy leads to stronger final GPA and bar passage, in addition to increased motivation and psychological well-being).
  \item \textsuperscript{230} See ACADEMICALLYADRIFT, \textit{supra} note 64, at 5–6.
  \item \textsuperscript{231} See \textit{id}.
  \item \textsuperscript{232} See Ronald G. Ehrenberg, \textit{American Law Schools in a Time of Transition}, 63 J. LEGAL ED. 98, at 111 (2013).
  \item \textsuperscript{233} See Matasar, \textit{supra} note 24, at 202.
  \item \textsuperscript{234} Caplan, \textit{supra} note 3.
  \item \textsuperscript{235} TAMANAH, \textit{supra} note 4.
\end{itemize}
attention to nurture. The car is speeding up a hill toward a blind corner, and some passengers already have bailed out; those still inside are anxious and uncertain as to whether they will make it without crashing.

Ultimately, however, these external changes and the internal adjustments they force have the potential to improve legal education dramatically, resulting in better, happier, and well-adjusted attorneys. First, now that the public no longer views law as a failsafe career choice, fewer people will choose to pursue a J.D. simply because they do not know what else to do with a liberal arts education. Media attention on truthful law school data reporting means potential law students will be able to make informed decisions regarding both law school and the field in general, and they should matriculate with a clearer picture of what a legal education will provide and what to expect in practice. Law students in the “new normal” should have a deeper dedication to legal study and a stronger sense of purpose in pursuing the profession. Additionally, although law schools are in the negative media spotlight at the moment, they are not the only education providers dealing with these issues. The Great Recession impacted other graduate programs, undergraduate providers, and earlier education providers as well; but law schools are subject to more stringent reporting requirements and thus are easier to criticize, even though some of the criticisms are warranted.

Finally, the legal institutions that weather the current upheaval and thrive in its aftermath likely will do so due in no small part to better teaching methods. As discussed above, professors who want their students, programs, and schools to succeed will adjust to their students’ needs in ways that encourage true learning and lead to greater psychological well-being. Furthermore, the careful, systematic evaluation of law school programs necessary to thrive in the

236. See discussion supra Section I.
237. See Sheldon Krantz, The Legal Profession: What is Wrong and How to Fix It, 17–19 (2013) (noting that the primary reason students chose to enroll in law school in recent decades was to make money and gain prestige, but surveys from 2012 indicate more altruistic goals of helping others, with financial goals related more to repaying debt than socioeconomic status); see also Kelly Phillips Erb, Attorney Offers Students 1,000 Reasons to Skip Law School, FORBES (Dec. 22, 2013), http://www.forbes.com/sites/kellyphilipserb/2013/12/22/attorney-offers-students-1000-reasons-to-skip-law-school/ (describing a scholarship an attorney established to encourage potential law students to choose a different graduate school path, since many enroll in law school because “they don’t know what else to do,” resulting in a disservice to those students and to the profession).
238. Matasar, supra note 24, at 167–68.
239. See discussion supra Section II.A.
new normal is likely to encourage more coordination between departments and a more cohesive educational experience for students.

IV. CONCLUSION

Indeed, the car may be speeding uphill toward a blind curve; but it will not crash as long as the driver remains focused and changes gears before it is too late. The landscape has changed, and although it may feel easier to continue driving at the current speed and in the same direction, doing so simply will not work anymore. Legal educators can navigate the obstacles in their roads effectively if they recognize the need for change and commit to the shift despite the fact that it might significantly disrupt the status quo. Law schools can survive and even thrive in the “new normal” if they reevaluate their programs and teaching with a focus on the unique needs of their incoming students. After all, change is not always a bad thing; after a difficult portion of the racetrack the road usually evens out for a nice straightaway.
Do Med Schools Do it Better?  
Improving Law School Admissions by  
Adopting a Medical School Admissions Model  

Rebecca C. Flanagan*  

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I. INTRODUCTION: DO MED SCHOOLS DO IT BETTER?

Hardly a day passes without national or local media running a story criticizing law schools, legal education, or the skills of young lawyers. Dozens of articles have been written on the failure of law schools to properly prepare law students for the work they will do after they graduate.1 Although there are a few commentators—primarily law professors, who have a vested interest in the status quo2—who think this criticism will pass when the job market improves, most critics believe law school must fundamentally change in order to produce practice-ready graduates.3

In contrast to the constant criticism leveled at legal education, medical education receives little public criticism. While there are some critics who think medical school should be shortened to three, instead of four years,4 and others who criticize the disjunction between medical education and internship,5 it is quite rare to find any meaningful criticism of medical training in popular media or academic circles. Additionally, the public honors and trusts doctors, while lawyers are the subject of jokes and scathing criticism.6

The perceived differences between doctors and lawyers start with differences in how lawyers and doctors are educated and trained. Both professional programs have their origins in the nineteenth


6. Sixty-nine percent of respondents rated the honesty and ethics of doctors to be very high or high. In contrast, only twenty percent of respondents rated the honesty and ethics of lawyers to be high or very high. Gallup Poll, Honesty/Ethics in Professions (Dec. 5–8, 2013), http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx.
century, and evolved to preeminence in the twentieth century.\textsuperscript{7} Despite similar origins, medical education has become more rigorous, more practice-oriented, and more thorough.\textsuperscript{8} While legal education has made some minor changes during the twentieth century, the case method of instruction still reigns supreme over 140 years after its introduction.\textsuperscript{9}

The differences between legal education and medical education start before students enter their post–graduate professional programs; the differences in preparation begin during the undergraduate years. This article briefly compares pre–law and pre–medical undergraduate preparation, and discusses how the differences in preparation shape preparedness in professional school. Taking cues from the successes in pre–med preparation, this article provides recommendations for improving the law school admissions model by adopting more rigorous pre–law preparation standards.

The recommendations in this article are a necessary prerequisite for law schools looking to produce the “practice ready” graduates that the public demands.\textsuperscript{10}

II. LAW SCHOOL ADMISSIONS: THE PATH OF LEAST RESISTANCE

It doesn’t take a lot of preparation to apply to law school; to be admitted to an ABA–accredited law school, an applicant must have completed a “bachelor’s degree, or successful completion of three–fourths of the work acceptable for a bachelor’s degree, from an institution that is accredited by . . . the Department of Education.”\textsuperscript{11} In addition, students must “take a valid and reliable admission


\textsuperscript{9}See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 247, 278 (1983) (referring to the case method as “no other teaching method [could be] considered its peer” and “that remarkable and resilient vehicle.”).


test,” presumptively the Law School Admission Test (LSAT). Law schools do not require specific classes, extracurricular involvement, clinical or experiential training, or community service. While all the aforementioned are helpful, especially if a student would like to be admitted to one of the best law schools, they are far from necessary for admission to the vast majority of law schools. Although law schools may add other requirements—most require students to submit a personal statement and letter(s) of recommendation—the only requirements necessary are a bachelor’s degree earned by the time classes begin and an LSAT score. Even when schools require additional materials from applicants, “the lion’s share of almost every law school class is admitted based primarily on the strength of individual applicants’ combined undergraduate grades (UGPA) and LSAT, or index scores.”

For admission to a professional program, these are low hurdles to cross. In reality, admission to law school represents a sliding scale, with the most prestigious programs requiring substantial experience, extracurricular involvement, and the highest–caliber undergraduate education. As law schools move down the rankings ladder, admissions standards become more and more relaxed, closer to the minimum threshold set by the ABA.

Law schools with lesser application requirements find myriad justifications for the relaxed standards. The relaxation of admissions standards has been especially pronounced since 2011. The “new normal,” a term used to describe the economy after the

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12. Id.
16. See Ashby Jones & Jennifer Smith, Amid Falling Enrollment, Law Schools Are Cutting Faculty, WALL ST. J. BLOG (July 15, 2013), http://online.wsj.com/news/articles/SB100014241278873323664204578607810292433272 (“Law schools faced with a dwindling pool of applicants confront a tough choice. They can fill seats by relaxing admissions criteria, a tactic that risks jeopardizing their standing in the influential annual rankings put out by U.S. News & World Report.”).
“Great Recession” of 2008, radially changed the landscape of law school admissions. After the recession, potential law students turned away from law schools as it became apparent that a J.D. was not the path to stable or lucrative employment for the math–averse. The recession hit legal employment especially hard, and criticism of law school job statistics became endemic. While law students who graduate from top–ranked law schools still receive job offers from large law firms, students graduating from lower–ranked law schools face significant educational debt and a grim employment landscape. These factors have combined to create a challenging admissions environment for many, if not most, law schools.

A. No Required Courses

Law schools do not require any specific courses, or prefer any particular majors, for admission. The Law School Admission Counsel (LSAC) pre–law guide, titled “Thinking About Law School,” states that “[n]o particular undergraduate education is recommended; students are admitted to law school from almost every academic discipline.” Similarly, the ABA’s pre–law website states that “[t]he ABA does not recommend any undergraduate majors or group of courses to prepare for a legal education. Students are admitted to law school from almost every academic discipline.” The ABA suggests that J.D. applicants develop certain skills, such as “Problem Solving, Critical Reading, Writing and Editing, Oral Communication and Listening, Research Organization and Management, Public Service and Promotion of Justice, Relationship–building and

Collaboration, Background Knowledge, and Exposure to the Law.”

Despite these recommendations, the ABA has a rather sparse explanation of how students can gain those skills, and even less information about how law students can incorporate skill building into their undergraduate or post-graduate careers. Applicants are left to their own devices to figure out how to gain these skills, especially if they have already graduated from college and work full-time.

It is particularly noteworthy that the explanation of how students acquire “background knowledge” closely parallels the requirements for a liberal arts degree. The ABA suggests taking courses in history, political thought, political systems, basic mathematical and financial skills, a basic understanding of human behavior and social interactions, and an understanding of diverse cultures, international institutions, and world events. The recommendations under “background knowledge” are at odds with the introductory paragraph, on the same page, which states that the ABA does not recommend “any undergraduate majors or group of courses.” Additionally, these recommendations come at the end of the page, far below the introductory statement stressing that “[t]here is no single path that will prepare you for a legal education.” Only the most committed, diligent applicants will read to the end of the page to see the recommendations, and are likely to be confused by the contradictory information. An applicant can choose which recommendations to follow; either the ABA doesn’t recommend any “group of courses,” in which case they can apply without background knowledge, or they can follow the latter recommendations, and get a broad liberal arts education, quite similar to what has been understood as “pre-law” by many educators and professors.

The lack of required courses, and contradictory recommendations from the body that accredits law schools, means that anyone with a bachelor’s degree and an LSAT score can apply to law school. Even if a potential law student followed the conflicting ABA recommendations, the lack of standards among undergraduate institutions makes it difficult for students to know if the classes they are selecting actually provide the knowledge they need to succeed; a modern world history course at one college may be a course focusing on non-

24. Id.
25. Id.
26. Id.
27. Id.
Western societies, or a vast survey course including American history.29

In addition, rising grade inflation makes it difficult for pre–law students to know if the classes they are selecting are actually providing them with the requisite skills necessary to succeed in law school. Grade inflation has become a significant problem at undergraduate colleges and universities.30 Many students can earn above–average grades throughout their undergraduate years by artfully selecting courses and majors.31 This problem is especially pronounced in business programs.32 Students (and law school admissions professionals) cannot look to their undergraduate grade point averages to determine if they have mastered the “background knowledge” the ABA suggests will help them succeed in law school.33

Students who, through diligent research and careful attention to course descriptions, manage to craft an undergraduate program that provide them with the background knowledge necessary for law school may still be underprepared for the rigors of law school coursework. Empirical research suggests college graduates who apply to law school today are far less qualified than previous generations of applicants.34 Recent empirical studies have questioned the rigor of many undergraduate programs. Many college students that

29. See U. Conn., Course Catalog, Modern World History, available at http://catalog.uconn.edu/hist/; Lafayette College, History Courses, History of the Modern World, available at https://history.lafayette.edu/courses/#105 (although these courses share very similar names, the descriptions of the courses show they have vastly different coverage, and will provide students with completely different background knowledge and skills. Students would have a very difficult time trying to meet the A.B.A. recommendations for background knowledge by just looking at course names).


33. Winai Wongsurawat, Grade Inflation and Law School Admissions, 16 QUALITY ASSURANCE IN EDUC. 224, 225 (2008) (unfortunately, there are no more recent studies tracking the increased use of LSAT in law school admissions).

graduate from bachelor’s programs show few gains in critical thinking, reasoning, and writing skills.\textsuperscript{35} Other studies suggest that college students today study dramatically less than college students since the 1960’s.\textsuperscript{36} While the reasons for the decline in undergraduate rigor are beyond the scope of this paper,\textsuperscript{37} it is critical to note that law schools are facing a decline in the quality of pre–legal education. A pre–law student of 2014 is not like a pre–law student of 2004, 1994, or 1984. The lack of guidance by the ABA recommendations compounds the problem for applicants, who do not know what they should be studying, or how to acquire the skills necessary for success. Institutionally, law schools have been uninvolved with the dialogue about skills acquisition on undergraduate campuses, so undergraduate institutions do not know how to craft a pre–law program that helps students acquire the skills necessary for law school success.

The end result of the lack of required courses or competencies for admission to law school is an applicant pool that does not have the fundamental knowledge or skills to succeed in law school.\textsuperscript{38} Many law schools are forced to provide substantial remedial training in basic writing, as well as instruction in critical thinking and reading,\textsuperscript{39} while working to train students to work in an increasingly complex and technologically advanced field. However, the remedial training offered by law schools is often squeezed into the curriculum, between required 1L courses, and limited to students who are clearly at–risk (based on the LSAT and UGPA) or students who have already failed to perform on law school exams.\textsuperscript{40} The type of remediation provided by the majority of law schools does not reach students who have substantial weaknesses in foundational knowledge and skills, but rise above “at–risk” standard.\textsuperscript{41}

\textsuperscript{35} Id.
\textsuperscript{36} Philip Babcock & Mindy Marks, The Falling Time Cost of College: Evidence From Half a Century of Time Use Data, 93 REV. ECON. & STAT. 468 (2011).
\textsuperscript{38} See Stuart & Vance, supra note 37.
\textsuperscript{39} Academic support programs are designed to work with a small number of incoming students with undergraduate GPA’s and LSAT scores that place them at risk for academic failure.
\textsuperscript{41} See Louis N. Schulte Jr., Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and
B. Law School Admissions Test

The lack of prerequisites necessary to be admitted to law school are supposed to be a boon to the field, providing legal education with a spectrum of opinions to stimulate class discussion and deepen student perspectives.\(^{42}\) In reality, the lack of requirements means that there is little standardization among law school applicants other than their LSAT score. The LSAT does not measure any academic subject matter; it is a test of “the reading and comprehension of complex texts with accuracy and insight, the organization and management of information and the ability to draw reasonable inferences from it, the ability to think critically, and the analysis and evaluation of the reasoning and arguments of others.”\(^{43}\) These skills are measured through five, 35–minute sections of multiple-choice questions: one reading comprehension section, one analytical reasoning section, and two logical reasoning sections.\(^{44}\)

The LSAT makes a very narrow assertion: it is the best predictor, in conjunction with undergraduate grade point average, of first-year law school grades.\(^{45}\) The LSAT does not purport to measure the ability or skills necessary to be a lawyer, the attributes necessary for success in the field, or qualities valued in an ethical practitioner.\(^{46}\) It is designed to measure an applicant’s ability and skills considered essential for success in law school.\(^{47}\) The LSAC-sponsored history of the test found that the LSAT was never meant to test lawyering skills or ability; rather, “the test’s usefulness came in its ability to predict lack of success—students who did poorly on the aptitude test usually did poorly in law school.”\(^{48}\)

How to be successful on the LSAT is a topic that is fraught with political, social, and educational controversy.\(^{49}\) To do well on the LSAT, applicants need ability to do well on standardized tests of

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\(^{42}\) A.B.A. REP., supra note 23.

\(^{43}\) LSAC REP., supra note 22.

\(^{44}\) Id.


\(^{47}\) Id. at 2–4.

\(^{48}\) Id. at 2.

\(^{49}\) See Phoebe Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41 (2006) (arguing that the LSAT is the “center of the storm” involving admissions).
verbal reasoning and logic; they need time-intensive, specifically-tailored training for the test, or they need to major in the liberal arts. There are myriad problems with these strategies. LSAT preparation is costly and time consuming. The average cost of the two most popular LSAT prep programs is $1424. The “most popular” option among people enrolling with Kaplan test prep was an in-class prep program, which requires test takers to attend twenty-eight hours of in-class lectures, as well as three full-length, proctored LSATs. It would be difficult, if not impossible, for a student who must work to pay for school, or take care of a family to invest the time and effort in adequate LSAT preparation.

Additionally, LSAT rewards the applicants who have chosen liberal arts majors. Liberal arts may provide a better foundation for critical thinking and reasoning than pre-professional majors such as business, health sciences, and communications. However, liberal arts disciplines fail to provide students with career training required to find post-graduate employment. For first-generation college students, or students looking to attend law school part-time because they have to support a family, liberal arts is a luxury they cannot afford. Despite the fact that law schools, the LSAC, and the ABA say that anyone can do well in law school, liberal arts majors seem to do better. In a study of the undergraduate majors that score the highest on the LSAT, “among those majors with at least 1000 takers, the top major was Philosophy, followed by Economics, History, English, and Political Science.”

50. Allyson P. Mackey et al., Experience-Dependent Plasticity in White Matter Microstructure: Reasoning Training Alters Structural Connectivity, 6 FRONTIERS IN NEUROANATOMY 1 (2012) (researchers at University of California at Berkeley found that rigorous, three-month training in reasoning increased white matter neuroplasticity and increased LSAT scores).
53. Id.
54. Patricia Cohen, In Tough Times, the Humanities Must Justify Their Worth, N.Y. TIMES, Feb. 25, 2009, http://www.nytimes.com/2009/02/25/books/25human.html; see also ANDREW HACKER & CLAUDIA DREIFUS, HIGHER EDUCATION? HOW COLLEGES ARE WASTING OUR MONEY AND FAILING OUR KIDS—AND WHAT WE CAN DO ABOUT IT 101 (2010) (Hacker and Dreifus noted that students interviewed “were constantly badgered by parents and relatives who wanted to know how supposedly useless subjects would help them move up the social ladder.”).
than 1000 LSAT takers, the top five majors were classics, policy studies, international relations, art history, and mathematics.\textsuperscript{56} Earlier studies have found similar results; liberal arts majors do the best on the LSAT.\textsuperscript{57}

The LSAT is also widely criticized because of its negative effects on students of color. The average LSAT score during test administrations from 2005 through 2009 was 142.37 for African American test takers, while the average score for white takers was 152.7.\textsuperscript{58} The LSAT “disproportionately disadvantages (and excludes) students of color,” leading to more homogenous classes.\textsuperscript{59}

Not only is the LSAT a test that rewards white applicants who can afford test preparation, but it has made no effort to keep up with the skills, knowledge, or abilities necessary for success as a lawyer.\textsuperscript{60} This is one of the most significant criticisms of not only the LSAT, but of law school generally; instead of measuring what it takes to succeed as a practitioner, law schools look to measure which students will not do poorly in their first year of law school.\textsuperscript{61} The limited academic skills required to do well during the first year of law school do not relate to success as a practicing attorney.\textsuperscript{62} These aptitudes are not measured in any meaningful way during the law school application process.\textsuperscript{63}

Attempts to supplement or replace the LSAT with a better test, or a test that does a better job of predicting the success of future lawyers (instead of the success of law students) have not been fruitful. The most recent attempt at supplementing the LSAT was a proposal by Majorie Shultz and Sheldon Zedeck. Professors Shultz and Zedeck sought to “expand the focus” of law school admissions by examining the competencies related to professional performance.\textsuperscript{64} Professor Zedeck, a scholar in the field of personnel psychology, and Professor Schultz, a law professor, started by researching what defines successful or effective lawyering.\textsuperscript{65} After extensive

\begin{itemize}
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Nieswiadomy, \textit{supra} note 51.
  \item \textsuperscript{59} Holmquist et al., \textit{supra} note 13, at 565.
  \item \textsuperscript{60} Id. at 566 (“Commentators had long critiqued the LSAT as too narrow, but . . . no persuasive additions or alternatives had emerged.”).
  \item \textsuperscript{61} LaPiana, \textit{supra} note 46.
  \item \textsuperscript{62} Holmquist et al., \textit{supra} note 13, at 565.
  \item \textsuperscript{63} Id. at 568 (“Law schools rely heavily on the LSAT for admissions decisions, despite little or no evidence that the LSAT predicts lawyering competence.”).
  \item \textsuperscript{64} Id. at 566.
  \item \textsuperscript{65} Id. at 576–577.
\end{itemize}
research, Schulz and Zedeck developed twenty-six factors of lawyering effectiveness, including “problem solving, practical judgment, listening, organizing and managing one’s own work, [and] building and developing relationships.” Next, they selected and developed eight tests, and evaluated the strength of the tests to measure lawyering effectiveness using 1100 volunteers among students and alumni at Hastings Law School and Berkeley Law. Results of this study found that the new tests predicted almost all of the twenty-six competencies.

Despite the efficacy of the Shultz-Zedeck test, the professors need to conduct additional research before the test is ready to be implemented. The professors see the test as a useful adjunct to the LSAT, one that measures professional competencies alongside academic ability. Unfortunately, to implement and conduct further research on the Schultz-Zedeck test would require funding and participation from most law schools. At this time, the law school community has not responded to the need for a more reliable admissions test.

Law school admissions is plagued by a number of deficiencies that cannot be easily remedied unless law schools work in concert with each other and accrediting bodies. These deficiencies are not insurmountable, but law schools must look carefully at how they admit students to produce a better model.

III. Pre-Med: A Gauntlet Not Easily Passed

In sharp contrast to law school admissions, admission to a United States medical college requires applicants to prepare throughout their undergraduate years. American medical schools require applicants to successfully complete an array of specific, foundational courses in the sciences, have a very strong Medical College Admissions Test (MCAT) score, as well as extensive clinical and research experience. While these make up the essential requirements for admission to medical school, most successful applicants have stellar undergraduate grades, are active in extracurricular activities, have years of community service experience, and a composite letter of recommendation from their undergraduate or post-baccalaureate program. Lastly, a medical school applicant must do well during an

66. Id. at 577.
67. Id. at 578–579.
68. Id. at 580.
69. Id.
70. Id. at 582.
71. Id. at 583.
interview with medical school admissions staff or faculty in order to be admitted to medical school. If admission to law school represents the path of least resistance for the math-averse college graduate, admission to medical school is a marathon-length gauntlet, an intellectually, academically, and personally challenging array of requirements and competencies that must be mastered in order to be admitted. Medical schools term this gauntlet “holistic review,” and it is designed to admit and train the best-prepared students.72

A. Pre-Med Course Requirements: Foundational Knowledge and Fundamental Skills

The overwhelming majority of United States medical schools have minimum course requirements for admission. Of 141 allopathic (M.D.-granting) medical schools in the United States, 119 medical schools require organic chemistry, 118 require inorganic (general) chemistry, 97 require biology, and 84 require English courses.73 Medical school prerequisites require about one-third of a college students’ credit hours, leaving enough time for pre-med students to choose almost any major.74

Although medical schools currently require science and English courses in order to apply, a recent recommendation by the Scientific Foundations for Future Physicians looks to change the pre-med course requirements.75 Instead of focusing on courses, medical schools are urged to focus on academic competencies.76 Competencies are learner-performances, where “[e]mphasis should be on defined areas of knowledge, scientific concepts, and skills rather than on specific courses or disciplines.”77 Competencies are meant to allow students to get a broad-based, “intellectually expansive” liberal arts education, allow undergraduate colleges and universities to develop novel “interdisciplinary and integrative science courses” without increasing instructional hours in the sciences, and increase “scientific rigor and its relevance to human biology.”78

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73. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE OFFICIAL GUIDE TO MEDICAL SCHOOL ADMISSIONS (10th ed. 2014) [hereinafter OFFICIAL GUIDE].
74. Id.
76. Id. at 1–2.
77. Id. at 1.
78. Id.
would require undergraduate institutions to develop courses to meet the new competencies, and would require the MCAT, to accurately assess mastery of the competencies in pre-med students.\(^\text{79}\)

**B. MCATs: A Purpose–Driven Test**

The MCAT is comprehensive, academic, and integrated with the competencies necessary to succeed as a medical professional. The current MCAT is divided into four sections: the physical sciences (encompassing general chemistry and physics); verbal reasoning (evaluating applicant ability to understand information and arguments); biological sciences (covering biology and organic chemistry); and a trial section (test questions for an overhauled 2015 MCAT, which will be administered beginning the spring of 2015). The new MCAT exam will add a section on psychological, social, and biological foundations of behavior, focusing on the social sciences and “the importance of socio–cultural and behavioral determinants of health and health outcomes.”\(^\text{80}\) The verbal reasoning section will change slightly, becoming the section on critical analysis and reasoning skills, which emphasizes that “medical schools want well-rounded applicants from a variety of backgrounds.”\(^\text{81}\)

The MCAT is closely tied to undergraduate education. It would be difficult, if not impossible, for most people to achieve even an average score on the test without coursework in biology, chemistry, and physics. The MCAT administered after 2015 will also require coursework in social sciences, specifically psychology, sociology, or anthropology.\(^\text{82}\) Applicants who plan on applying to the small minority of medical colleges that do not specifically require foundational coursework in the sciences will find that it is nearly impossible to succeed on the MCAT without mastery of basic sciences.

The MCAT administered in 2015 was overhauled because, in the words of the president of Association of American Medical Colleges,

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79. *Id.*
81. *Id.*
“the health system of tomorrow will require a different kind of physician.”

The MCAT is designed to test an applicant’s ability to successfully complete medical school, but also seeks to stay current with the medical profession, and what skills and knowledge are required to stay proficient in the field. The new MCAT will last seven–and–a–half hours. The content of the MCAT was expanded, but the test will continue to “be updated to stay current with the exponential growth of medical knowledge, focusing on the areas medical school educators and students think are most important for medical school.”

1. **Clinical Experience and Community Service: Keys to “Holistic Review”**

A popular guide to medical school admissions sums up the process this way: “If you will be happy pursuing any profession other than medicine, go do that. If not, become a doctor.” If a pre–med student can check all the academic boxes, they still have to prove to medical colleges that they have research, or clinical, experience to complement academic knowledge gained through undergraduate coursework. Clinical experiences are not strictly limited to work in a laboratory or medical facility; clinical experiences can be health policy research, academic research in an emerging area of medical concern, or population–based research, such as working in an underserved foreign country. Clinical experience can also be community–based and, although the two components can be distinct, it is often combined with community service. The key to clinical experience and community service is what they show about the applicant’s interests and attributes. Medical college admissions professionals want to see that applicants explore medicine before committing to a seven–to–twelve year journey. Specifically, that the applicants understand “the daily demands placed upon physicians,” can demonstrate the communication and empathy skills necessary to work with different people, and the “willingness to put others’ needs before [their] own.”

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85. Kirch, supra note 83.


87. *Id.* at 38–39.

88. *OFFICIAL GUIDE, supra* note 73, at 12.
Clinical experience and community service are a part of the holistic review process in medical school admissions. Holistic review in medical school admissions is defined as “a flexible, individualized way of assessing an applicant’s capabilities by which balanced consideration is given to experiences, attributes, and academic metrics and . . . how the individual might contribute value as a medical student and future physician.” Holistic reviews match desirable physician traits with applicant data; while an academic record and MCAT scores can measure intellectual ability, “commitment to service, cultural sensitivity, curiosity and engagement” are some of the qualities that can be demonstrated through clinical experience and community service. Most notably, holistic review emphasizes “attributes . . . that are associated with excellence in physicians.” By requiring clinical experience and community service by applicants, medical schools look beyond success in medical school, to success as a medical professional.

Commitment to the holistic review process is demonstrated through the application process. Medical schools, like law schools, have a unified application process, known as the American Medical College Application Service (AMCAS). The AMCAS consist of nine sections, asking applicants for basic personal information in sections one through three, academic information in sections four and nine, and “holistic” information in section five (work and activities), section six (letters of evaluation), and section eight (personal statement). Applicants have three separate sections in which to demonstrate their personal qualities and experiences that would make them an exceptional physician.

Some medical schools seek additional, school specific information from top applicants, including supplemental letters of evaluation and supplementary writing samples. This process is known as the secondary application. The secondary application allows students to use their clinical experiences and community service to demonstrate “fit” with a particular medical school, based on their mission.

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90. Witzburg & Sondheimer, supra note 72, at 1566.
91. Id.
92. Id. at 41.
94. Id. at 38.
2. Medical School Interviews: You Can’t Just be Good on Paper

Medical schools seek applicants who will become great doctors, not just great students. After applicants complete the AMCAS process, top applicants are invited to an interview. Interviews are meant to supplement the first and secondary application processes. While an applicant may shine on paper, it is particularly difficult to measure such qualities as empathy, self-awareness, ability to communicate clearly, and interpersonal skills without meeting the person behind the accomplishments. The interview allows medical school admissions teams to “evaluate . . . other traits necessary to . . . the development of a competent, compassionate, and responsible physician.” The interview process usually lasts a full day, and students are interviewed in small or large groups, meeting with everyone from the admissions team to faculty, students, and administration. Applicants must demonstrate the “soft” skills necessary to be a successful physician, not just be an academic star.

IV. Applying the Medical School Admissions Model to Law Schools: Problems and Prognostications

The medical school and law school admissions processes bear few similarities. Medical school admissions is comprehensive, rigorous, and intense. In contrast, the law school admissions process is limited, straightforward, and primarily academic. Many critics point to the current economic situation at law schools to dismiss any suggestion that law school admissions should become more rigorous. Applying the medical school admission process, with holistic review of all applicants, would be expensive, time-consuming, and in the short-term, lead to a further decline in applicants. At a time when law schools are struggling to fill their classes, the last thing many schools want to do is create more hurdles to admission.

However, the long-term payoff of a more thorough, holistic admissions model is significant. Law schools will have better prepared students, with standardized foundational knowledge, allow-

95. Id. at 48.
96. How Important is the Interview in Getting Accepted to Medical School?, ASS’N OF AM. MED. COLLEGES, https://www.aamc.org/students/aspiring/basics/284808/interview2.html (last visited Nov. 1, 2014).
ing first–year classes to spend less time on remedial skills. Students who do not have to spend time on remedial skills are more prepared to move onto experiential learning earlier in their law school career, which has the potential to graduate more practice–ready graduates. Less reliance on the LSAT (or supplementing the LSAT with a more complete test of skills, such as the Schulz–Zedeck test) opens the possibility of a more diverse, more competent law school class. Applicants with pre–law “clinical” or volunteering experience in law will be more certain about their career choice, and have a better network when they graduate, potentially leading to fewer dissatisfied, disillusioned law school graduates.

A. What We Can Borrow from the Medical School Model

There is much law schools can do to build a better admissions model. Law schools can start by evaluating what skills and knowledge pre–law students need in order to succeed beyond the first year of law school academics. While the LSAT remains a good test to measure academic ability, law schools have not yet evaluated what skills and knowledge students need to succeed outside of the classroom and beyond the first year. Law schools have relied on personal statements and letters of recommendation to provide information about an applicant’s motivation, interpersonal skills, resilience, integrity, and purpose. Both of these tools are incomplete and inadequate. A more thorough admissions model would adopt the most successful elements of the medical school admissions process and adapt them to the unique needs of law schools.

1. Designate Core Competencies for Undergraduate Education

Medical schools have long relied on undergraduate science courses to provide the foundation for medical school courses. Recent research recommends that medical schools move to a competency–based model, providing flexibility for students to acquire the requisite skills through a wider variety of courses. Law schools can adopt a similar competency–based model, focusing on the key competencies that pre–law students must demonstrate before applying to law school. Law schools would need to identify which key skills provide the foundation of law school academic success, skills that cannot be adequately measured by a short test such as the LSAT. The identification of key academic skills is more important

98. Scientific Foundations for Future Physicians, supra note 75.
now that fewer students are majoring in the traditional liberal arts disciplines that previously provided the foundation of law school learning.\textsuperscript{99} Law schools could require applicants to have completed at least one course with a substantial analytical writing requirement, and require applicants to have either completed a course in grammar and style, or alternatively, have successfully completed CoreGrammar, an online grammar tutorial.\textsuperscript{100} Similarly, law schools could require applicants to have a foundation in basic economic principles, civics, modern western traditions, and basic philosophy.

To employ a competency–based assessment of transcripts, law schools would need to work with undergraduate institutions to identify which courses provide foundational skills and knowledge.

This process can be simplified by contracting with LSAC. The LSAC already evaluates applicants’ transcripts as a part of the law school credential assembly service (LSCAS), which summarizes transcripts and converts all undergraduate grades to a standard system.\textsuperscript{101} LSAC can work with undergraduate institutions to evaluate courses to find which courses meet designated competencies. Because LSAC already has an existing relationship with undergraduate institutions and some understanding of courses and grading policies, this process should not require extensive research or years to complete. The benefit of core competencies is a standardized foundation of essential knowledge and skills across all matriculants.

To ameliorate the challenge core competencies would pose to non–traditional applicants, law schools could create short post–baccalaureate programs, similar to the programs created by many medical schools. Medical school post–baccalaureate programs allow medical school aspirants to fulfill the core competency requirement they may have missed during their undergraduate years.\textsuperscript{102} Law schools could adapt the medical school model to fit the needs of pre–law students, creating short, full–time post–baccalaureate programs that run over the summer break, or part–time, year–long

programs for law school aspirants who work full-time. An additional benefit of these programs is that they could use facilities that go vacant during the summer months, provide additional teaching opportunities for law school faculty who might otherwise be laid off if the decline in law school applicants continues, and bring much-needed revenue to law schools.

2. Adopt an Interview Process

Law school applicant interviews could provide law schools with an effective gauge of the soft skills necessary for success as a practicing attorney, such as negotiation skills, listening ability, problem solving, and practical judgment. Some law schools, including Northwestern and Vanderbilt, have already incorporated an interview into their admissions process. There are a variety of methods law schools could adopt in implementing their own interview process.

Law schools could use alumni volunteers, trained by admissions staff, to interview applicants. Alumni interviewers could use a standardized rubric to assess applicant ability, interviews could be conducted in teams, and rubric scores could be averaged among interviewers. Using alumni to interview prospective students provides the additional benefit of connecting alumni to potential students, giving alumni a greater stake in the success of matriculating students.

Law schools could also use faculty teams to interview students, much like the medical school interview model. Faculty interviews could be structured as mock arguments, negotiations, or counseling sessions. Faculty interviews could also be conducted with teams of applicants, so faculty interviewers could get a better sense of how students work with others.

Faculty interviews would not only give the law school an assessment of soft skills, but act as a recruiting tool. Faculty will know applicants and can use the interview to build a connection with the most promising applicants. Applicants will be able to make a more informed choice when deciding on a law school, potentially limiting the power of law school rankings.

103. Holmquist et al., supra note 13, at 577–578 n.44.
3. Use a More Thorough Test of Ability and Skills

The LSAT is an incomplete test of academic ability, and it does not measure many of the critical skills required to be a successful attorney.\(^\text{105}\) While it would require many years, and millions of dollars, to overhaul the LSAT in the manner of the MCAT 2015 redesign, there are other options available to law schools that would improve the current testing regime. Adding a test, such as the Schulz–Zedeck, or modifying the current test protocol to include more lawyering skills, to better predict which applicants will succeed in law school and in the practice of law could lead to a more diverse, qualified class. Potential applicants that are dissuaded from applying to law school, because of the perceived racial bias of the LSAT,\(^\text{106}\) may choose to apply to law school if they know that they can take a more comprehensive test that includes lawyering skills.

B. Problems with a New Admissions Standard

Despite the benefits of borrowing from the medical school admissions model, critics will be quick to point out the substantial differences between post–graduate medical education and law school. One difference between law school and medical school admissions is the disparity in medical school seats; more than twice as many students apply to medical school as there are spaces for prospective doctors, despite the fact that the United States faces a shortage of approximately 90,000 doctors.\(^\text{107}\) The discrepancy between medical school seats and the doctor shortage in the United States is a function of how post–graduate medical education is funded.\(^\text{108}\) Although colleges and universities in the United States have taken significant steps towards increasing the number of medical schools in this country, political obstacles have prevented a corresponding increase in medical residencies (often referred to as post–graduate medical education).\(^\text{109}\) The United States government, through

\(^\text{105}\) Holmquist et al., supra note 13, at 571–572.
\(^\text{107}\) Medical School Applicants, Enrollment Reach All–Time Highs, ASS’N OF AM. MED. COLLEGES (Oct. 24, 2013), https://www.aamc.org/newsroom/news-releases/358410/20131024.html (“In 2013, ‘[t]he total number of applicants to medical school grew by 6.1 percent to 48,014.’”).
\(^\text{108}\) Id.
Medicare, funds residencies, which are required for doctors to practice medicine. Until Congress increases funding for medical residencies, it is likely the doctor shortage will remain, and many more students will seek admission to medical school than there are seats for medical students.

The situation at law schools across the country face the opposite problem. Law schools, just now emerging from the “new normal” that resulted in fewer jobs for law school graduates, face the opposite problem as medical schools: there are too few positions available for too many law school graduates. While medical schools have the luxury of setting very high standards for prospective students, law schools, feeling the pinch of few tuition-paying students at a time of reduced budgets, must make tough choices about class size and student credentials amidst reductions in staff, and at some schools, faculty.

There will be some complaints about any change to law school admissions practices. The current practices are well-established, well-understood, and in many ways, simple. Changes to the admissions process will upset participants who rely on law school to be a default plan for undecided undergraduates and underachieving graduates who want an easy path to a respectable graduate program. These complaints should not deter law schools from using this unique moment in time to address deficiencies in the admissions process that prevent law schools from admitting applicants that are adequately prepared for the academic and personal rigors of law school and a legal career.

V. CONCLUSION: HOW WE MOVE TO A NEW ADMISSIONS MODEL

Law schools need to engage with the ABA Section on Legal Education and Admission to the Bar to begin the process of transforming admission to law school. To extricate themselves from imme-

110. Id.
112. Frequently Asked Questions, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (last visited Sept. 17, 2014) (“Since 1952, the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association has been recognized by
diately–gratifying yet ultimately self–destructive admissions patterns,¹¹³ law schools need to work together, in conjunction with accrediting bodies, to craft an admissions model that serves the needs of the law schools and ensures a better–prepared student body. While law schools may be reticent to require additional requirements during a time of declining enrollment, it is incorrect to assume these requirements will result in a long–term decline in applicants. By reforming law school admissions, law schools will find reforming curriculum, and responding to the current criticisms surrounding legal education, to be less fraught and more straightforward. As better–prepared and better–qualified applicants matriculate, law schools will be able to impart higher–order skills earlier in the curriculum, allowing law schools to focus on practical skills earlier in law school. A revised admissions model, with a strong emphasis on undergraduate skill–building, can transform the conversation about law school reform and help legal training resume its position as world–class.

Are We There Yet?
Aligning the Expectations and Realities of Gaining Competency in Legal Writing

Sherri Lee Keene*

ABSTRACT

Each year, it seems that more law professors express their concerns that increasing numbers of students are coming to law school underprepared for the task. Moreover, professors often express specific concerns about their students’ writing abilities. While there may be some truth to these assertions, it is also true that legal educators need to take a closer look at law school curriculums and teaching methods to make sure that students are afforded the best opportunities to succeed. Indeed, the challenges of modern legal education may reflect not only the shortcomings of today’s students, but also the need for law schools to reconsider their curricular goals and approaches to teaching. Legal skills, such as legal writing, have long maintained a subordinate position in the curriculums of many law schools. While their importance has received increased recognition as of late, many law schools continue to dedicate insufficient time and resources to their teaching. Indeed, most law schools only require students to take two semesters of formal instruction in practical legal writing during their first year and require students to take no additional legal writing courses in their second or third years. Consistent with this curricular approach, many law professors seem to expect students to gain significant competency in legal writing before they begin their second year of law school and to be able to proceed from that point with less guidance.

This article urges legal educators to consider what law schools are asking their first–year law students to learn in just two semesters of practical legal writing in comparison to what law students can realistically achieve. Currently, it seems that a disconnect exists between what legal writing faculty are able to teach students in their first year and what professors teaching students in later years expect these students to know. A review of select, first–year students’ final writing assignments provides some perspective on
what students are learning in their first–year legal writing courses. It is the author’s hope that this article will paint a more accurate picture of what professors can reasonably expect from students in their second and third years. Ultimately, this article asks legal educators to recognize the hard work and achievements of law students, while acknowledging all that legal writing entails and all that students still need to be taught after their first year.

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INTRODUCTION

Most legal writing professors share the experience of having law school faculty colleagues, who do not teach legal writing\(^1\) to students in their first year, express concerns about the level of writing proficiency of the upper–level students whom they teach. While many of these professors’ remarks address their students’ struggles
to produce meaningful scholarly papers, others’ remarks concern their students’ inability to communicate effectively their analysis of legal problems for hypothetical, and sometimes even real, clients.2 Yet, those professors who teach legal writing to first–year students know the broad scope of skills and topics covered in first–year legal writing courses and how hard most students work to gain competency in legal analysis and writing before they leave their legal writing classrooms.3 Legal writing professors know that nearly all of their students show amazing growth over the course of the school year and that by the end of the spring semester, many students submit legal writing papers that are impressive overall, or at least in many respects. But, these professors also know that at the end of the first year, many law students still struggle with legal writing and that all law students still have much more to learn.

Most, if not all, professors of legal writing would agree that more than two semesters of practical legal writing courses are needed to prepare law students adequately for the work they will do in legal practice.4 The transition to legal writing is not easy for the majority

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1. Unless otherwise indicated, in this article, the term “legal writing” refers to practical legal writing, or the types of writing that lawyers regularly do in practice when representing clients.

2. See Sarah O. Rourke Schrup, The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs, 14 CLINICAL L. REV. 301, 302 (2007) (“Even when LRW faculty members believe they have produced within each student the best writer that student can be in his nascent legal career, upper–level faculty, including clinicians, lament the research and writing skills of the students that enter their courses.”).

3. See Miriam E. Felsenburg & Laura P. Graham, Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223 (2010) (comparing the expectations of beginning legal writers to their experiences during the first weeks of law school); Lucia Ann Silecchia, Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?, 100 DICK L. REV. 245 (1996) (discussing the scope of coverage of first–year legal writing courses and the hurdles that students face when they begin to engage in practical legal writing).

4. See Pamela Lysaght & Cristina D. Lockwood, Writing–Across–the–Law–School Curriculum: Theoretical Justifications, Curricular Implications, 2 J. ASSN LEGAL WRITING DIRECTORS 73, 73–4 (2004) (noting that difficulties with legal writing stem, at least in part, from a lack of opportunity for students to apply the skills they learned in their first–year legal writing courses after that year and advocating for a program that includes required
of new law students. Even if students have been successful with writing in other contexts, most new legal writers find that they face a steep learning curve when they begin their legal writing coursework. To most entering law students, practical legal writing is a new and different form of writing that requires a shift in thinking from more familiar written products and processes, and a learned appreciation for what is considered to be effective writing in a legal context. Indeed, what qualified as effective writing in undergraduate school may not qualify as such in law school. In undergraduate school, for example, many professors reward students for restating learned information, and verbosity is often encouraged as students work to add more content to meet required page limits. By contrast, in legal writing, clarity and conciseness are of the utmost importance. Effective legal writing is to be thorough, but nonetheless efficient, and the writer is often called upon to synthesize and repackage information so that it is easier for the reader to understand. This type of writing is often more purposeful and reader-focused than the writing that students did before law school.

writing components in all upper-level doctrinal courses); Carol McCrehan Parker, Writing Throughout the Curriculum, Why Law Schools Need It and How to Achieve It, 76 Neb. L. Rev. 561, 563 (1997) (“Neither a single ‘rigorous writing experience’ nor a first-year legal writing class is sufficient to provide basic competence in written communication.”); J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35, 75–76 (1994) (advocating for programs that afford students an opportunity to further develop their legal writing during their second and third years of law school).

5. See Felsenburg & Graham, supra note 3, at 266–67 (noting how law students past writing successes may have resulted from their demonstrating a mastery of a subject matter and reciting that mastery, “often accompanied by editorial comments and opinions as permitted or required by the professor.”); Miriam E. Felsenburg & Laura P. Graham, A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation By Shifting Their Focus from Product to Process, 24 Regent U. L. Rev. 83, 88 (2011) (noting that college students are often asked “to read and discuss the content of the subject area, to memorize the content of the subject area for examinations, or to write research papers identifying and commenting on the trends and themes of the subject area.”) (citing Kenney F. Hegland, Introduction to the Study and Practice of Law in a Nutshell 1–2 (5th ed. 2008) (exploring students’ undergraduate studying habits that are not effective in law school)).

6. Mark L. Osbeck, What is “Good Legal Writing” and Why Does it Matter?, 4 Drexel L. Rev. 417, 427 (2012) (describing clarity, conciseness, and engagement of the reader as the fundamental qualities of good legal writing); Felsenburg & Graham, supra note 3, at 257 (“The central task of the legal writer is to produce a document . . . that effectively communicates a correct, clear, concise answer to the legal problem.”).

7. See Felsenburg & Graham, supra note 3, at 268 (“Knowledge-driven approach to writing, which likely produced ‘A’ papers in college is ‘woefully inadequate for the goal-oriented writing of lawyers and judges.’”) (quoting Brook K. Baker, Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice, 23 WM. Mitchell L. Rev. 467, 511 (1997)); see id. at 273 (describing the shift from “knowledge telling” to “knowledge transforming” required for legal writing) (citing Christine M. Venter, Analyze This: Using Taxonomies to ‘Scaffold’ Students’ Legal Thinking and Writing Skills, 57 Mercer L. Rev. 621, 639 (2006) (noting that students need to come to see their writing as “knowledge transforming,” and to “begin to see themselves as legal authors who contribute to the ongoing development of the law.”)).
It follows that the quality of legal writing is judged not only by whether it is mechanically well-written, but also by its content and usefulness to the reader. Thus, to be effective as a legal writer, a law student must not only possess a solid technical writing ability, but also develop an understanding of the law and a familiarity with legal practice. Students, therefore, must gain a real appreciation for the new legal audience for which they are writing and consider how this audience makes professional decisions. In order to write successfully for this new reader, law students need to gain an understanding of legal methods, including concepts such as jurisdiction, court hierarchy, and stare decisis. Indeed, good legal writing is often the result of the successful execution of a number of important legal skills—such as sound legal analysis, thorough legal research and factual investigation, advocacy, and problem solving.

To be effective advocates, students will also need to learn how to make not only superficial writing choices, but also strategic, professional decisions about how best to present their analysis in order to serve their specific writing purpose.

In order to be more effective teachers, legal writing professors have raised their awareness of all that is required for effective legal writing and all that law students must learn to become competent in this skill. Therefore, legal writing professors understand that effective legal writing is not a skill that is easily acquired and that no law student can truly master legal writing in their first year. Law school professors who do not teach legal writing to entering law students may not fully appreciate what legal writing requires,
and may significantly underestimate what students must learn to be successful. These professors may assume that students who do not excel early on as legal writers, are simply poor writers generally. This lack of understanding can lead legal educators to expect, wrongly, that most law students should be able to acquire a high level of proficiency in legal writing with just a few legal writing experiences in a relatively short period of time. Even more, wrong assumptions about the time needed to gain competency in legal writing are reflected in current American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools (ABA Standards), and the curriculums of many law schools that devote insufficient time and resources to its teaching.

Given the current demands of the legal market, it would seem worthwhile for legal educators to take a closer look at what law students can realistically accomplish in two semesters of legal writing and adjust their law school curriculums accordingly in order to better prepare new law graduates for the legal writing that they will do when they begin to practice. While opinions vary widely as to what level of proficiency in legal writing is sufficient for new law school graduates, it seems beyond dispute that law students have nothing to lose and everything to gain from increasing their competence. This article will focus less, however, on defining appropriate goals for legal educators with respect to legal writing, but rather, will address the question—how much can legal educators realistically expect law students to accomplish in one year of legal writing?

13. Rideout & Ramsfield, supra note 4, at 40–41 ("Legal educators . . . often see legal writing as quite simple if one knows how to write . . . . Without further investigation, these educators may have pegged legal writing courses as remedial, either explicitly or implicitly. In any case, these experts are often frustrated and mystified by the apparent inability of law students to write. The easiest method is to blame lower academic institutions for failing in one of their purposes—to teach writing.").

14. See Rideout & Ramsfield, supra note 4, at 40–46 (discussing traditional views of legal writing teaching and pointing out how misconceptions about legal writing teaching can lead to poor curricular choices).


16. This article focuses on one year of legal writing courses as most accredited law schools offer two semesters of legal writing in their students’ first year, and do not require students to engage in advanced legal writing courses. See ALWD/LWI, REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), available at http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf (Question 12, p. 7) [hereinafter ALWD SURVEY]. The ALWD Survey provides that almost all legal writing programs required courses in both the first semester (98%) and second semester (98%) of the first year of law school. Id. Significantly fewer schools, 47 of 178 respondents (26%), indicated that they had required a legal writing course in the fall semester of the second year of law school, and considerably less indicated requiring legal writing courses in subsequent semesters. Id. at vi, 12.
The author will explore this question by reviewing appellate briefs written by law students across a law school class at the end of their first year for a uniform, legal writing assignment. In order to get a better sense of what legal educators can best hope students to accomplish, the appellate briefs selected to be reviewed were identified by legal writing professors as the best in the class. Part I of this article will discuss what many legal educators expect law students to know after one year of legal writing instruction. Part II of this article will discuss the methods used by the author to assess the level of proficiency in legal writing that legal educators can reasonably expect of law students after they complete two semesters of legal writing coursework. This part will also acknowledge the scope and limitations of this study. Part III will provide some context for the appellate briefs reviewed for this assessment. This includes describing the law school course for which students wrote their appellate briefs and the specific legal writing assignment. Part IV will discuss in detail what the students included in this study were able to accomplish in two semesters of legal writing. Part V will consider what remained after the first year for students to learn. Ultimately, this article will consider whether legal educators have realistic expectations of what law students can learn in only one year of legal writing coursework. As many law schools do not require students to take practical legal writing courses after their first year, this discussion further considers whether this limited exposure to formal legal writing training is sufficient to prepare law students for the kinds of legal writing that they will encounter when they begin to practice law.

I. EXPECTATIONS OF LAW STUDENTS’ LEGAL WRITING AFTER THE FIRST YEAR OF LAW SCHOOL

A. Expectations Reflected in ABA Standards

In setting the standards for legal education, the America Bar Association has sent a conflicting message about the study of legal writing. In 2014, the Standards Review Committee made significant changes to the American Bar Association Standards and Rules of Procedures for Approval of Law Schools.17 Significantly, Standard 302 introduced specific “Learning Outcomes” that accredited

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law schools are now required to establish.\textsuperscript{18} According to these new standards, “at a minimum,” learning outcomes are to include “competency” in four areas, including “[l]egal analysis and reasoning, legal research, problem solving, and written and oral communication in a legal context.”\textsuperscript{19} Current ABA Standards therefore acknowledge the need for students to gain “competency” in legal writing while in law school,\textsuperscript{20} and also explicitly require law schools to provide opportunities in their curriculums for students to engage in “faculty–supervised” “writing experience[s]” both in, and after, their first year.\textsuperscript{21} The current ABA Standards, however, do not explain what level of proficiency is required for “competency.” Moreover, the ABA Standards make no specific reference to practical legal writing, and refrain from specifying that a particular type of writing needs to be taught.

The requirement that law students have one writing experience in their first year and one writing experience after their first year is not new, though the prior version of the ABA Standards described them as “rigorous writing experiences” “in a legal context.”\textsuperscript{22} The ambiguity of both the prior and current versions of this provision greatly limits their effectiveness as tools for those advocating for more required practical legal writing courses in the law school curriculum.\textsuperscript{23} Indeed, most law schools have interpreted this provision

\textsuperscript{18} Id. at 15 (Standard 302).
\textsuperscript{19} Id. Chapter 3 explains that law schools are to “establish learning outcomes that shall, at a minimum, include competency” in: knowledge and understanding of substantive procedural law, legal analysis and reasoning, legal research, problem solving, and written and oral communication in a legal context, exercise of proper professional and ethical responsibilities to clients and the legal system, and other professional skills needed for competent and ethical participation as a member of the legal profession. Id. The prior version of Chapter 3 did not reference specific learning outcomes, but did provide that each law student was to receive substantial instruction in a list of areas, including “legal analysis and reasoning, legal research, problem solving, and oral communication.” Section on Legal Education & Admissions to the Bar Standards & Rules of Procedure for Approval of Law Schools, AM. BAR ASS’N 21 (2013–14) (Standard 302) [hereinafter ABA STANDARDS 2013–14] (the Curriculum is now addressed in Standard 303).

\textsuperscript{20} Prior ABA reports on legal education have acknowledged the importance of legal writing. MacCrate Report, supra note 10. The MacCrate Report identified ten essential lawyering skills, including “legal analysis and reasoning” and “communication (oral and written).” Id.

\textsuperscript{21} ABA STANDARDS 2014–15, supra note 17, at 16 (Standard 303(a)(2)). Standard 303(a)(2) provides that law schools are to have a curriculum that requires students to “satisfactorily complete . . . one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised.” Id.

\textsuperscript{22} ABA STANDARDS 2013–14, supra note 19, at 21 (Standard 302(a)(3)).

\textsuperscript{23} See Kenneth D. Chestnek, MacCrate (In)Action: The Case for Enhancing the Upper–Level Writing Requirement in Law Schools, 78 COLO. L. REV. 115, 122–26 (2007) (suggesting that the 2001 amendment to America Bar Association Standard 302 adding an upper–level rigorous writing requirement, was intended to encourage additional practical legal writing instruction). While this Standard has been amended since 2001, the intent of the standard
broadly, only requiring students to take practical legal writing courses in their first year of law school, and permitting, or requiring, students to satisfy the later writing requirement with scholarly writing. Moreover, regardless of the drafters’ intent in requiring two significant legal writing experiences in law school, this requirement reinforces existing expectations among many legal educators that competence in practical legal writing can be achieved with little formal legal writing training.

has not been clarified to indicate that a specific type of writing is required. Indeed, Interpretation 303–2 to current ABA Standard 303 focuses on the intensity of the writing experience rather than the type of writing and now provides that “factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student’s written products, and the number of drafts that a student must produce for any writing experience.” ABA STANDARDS 2014–15, supra note 17, at 17 (Interpretation to Standard 303–2).

24. See Chestnek, supra note 23, at 116 (concluding that the 2001 amendment to the ABA Standards, which added an additional “rigorous writing” requirement, “had little or no effect on how law schools educate law students in practice skills” and “constituted a missed opportunity”). In the most recent ALWD Survey, out of the 178 schools that replied, 164 indicated that students at their law school were required to satisfy an upper–level writing requirement for graduation. Of that 164, however, seventy–one schools indicated that scholarly writing was required, and 92 schools indicated that scholarly writing was not required but could count toward the requirement. By contrast, only thirteen schools reported that advanced practical legal writing was required, and sixty–nine schools reported that it was not required but could count toward the requirement. ALWD SURVEY, supra note 16, at 25.

25. The author recognizes that while the ABA Standards require that students satisfy only two “writing experience[s]” they also now require that students “satisfactorily complete “one or more experiential course(s).” ABA STANDARDS 2014–15, supra note 17, at 16 (Standard 303(a)(3)). In addition, law schools are now required to provide substantial opportunities to students for “law clinics or field placements(s).” Id. While not all of these experiential opportunities can provide formal writing instruction, some may provide additional legal writing opportunities. See Schrup, supra note 2, at n.3 (citing Angela J. Campbell, Teaching Advanced Legal Writing in a Law School Clinic, 24 SETON HALL L. REV. 653, 663 (1993) (arguing that live–client law clinics can provide richer learning opportunities for students than those offered in simulated courses) and Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report, 33 GONZ. L. REV. 1, 33–38 (discussing how clinical teaching can promote advanced writing skills)). Yet the argument can be made that advanced writing in legal clinics is not a good substitute for advanced legal writing courses. See Schrup, supra note 2 (“[W]hile both clinicians and LRW faculty members devote substantial time to teaching, clinicians teach a wider variety of skills and substantive law, while LRW faculty members provide more in–depth coverage of the nuances of writing, research, and legal analysis. To the extent that a clinician even touches upon writing during the clinic’s classroom component, that instruction necessarily must be limited in order to accommodate other topics that arise in the clinical setting . . . .”); Tonya Kowalski, Toward a Pedagogy for Teaching Legal Writing in Law School Clinics, 17 CLINICAL L. REV. 285, 285 (2010) (noting that while “[c]linicians spend many hours every week triaging student writing and coaching their students to produce practice–worthy documents, . . . advanced legal writing is not routinely addressed in clinic seminars and there is no clear methodology for teaching advanced legal writing through clinical supervision.”).
B. Expectations Reflected in Teaching Methods

As discussed above, ABA Standards concerning the study of legal writing only require that students have two faculty–supervised writing experiences in law school, and do not specify the type of legal writing to be taught. Regardless, most law schools require their students to take two semesters of practical legal writing in the first year of law school. Many law schools, however, do not require students to take practical legal writing after their first year. 26 The expectations of law faculty often mimic this curriculum, as students are expected to make significant strides in their first–year legal writing courses. Many law professors expect students to be prepared as they enter their second year, to engage in increasingly complex legal analysis and writing, in a variety of forms, without the need for significant formal instruction and with decreased faculty supervision. 27 Yet the expectations of legal writing professors, who provide formal legal writing training to law students in their first year, are relatively humble.

Legal writing professors tend to expect that students will leave the first year with some knowledge of how to analyze the legal problems that they will be assigned and draft the basic documents that they will be expected to produce, when they first enter the practice of law. Most legal writing professors would describe their first–year required, legal writing courses as introductory in nature. The term “legal writing” often encompasses a wide scope of writing in law practice. One year only affords enough time for students to be introduced to the basic genres of legal writing, analyze a handful of legal problems, and produce a few types of documents. At most law schools, the fall semester required legal writing course focuses on predictive legal writing, while the spring semester focuses on persuasive legal writing. While the range of documents that students write can vary from one law school to another, most first–year legal

26. ALWD SURVEY, supra note 16.
27. See Schrup, supra note 2, at 317 (noting that law school clinicians use teaching methodologies that are “client–centered,” “experiential, reflective and non–interventionist,” and thus less directive than legal writing teaching methods); Kowalski, supra note 25, at 290 (observing that clinical scholarship seems to presume “that all of the fundamentals are covered during the first year and should not have to be addressed again with upper–division students.”); Jessica Wherry Clark & Kristen E. Murray, The Theoretical and Practical Underpinnings of Teaching Scholarly Legal Writing, 1 TEX. A&M L. REV. 523, 524 (2014) (describing the process of engaging in scholarly writing for law students as akin to being “thrown into the deep end,” and noting the “lack of structured feedback and guidance” in this “often–isolating experience”).
writing courses are consistent in requiring that, at a minimum, students learn to write office memoranda and litigation briefs.\textsuperscript{28}

It follows that students can only meet the expectation that they have some knowledge of how to analyze a legal problem and to draft the necessary documents, if they are able to transfer what they learn in their first-year legal writing courses to new legal problems and new forms of legal writing that they later encounter. As such, many legal writing professors place significant emphasis on helping students develop a general approach for engaging in legal analysis and a broad understanding of what makes a legal document effective.\textsuperscript{29} Moreover, most legal writing professors define their teaching goals not in terms of the types of practice documents that their students will be able to write, but rather by their students’ abilities to engage in a learned process as they work to produce practice documents that meet the needs of their intended readers and the expectations of the legal community. As legal writing courses afford only enough time for students to analyze a few legal problems and draft a few practice documents, it makes sense that legal writing professors maintain a focus on teaching students how to engage in necessary analytical and writing processes.\textsuperscript{30}

While focusing on the analytical and writing processes, legal writing professors work to teach students to prepare legal practice documents that align with legal practitioners’ and judges’ ideas of what is effective legal writing.\textsuperscript{31} Yet, legal writing is, in many ways, more of an art than a science. The expectations of legal practitioners and judges are not firmly established, and accordingly the standards of legal writing professors are not perfectly aligned.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} See ALWD \textit{Survey}, \textit{supra} note 16, at 13 (showing that the most popular legal writing assignments in the first year are office memoranda (assigned by 174 of 176 responders or 99%) and appellate briefs (assigned by 125 of 176 responders or 76%).
\item \textsuperscript{29} See Schrup, \textit{supra} note 2, at 317 (characterizing legal writing teaching as placing emphasis on “writing to an institutionalized legal audience, applying set writing processes, and operating within an established discourse community.”).
\item \textsuperscript{30} See Rideout & Ramsfield, \textit{supra} note 4, at 50–51 (discussing the “‘process’ perspective on writing, in which the focus shifts from the text itself to the processes by means of which the writer produces the text’’); \textit{id.} at 51–61 (discussing the process perspective and noting its growing popularity as a method of legal writing teaching, and discussing the socialization process that is a necessary corollary to teaching legal writing to legal novices).
\item \textsuperscript{31} See Jane Kent Gionfriddo, \textit{The “Reasonable Zone of Right Answers”: Analytical Feedback on Student Writing}, 40 \textit{Gonz. L. Rev.} 427, 430 (2005) (“Legal writing classes do not teach students to write to a general audience; they teach students to write to an audience of law practitioners.”); Amy Vorenberg & Margaret Sova McCabe, \textit{Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs}, 2 \textit{Phoenix L. Rev.} 1 (2009) (surveying judges and practitioners in order to compare the demands of legal writing curricula to real world expectations).
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Nonetheless, some consensus has been reached regarding what legal writing professors deem to be effective legal writing, and what “elements” are fundamental to an effective legal document.

One of the best evaluations of legal writing standards comes from a 1994 study by the Law School Admission Council (LSAC), in which researchers attempted to define legal writing by analyzing professor comments on objective legal memoranda prepared by first–semester law students.32 While that study involved predictive writing, the elements identified as important to the professors’ assessments of good writing in that study seem relevant in many respects to other forms of legal writing. Researchers found some disagreement among professors’ assessments of the overall quality of the memoranda studied. Notwithstanding, researchers were able to identify individual elements of legal writing that were most significant to the law professors’ determinations of the quality of the memoranda, and ultimately grouped these individual elements into categories.33

Researchers found that professors’ assessments were determined primarily by the quality of the legal discussion; less attention was placed on other parts of the memoranda, such as the Question Presented and Brief Answer, Statement of Facts, and Conclusion sections.34 It was determined that the application of law to facts, organization, flow, and clarity had the greatest impact on the professors’ assessments of the overall quality of the memoranda.35 The most important category of elements addressed various aspects of the writer’s analysis and reasoning that researchers labeled as “Discussion,” including the writer’s application of law to facts, use of key facts, and inclusion of support for statements, as well as the completeness of the writer’s explanation and the effectiveness of the writer’s analogy and comparison of facts.36 The second most important category addressed various aspects that researchers labeled as “Writing,” including clarity, organization, introduction and

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32. Hunter M. Breland & Frederick M. Hart, Defining Legal Writing: An Empirical Analysis of the Legal Memorandum, in LSAC RESEARCH REPORT SERIES (1996) [hereinafter LSAC STUDY]. For this study, researchers examined 237 legal memoranda prepared by first–semester law students at twelve different law schools. Researchers developed taxonomy of the elements of a legal memorandum from oral and written professor comments to the memoranda.
33. Id. at 24–34.
34. Id. at 32.
35. Id. at 30, 41.
36. Id. at 32.
thesis statements, and flow.\textsuperscript{37} Less weight was given to writing mechanics and other aspects of writing style.\textsuperscript{38}

The expectations of legal writing professors are reflected in their teaching goals and the manner in which they teach. Consistent with the above study, legal writing professors continue to focus on specific elements of legal writing as they provide guidance and feedback to students. In particular, legal writing professors spend significant time teaching students how to organize their legal writing and perfect their legal analysis. Legal writing professors also work with first–year law students to meet the broader goal of producing useful legal documents that meet the needs and expectations of their legal audience and satisfy the purpose for which they are written.

II. METHODS USED TO EVALUATE STUDENT LEGAL WRITING

The goal of this project was to analyze well–executed legal writing documents submitted by law students at the end of their first year in order to get a better understanding of what legal educators can reasonably expect students to learn in their first–year legal writing courses. The appellate briefs reviewed for this article were prepared by first–year law students at the author’s institution—the University of Maryland Carey School of Law—for their final legal writing assignment. Students submitted these appellate briefs at the end of their second–semester, required legal writing class. While the first–semester required legal writing class focused on predictive legal writing, the second semester class—Written and Oral Advocacy (Advocacy)—focused on persuasive legal writing. “Best” briefs were solicited for review, as the goal of this project was not so much to determine the range of performance that could be expected, but rather to establish an upper–threshold of what legal educators can reasonably expect of students’ legal writing after two semesters of legal writing.

Professors of the Advocacy courses are primarily adjunct faculty, who are also current, or former, legal practitioners or judges. Each Advocacy class usually has about twelve students and there are typically about twenty sections. The content of this course is designed to be fairly uniform, and all classes use the same textbook, cover the same topics, and work on the same legal writing assignments.

\textsuperscript{37} Id. \\
\textsuperscript{38} Id. “Mechanics” included citations, editing and proofreading, grammar and usage, punctuation, and spelling. Id. The aspects of style that were given less weight included word choice, precision, tone and attitude, paraphrasing and use of quotations. Id.
The program is coordinated by the author, a legal writing professor and program director, who is a full-time faculty member. The author plans the course syllabus, chooses and prepares the legal writing assignments, and provides teaching materials to the adjunct faculty, including detailed guidance for legal writing assignments.

At the end of the second semester, the author asked Advocacy professors to identify and submit the best briefs that they received from their students. Professors identified a total of fourteen appellate briefs as the best in their classes. In soliciting best briefs from a variety of professors, the author hoped to get an idea of what students can be expected to learn regardless of the professor’s specific teaching style or methods and a more collective representation of what are thought to be exceptional briefs. The fact that Advocacy professors are primarily adjunct faculty, most of whom are also practicing attorneys or judges, suggests that these attorneys’ evaluations might align with those of legal professionals in practice.

The author acknowledges that this study has some obvious limitations. As the appellate briefs considered here were selected by individual professors, and necessarily the selection was somewhat subjective, it is impossible to know if the briefs considered were truly representative of the best work in the class. In addition, not every professor chose to submit a brief, so the briefs collected are not from all Advocacy classes. The author also recognizes that the briefs examined here may not be perfect representations of the work of first-year students. The abilities and performances of law students will vary by law school, and even by law school class. Since this study only includes appellate briefs written by Maryland students, it is not necessarily representative of the work of other law students at other law schools. Furthermore, as the study only covers one law school class, and one legal writing assignment, it is not possible to determine what the students in this study accomplished compared with other Maryland students in other graduating classes, or whether the legal writing assignment used had any impact on the students’ performances.

Even with these limitations, however, this study should still have some relevance for legal educators at other law schools. While examples were drawn from Maryland, this law school is not an outlier with respect to its student body. Furthermore, the fundamental

coverage, teaching methods, and types of legal writing assignments used at Maryland are fairly consistent with those at many law schools.\textsuperscript{40} Indeed, the writing assignments used at Maryland, including the one used for this study, are often modified versions of writing assignments used at other law schools.\textsuperscript{41} Moreover, the goal of this study goes beyond defining successful legal writing for first-year law students. In providing a snapshot of law student achievement in legal writing, this study ultimately serves its intended purpose if it furthers the dialogue about legal writing study in the law school curriculum.

The author determined that the appellate briefs selected for this study should be evaluated both to confirm their overall good quality and to identify various qualities of these briefs for the purpose of comparison. Therefore, the appellate briefs were examined holistically for their individual and relative effectiveness, and also reviewed with specific criteria in mind. After consulting the LSAC study, as well as various legal writing texts and scholarly articles, it was determined that further review of each brief should focus on: (1) the brief’s organizational structure; (2) the quality of legal analysis; (3) the clarity, conciseness, and flow, of the writing (both substantive and more superficial); (4) the persuasiveness of the arguments; and (5) the persuasiveness (and other relevant qualities) of the statement of facts and other non–argument sections.\textsuperscript{42} The identified criteria are discussed more fully below.

With respect to organization, the primary focus was on the writer’s use of headings, roadmaps, and strong topic sentences, as well as the internal structure of the text in the argument section of the briefs. In assessing the quality of legal analysis, particular attention was given to the writer’s synthesis of information, and effective use of case law, including the making of clear connections (including analogies and distinctions) between prior case law and

\textsuperscript{40} See ALWD SURVEY, supra note 16, at iv, v, 7–18.

\textsuperscript{41} The writing assignments used in Maryland’s Advocacy course, including the writing assignment that was the subject of the present study, are often adapted from hypothetical legal problems developed at other law schools and shared in a collective “brief bank.” Maryland professors also contribute legal problems to this bank and those assignment are sometimes used by professors at other law schools.

\textsuperscript{42} LSAC STUDY, supra note 32; Osbeck, supra note 6; MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (2010); MICHAEL D. MURRAY & CHRISTY H. DESANTIS, ADVERSARIAL LEGAL WRITING AND ORAL ARGUMENT (2006); ANTONIN SCALIA & BRYAN A. GARBER, MAKING YOUR CASE—THE ART OF PERSUADING JUDGES (2008); LOUIS J. SIRICO & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION (2001).
the writer’s client’s case. While evaluations of the briefs’ organization and the quality of legal analysis addressed the clarity and conciseness of the writing to some extent, these qualities were also considered independently.

Clarity and conciseness were judged from the perspective of the intended reader, or legal audience. In assessing clarity, the primary focus was whether the writer had formulated a clear message—clearly stating the relevant points that needed to be established for the argument to be successful, and whether the reader could comprehend the writer’s message. For this category, stylistic and grammar issues were also considered, including whether the writer used plain English, simple words, simple sentence and paragraph structures, and proper grammar and punctuation. In assessing conciseness, one consideration was whether the writing was efficient—being as succinct as possible without omitting useful information. Another factor was whether the writing included unnecessary parts, words, or sentences. In evaluating the flow of the writing, the reader’s reaction to the writer’s style was considered. Attention was also given to the various writing techniques employed by the writer, including variation in sentence structure, as well as the effectiveness of the tone and the authenticity of the writing style.

With respect to the persuasiveness of the argument, the reader’s reaction was again considered, but this time the focus was on the reader’s reaction to the argument itself. One specific concern was whether the legal rules and concepts were framed in a persuasive manner in the argument. Another consideration was whether counter–arguments were addressed and negative authority was distinguished, and if so, the manner in which this was done. Attention was also given to whether the writer told a compelling story and connected with the reader on a more personal or emotional level.

In evaluating parts of the brief other than the argument, the primary focus was on the reader’s overall impression of the appellate brief, including whether the brief seemed professional and the writer seemed credible. For many parts of the brief, the main question was whether or not the required information was provided and whether the intended purpose was served. For the statement of facts, the main concern was whether the writer told a persuasive version of events without inappropriately characterizing the facts. Other parts, such as the statement of issues and summary of the argument, were evaluated not only for the usefulness of their content, but also their persuasive quality.
Through a review using the above criteria, the author sought to establish that there was some consensus among professors as to the overall quality of the briefs and the various elements that made them effective.\footnote{The author reviewed the briefs, first making a holistic assessment and then a more–focused assessment. Two Maryland law graduates, who were then third–year students, conducted research and helped to establish the criteria for evaluating the briefs. The appellate briefs were evaluated first by the two student reviewers. The student reviewers independently evaluated each brief, judging it both holistically and with respect to the established criteria. After independent review, these reviewers then met to discuss their individual assessments. While they found some disagreement, they also concluded that their initial evaluations were consistent in many respects. They ultimately wrote a combined report summarizing their general findings and also discussing their assessment of each brief in good detail, considering the above stated criteria. After the author completed her assessment, she consulted the report prepared by the student reviewers and compared her findings and assessment. While there were some disagreements between the author’s evaluation and the students’, the most significant strengths and weaknesses of each brief were consistently identified. Through this process the author was able, to some extent, to test the review process.}

III. CONTEXTUAL INFORMATION FOR THE LEGAL WRITING REVIEWED

Like most law schools, Maryland’s first–year students are required to take two semesters of legal writing courses.\footnote{ALWD SURVEY, supra note 16, at vi, 7 (“Almost all writing programs include required courses in both the first (98% of responders) and second (99% of responders) semesters of the first year of law school.”).} The first–semester course focuses on predictive legal writing and, while this course is not taught uniformly, most legal writing assignments involve the preparation of all or part of an office memorandum. In contrast to the second semester, and different than many schools, the fall semester legal writing course at Maryland is taught by full–time law school professors, who are primarily casebook and clinical faculty, and in conjunction with a casebook course, such as Criminal Law, Torts, Contracts, or Civil Procedure, taught by the same professor.\footnote{Id. at v, 5.} The spring semester Advocacy course focuses on persuasive legal writing, and students are required to prepare both a trial motion memorandum and an appellate brief. As indicated above, the Advocacy course is taught primarily by adjunct faculty in a stand–alone course.

In addition to moving from objective to persuasive writing, students should also experience a shift in difficulty in legal writing assignments over the course of the school year as each new assignment is designed to be incrementally more difficult than the one before it. Students generally begin the year writing a short office memorandum or discussion section of an office memorandum on a
single, discrete legal issue. The law is usually relatively straightforward and students work with little legal authority. By the end of the year, students write a full appellate brief on two distinct legal issues, complying with many of the requirements of actual court procedural rules. The law for persuasive writing assignments is more complex, often involving constitutional issues, and federal statutes and case law. In addition, students work with significantly more legal authority. Students are also assigned to represent opposing parties, but expected to know the arguments for both sides.

The students' work is also expected to become increasingly more independent over the course of the year. Nonetheless, throughout the year, students are given significant support and often work collaboratively in their legal writing classes. Students often discuss their organization and legal analysis for their assignments in class with both their professor and peers. While more guidance is provided on early assignments, even for later assignments in the second semester, it is not unusual for professors to work with students to establish a sound organizational structure for their appellate briefs and identify viable arguments, as well as potential counter-arguments. In addition to receiving guidance in class, students also have the opportunity throughout the year to work one-on-one with their professor and student teaching assistants. The professor and teaching assistants provide written and oral feedback to students on their document drafts throughout the fall semester and on their motion memorandum drafts in the second semester. Professors often provide feedback on common “errors” in class, and the professors and teaching assistants usually meet with students individually during the semester for at least one planned writing conference, and encourage students to schedule additional conferences, as they deem necessary.

In Advocacy, the appellate brief assignment involves the same legal problem as the motion memorandum assignment, though students are required to “switch sides” and represent the opposite party. Nonetheless, the feedback on the motion memorandum is relevant to the appellate brief. It is not expected that students will receive significant, individualized feedback on their appellate brief drafts, and students often only turn in their final drafts of their appellate briefs, not the preliminary drafts, to their professors.

One way that Maryland varies from many other law schools is in its approach to teaching research. Research is taught independently of legal writing in an accelerated course in the first half

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46. Id. at 11.
of the second semester. It follows that in both semesters, students engage primarily in closed–research legal writing assignments, for which much or all of the legal authority they are to use for a given assignment is provided to them. For the final appellate brief assignment, students are provided with sufficient authority to complete their assignment successfully, but are often given the option of doing additional research if they choose.

The final appellate briefs reviewed by the author addressed a legal problem involving an arrest of a hypothetical client, John Smith, in the doorway of his home. An anonymous tip to local police accusing Smith of selling illegal drugs prompted the arrest. The parties’ arguments addressed whether police violated Smith’s constitutional rights when they reached across the threshold of his home to arrest him. Prior to his arrest, the police had not obtained a warrant. In addition, the briefs addressed an alternative argument that focused on whether the police had probable cause to arrest Mr. Smith. For the legal writing assignment, students were provided with a number of documents including a case record that included court documents, relevant legal authority, and court procedural rules.

IV. WHAT LAW STUDENTS WERE ABLE TO LEARN IN TWO SEMESTERS OF LEGAL WRITING

While the author attempted to establish specific criteria for assessing the student briefs, the evaluation of the students’ legal writing inevitably remained subjective to some extent. That said, the author’s assessment was in accord with the initial assessments of the professors who selected the briefs, to the extent that the author agreed that every best brief submitted for review was overall an effective document. Of course, each brief had its strengths and weaknesses, and no one appellate brief was most effective in every respect. A common strength of all of the best briefs was their organization and clarity, as well as their persuasiveness. All briefs clearly explained the more general rules that governed the issues, and structured their arguments around the relevant law. One area in which appellate briefs varied considerably was with respect to the writers’ explanations of more specific aspects of the relevant rules of law, including the writers’ use of prior cases in their arguments. Some students included more information in their case descriptions and others provided less, yet both approaches seemed effective in many circumstances. The effectiveness of the arguments seemed to depend less on this factor, however, and more on how
well writers synthesized information and explained the connections, and differences, between the prior cases and their client’s case.

Below are some specific examples from the Argument and Statement of Fact sections of the students’ final appellate briefs. To make these arguments easier to follow, all examples are from appellate briefs written on behalf of the defendant, Mr. John Smith. For comparison, examples from other less effective briefs have also been included.

A. Clear, Concise Summaries of the Arguments

Most of the appellate briefs contained summaries of the arguments that were concise and laid out the legal positions of the parties fairly clearly. Writing a summary can be challenging for students as they need to be able to boil their argument down to a few key legal points and facts that they present clearly and efficiently. Even more, students need to figure out the best way to present these arguments so that they are persuasive to the reader. Some of the summaries, like the example below, seemed to focus primarily on stating the relevant legal rules, but also addressed the key facts of Mr. Smith’s case:

Example 1: Police violated John Smith’s Fourth Amendment rights by crossing the threshold of his private home without a warrant during the course of his arrest. Smith’s arrest was not made lawful when he opened the door of his home to police because he retained an expectation of privacy and did not acquiesce to the authority of officers . . . . Absent exigent circumstances or consent, the threshold of one’s home cannot be crossed without a warrant. [Cite]47 Although what a person knowingly exposes to the public is not a subject of Fourth Amendment protection, [Cite] an individual’s right to privacy is not completely relinquished when one opens the door after being summoned by a police officer’s knock. [Cite] This privacy right may be lost, however, if an individual submits to police authority. [Cite]

Other summaries, like the example below, incorporated more case facts, but provided less information about the law:

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47. For brevity, most citations have been omitted from the examples.
Example 2: The District Court did not err in granting defendant John Smith’s motion to suppress the evidence because Fourth Amendment violations occurred. Police violated the Fourth Amendment when they crossed the threshold into John Smith’s home in order to arrest him, when the police did not have a warrant. There is a firm line at the entrance to the home which cannot reasonably be crossed without a warrant.

B. Synthesized Information

The best briefs benefitted from useful topic sentences and rule statements that summarized the relevant law. The following examples come from a part of the argument where students discussed prior cases involving doorway arrests, including cases where the defendant came to the door in response to a police officer’s knock. The factual similarities and differences among these cases were not obvious at first. Students, therefore, had the task of identifying commonalities and distinctions among the prior cases. Some students did an excellent job cobbling together a rule statement from the existing cases and then explicitly stating it:

Example 3: Circuit courts have diverged in deciding the outcome of circumstances where a suspect is not already present in the doorway when police arrive. The Fourth Circuit follows the approach that an expectation of privacy is not forfeited when one exposes oneself to public view after police summon the individual by command or through a knock at the door. [Then, citing and describing United States v. McCraw, 920 F.2d 224 (4th Cir. 1990)].

Most of the students included synthesized rule statements in their appellate briefs, though some were more useful than others. Occasionally, a student did a good job describing the holding and facts of a case, but the argument was less effective because the student did not place a synthesized rule statement before the discussion. For example, instead of providing a synthesized statement of the relevant law, one student provided only the following much less useful sentence before launching into a discussion of the case: “Support for the Payton [v. New York, 445 U.S. 573 (1980)] [the seminal doorway arrest case] decision is found in McCraw.”
C. Useful Case Descriptions

For one part of the argument, the relevant authority included prior cases with facts that were often similar to Mr. Smith’s case facts. So that they could later analogize or distinguish these cases from their client’s case, it was important that students clearly describe the facts of the prior cases. For example, students needed to distinguish between cases where courts found that arrests in the doorway of one’s home were constitutional compared to those where arrests were deemed to be unconstitutional. The surrounding facts, including how the defendant came to arrive at the door, impacted the outcome of these cases. In the example below, the writer makes clear under what circumstances police have been found not to violate a defendant’s privacy (when the defendant opens the door and consents) and when they have (when the defendant opens the door but does not clearly consent):

Example 4: The police do not violate an individual’s Fourth Amendment rights when that individual answers a knock on the door and explicitly consents to a search. [Cite] (discussing that after Defendant relinquished his right of privacy and was arrested with probable cause by the police officer, Defendant gave explicit written and verbal consent to the police officers allowing a search). However an individual does not surrender his expectation of privacy nor consent to arrest by solely opening the door to his home. [Cite to McCraw] (holding that Defendant did not relinquish his expectation of privacy in his hotel room when he opened the door slightly to determine the identity of the police knocking on the door).

Another student also discussed the court’s holding in McCraw, but did so less effectively because he did not include a contrasting case or point out distinguishing facts. In the example below, the writer chose to ignore the factual differences between the facts in McCraw and those in Mr. Smith’s case (for example, that the defendant opened the door only slightly in McCraw compared with Mr. Smith fully opening the door in the present case), though these factual differences would likely be noted by a court:

Example 5: In McCraw, one of the defendants opened the door to his hotel in response to a police knock. The Court held that “a person does not surrender his expectation of privacy nor consent to the officer’s entry by so doing, and that his arrest . . . is contrary to the [F]ourth [A]mendment.” [Cite]
D. Clear Comparisons and Distinctions of Prior Cases

In arguing that Mr. Smith’s arrest in the doorway of his home was unconstitutional, students had to discuss conflicting rules set forth in competing authority. The United States Supreme Court’s decision in *Payton v. New York*, 445 U.S. 573 (1980) established the doorway of the home as a line that police cannot cross to affect a routine warrantless arrest. In an earlier case, *United States v. Santana*, 427 U.S. 38 (1976), the Court had allowed police to cross the threshold and enter a home to affect an arrest where a suspect was standing in the doorway when police arrived holding what appeared to be contraband and retreated into the home when she encountered the police. As such, that case involved not only the viability of an arrest in the doorway, but also the police’s right to enter the home when exigent circumstances existed. Many students did an excellent job discussing these two cases and showing the similarity and distinctions between those cases and their client’s case facts.

Example 6: Unlike, Mr. Smith who merely stood inside his doorway while he responded to a knock, the suspect in *Santana* had voluntarily positioned herself in plain view of a busy Philadelphia street and “was exposed to the public view, speech, hearing and touch as if she had been standing completely outside her house.” [Cite] [In *Santana*,] [t]he suspect attempted to thwart an arrest begun in public by retreating into her home and, by virtue of this “hot pursuit,” police were not required to obtain a warrant before entering the suspect’s home [Cite] . . . . Other [C]ircuits have distinguished the application of *Payton* from *Santana* and its progeny by focusing on whether the actions of the suspect reveal any disregard for his privacy expectation.

One student took a somewhat different approach, but likewise effectively compared and distinguished the facts of the prior cases:

Example 7: *Santana* only justifies a warrantless entry into the home because of exigent circumstances—the “hot pursuit” of a suspect. [Cite] In *Santana*, the defendant fled from a public place into her home after the police identified themselves and sought to place her under arrest. [Cite] (holding that the facts of the case were distinguishable from *Santana* on the grounds that the defendant opened the door in response to a knock). In
this case Mr. Smith did not flee from the police and the government has conceded that the police entry in this case was not justified by exigent circumstances.

Another student did a fairly good job distinguishing the facts of Santana and made the same general argument as the students above. This later argument was arguably less effective, however, because the student failed to connect the distinguishing facts of Santana to the Court’s holding in that case. Moreover, while the writer included in his discussion of Santana that the case involved exigent circumstances, he did not state explicitly that there were no exigent circumstances in Mr. Smith’s case. While the lack of exigent circumstances was implied and could be understood from the context, an explicit statement would make the argument more effective:

Example 8: Santana was standing in her doorway conducting illegal business activities when the police arrived on the scene. When the police moved to arrest her she retreated into her home and the police were forced, due to exigent circumstances, to follow in hot pursuit. Mr. Smith was not standing in the doorway when the police arrived. The arrest took place in the doorway only after Mr. Smith came to the doorway in response to a police knock. [Cite] But for the police knocking on his door, Mr. Smith would not have been in his doorway, and while he was in his doorway Mr. Smith made it clear via verbal communication with the police that he did not consent to their presence without a warrant.

E. Effective Use of Relevant Language in Opinions

As indicated above, students were provided with sufficient legal authority to complete the legal writing assignment. Some students found some excellent language in the cases provided that they used to enhance their arguments. Where students found helpful case language, this tended to add a bit of “punch” to their arguments and add to the overall persuasiveness of their arguments. In their arguments, students were expected to address the fact that, in Mr. Smith’s case, the police’s intrusion into the home was minimal. The following examples compare two students’ use of helpful case language. In the first example, the writer used the case language at the end of the relevant part of the argument to drive the point home:
Example 9: The unlawful conduct by police in the aforementioned cases and the conduct by [] [p]olice officers in the present case are one and the same . . . Although only Detective Smalls’ arms and hands crossed Smith’s threshold, for Fourth Amendment purposes, a breach no matter how small, is a breach. [Cite] (“[I]nterruption into the home without a warrant by even a fraction of an inch is too much.”).

Some students did not use this language in their briefs. As the police intrusion into the defendant’s home in the present case was minimal, however, the above language seemed very appropriate to quote. Yet, as the next example shows, even where other students used this same language, the placement of the quote affected its impact. One student used this quote at the beginning of the argument in a more general discussion that did not address the specific facts of Mr. Smith’s case. The language as placed seemed helpful to the analysis, but its use was less dynamic:

Example 10: The Court has in Payton and other cases concluded that this privacy protection casts a bright line over the doorway of one’s home, which, absent a warrant, consent or exigent circumstances, police shall not breach. [Cite] (prohibiting a warrantless police invasion of a home “by even a fraction of an inch”).

F. Persuasive Presentation of Facts

Persuasive authority on doorway arrests provides that a defendant, who is told by police that they are at the door to arrest him and then opens his door, has acquiesced to his arrest. Thus, in arguing that Mr. Smith relinquished his privacy when he opened his door to a police knock, effective advocates for Mr. Smith sought to suggest that the case evidence did not establish that Mr. Smith knew that police were at his door when he responded to their knock. Moreover, because the courts draw a bright line of privacy at the threshold of the home, effective advocates emphasized that Mr. Smith was standing in his home throughout his arrest.

In the following example, the writer did a good job of generally stating the relevant facts and being explicit that Mr. Smith remained in the doorway during his arrest. This writer also included the “bad fact” that, according to police testimony, Mr. Smith peered out the window prior to opening the door, but presented the officer’s testimony on this point in a manner that questions its validity (e.g.
someone who looked like Mr. Smith peered out the window). However, the writer says nothing about the source of this statement (e.g. “according to the police”) and thus appears not to contest the basic facts of what occurred (e.g. someone who looked like the defendant peered out the window):

Example 11: A little while later, at about 6:20 p.m., the officers went to Mr. Smith’s house unannounced, and without a warrant. [Cite] Mr. Smith’s car was parked in the driveway, and no one was outside. [Cite] All the curtains were drawn, and the door was shut. [Cite] The officers knocked on his door without identifying themselves and someone who looked like Mr. Smith peered out of the window. [Cite] . . . . After a few seconds a man matching Mr. Smith’s description opened the front door while remaining in the doorway. [Cite]

In the example below, the writer also does a good job of presenting the facts in a manner favorable to Mr. Smith. However, this writer chose to omit the “bad fact” that Mr. Smith is purported to have looked out the window before he opened the door. While a strategic choice, a court may not appreciate what it may interpret to be the writer’s lack of candor:

Example 12: On the evening of November 16 [], two members of the Police Department, including Detective Mark Smalls, arrived at the home of Appellee John Smith. [Cite] The yard was empty, the door was shut, and windows were closed and covered by curtains. [Cite] Mr. Smith answered an unannounced knock at his door to find the two police officers. [Cite] Upon recognizing the officers, and while standing inside the doorway of his home, Mr. Smith requested that unless they had [a] warrant, he would like for the officers to leave his property . . . .

Mr. Smith remained in the threshold of his home during this exchange [with police]. [Cite] [Detective] Smalls then reached his hands and arms across the threshold of Mr. Smith’s home to grab him[,] spin him around, and push him against the doorjamb before handcuffing him; this all occurred while Mr. Smith remained inside his house. [Cite]

The above examples demonstrate that the authors of the best appellate briefs were able to develop some level of proficiency in legal writing by the end of their first year. These students were able to draft appellate briefs that were considered to be effective when
evaluated holistically, and also exemplify, to varying degrees, the identified qualities of a good brief.\textsuperscript{48}

V. WHAT LAW STUDENTS STILL NEED TO BE TAUGHT AFTER TWO SEMESTERS OF LEGAL WRITING

The above review paints a fairly optimistic picture of what law students can learn in their first–year legal writing courses. Those students whose appellate briefs were identified as among the best in the class, were able to produce legal writing that was judged to be effective overall and to possess many of the elements associated with effective legal writing. These briefs demonstrate the students’ good grasp of the applicable law, and familiarity with the processes of legal decision-making and the conventions of legal practice. Moreover, the work of these students reflects an effective thinking process for analyzing a legal problem. The examples show that the students who authored these briefs made a number of thoughtful decisions in the course of their writing, for which they clearly considered their legal audience and writing purpose.

The above study suggests that it is realistic for legal educators to expect that law students will finish their first year with some knowledge of how to analyze the legal problems that they will be assigned to evaluate and draft the basic documents that they will be expected to produce, when they first enter the practice of law. It seems less clear, however, whether it is reasonable to expect that students who successfully complete their first–year legal writing courses will be able to engage successfully in increasingly complex legal analysis and writing, in a variety of forms, without the need for significant writing guidance and instruction. While the achievements of these students should be celebrated, the effective legal writing in the reviewed student briefs must be viewed in the proper context. The overall high quality of work presented should not be interpreted as an indication that these students have mastered legal writing or are even competent in this skill after taking their first–year legal writing courses.

\textsuperscript{48} In preparing this article, the author also reviewed briefs from other students that were not identified as best briefs, including some briefs that received average or low grades. Even among these briefs, the author found that most of the students’ briefs were well organized, though these briefs were generally less clear and less concise, and many were not particularly persuasive. Like the writers of the best briefs, these writers attempted to synthesize information and make connections between their case and prior cases. Though many of the writers of the other briefs did this less effectively, most were able to produce, among other things, persuasive statements of facts, some synthesized rule statements, and some made comparisons and distinctions between the present case and prior cases.
In evaluating the work of first-year students, it is important to understand what their accomplishments in legal writing do and do not represent. To this end, it is important to consider the professional context in which effective legal writing is done. As discussed more fully above, effective legal writing requires more than just strong technical writing ability. To be successful in this task, writers must be able to analyze legal problems and to communicate their analysis in a manner that will help them achieve a particular goal. As legal novices, new law students begin to engage in legal writing with little context and knowledge from which to work. Students are asked to write a document that meets the needs of a legal audience and serves a specified purpose, while they are just developing an understanding of the roles of legal professionals and the methods by which legal decisions are made. For many professors of legal writing, it can feel as if they are “trying to teach the wrong people the wrong material at the wrong time.” It follows that legal writing professors must provide significant guidance and feedback to students, especially early on. With their professors’ help, legal novices become not only better communicators, but also better legal thinkers.

To help facilitate the learning of the students, who are gaining knowledge about law and legal practice while writing in this context, it is important for legal writing professors to carefully plan and execute their students’ writing assignments. This is true even at the end of the first year. For example, for the appellate brief assignment, the legal issues were considered carefully to ensure that the selected issues were appropriately difficult for new legal writers. Discrete legal issues were selected in order to contain the scope of the problem. More important, throughout the process of writing their appellate briefs, students had the benefit of receiving

49. Ian Gallacher, Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation, 39 Akron L. Rev. 151, 168 (2006) (describing the process of teaching legal research to students who have not yet mastered the first-year curriculum as somewhat comparable to “trying to teach the wrong people the wrong material at the wrong time.”) (quoting Robert C. Berring & Kathleen Vanden Heuvel, Legal Research: Should Students Learn It or Wing It?, 81 Law Libr. J. 431, 441 (1989)); see Felsenburg & Graham, supra note 3, at 257 (noting that new law students often lack “any context in which to place the fundamental legal skills” they are being taught).

50. See Rideout & Ramsfield, supra note 4, at 45–46 (“[W]riting is an integral part of thinking and cognitive development.”) (citing Janet Emig, Writing as a Mode of Learning, 28 C. Composition & Comm. 122 (1977) (discussing how writing helps writers develop their thoughts)).

51. See Venter, supra note 7, at 626–28 (2006) (explaining that teachers of legal writing need to be explicit as they teach students analytical skills in order to better help students become experts in analysis).
extensive guidance and feedback. The relevant issues were identified for the students, significant authority was provided, and students collaborated to determine the best arguments and organizational structure. Under these circumstances, students had only a limited opportunity to make their own decisions as to how best to frame and support their arguments, and to develop their own writing voice. Thus, even the students’ final appellate briefs do not fully represent the level of difficulty of work that students will do when they enter practice, or mimic the circumstances under which students will be writing.

Moreover, the fact that students have been able to produce effective legal briefs in their first–year courses, does not necessarily mean that they will be equally successful in doing similar work for another course. While many law professors expect students to be able to engage more independently in new practical legal writing tasks after their first year, it may be difficult for many students to recognize the connections between the work that they did in their first–year legal writing courses and what they are later called upon to do. To be successful in addressing new legal problems and preparing different types of legal documents, students will need to be able to apply their previously acquired knowledge. Once a new legal writer grasps an understanding of legal writing in one context, they still have to transfer this knowledge to other contexts. While often assumed otherwise, such a transition is not always easy for students.

Contrary to what many legal educators expect, even

52. Teresa Godwin Phelps, The New Legal Rhetoric, 40 Sw. L.J. 1089, 1098 (1986) (“Although many in the legal profession see legal writing courses as remedial, teachers of advanced writers generally concur that first–year law students possess ‘flat competence,’ which is the ability to produce, for the most part, a document not marred by mistakes of spelling or grammar. Nonetheless, their writing lacks an authentic voice . . .”) (quoting Maxine Hairston, Working with Advanced Writers, 35 C. COMPOSITION AND COMM. 196, 198 (1984)); Terrill Pollman, Building a Tower of Babel or Building a Discipline? Talking About Legal Writing, 85 Marq. L. Rev. 887, 892 (2002) (“The greatest opportunity law offers is not that one can learn to manipulate forms, but that one can acquire a voice of one’s own, as a lawyer and as a mind; not a bureaucratic voice, but a real voice.”) (quoting James Boyd White, From Expectation to Experience: Essays on Law and Legal Education 25–26 (1999)).

53. See Laurel Currie Oates, I Know That I Taught Them to Do That, 7 Legal Writing: J. Legal Writing Inst. 1, 236 (2001) (noting the concern expressed by teachers “that students are not able to recognize that information acquired in one class is also applicable in another class.”); Schrup, supra note 2, at 303 (arguing that differences in teaching methods and the failure to collaborate “can ultimately hinder [students’] seamless learning from the first–year program into advanced, clinic–based writing.”); Kowalski, supra note 25, at 285, 288–295 (discussing the “transfer of learning” phenomenon where the mind fails to recognize “applications for previous learning in new situations due to the change in context.”).
when students successfully complete a task, they often have difficulty accessing their knowledge when they change contexts.\footnote{See Kowalski, supra note 25, at 289 (noting that “[n]ot only do students often overlook applications for knowledge obtained in previous situations, they also sometimes appear to regress when asked to change contexts.”) (citing Joseph M. Williams, \textit{On the Maturing of Legal Writers: Two Models of Growth and Development}, 1 \textit{LEGAL WRITING} INST. 1, 6 (noting that regression may occur when students are introduced to new experiences) and Sheila Rodriguez, \textit{Using Feedback Theory to Help Novice Legal Writers Develop Expertise}, 86 U. DEF. MERCY L. REV. 207, 236 (2009) (describing student writing regression during transition periods)).}

Legal writing professors see examples of this every year when students move from their first semester legal writing course to their second. Some students have difficulty understanding which skills developed in their first—semester course focused on predictive legal writing, are relevant to their second semester course focused on persuasive legal writing. To help students make this transition, legal writing professors often engage students in a discussion of which skills are needed for both tasks, such as good organization, synthesized discussions of the relevant legal rules and cases, and useful case descriptions that are appropriately detailed. Moreover, some professors introduce persuasive legal writing problems to students using a familiar process that the students employed in their predictive writing—evaluating the strengths and weaknesses of each sides’ potential arguments.

Sometimes transfer issues can be even more acute. Many students have difficulty as they attempt to organize arguments that apply different legal standards or types of legal tests, such as the weighing of factors as opposed to the satisfaction of elements. Even such a subtle shift from one structure of legal analysis to another, can challenge the novice legal writer. It follows that transitions to other types of legal writing, like scholarly writing, will necessarily be met with some challenges as the connections between these very different writing assignments are much more tenuous.\footnote{See Murray, supra note 27, at n.115 (explaining that students need to be made aware that a transition to scholarly writing is not as easy as other legal writing transitions, and pointing out the uniqueness of the need for the writer to find and develop a thesis).} While some skills are important to both practical and scholarly legal writing, such as writing clearly and concisely, it is also true that the audience and purpose of scholarly writing differs significantly from that of practical legal writing, and the legal writer must often make substantially different analytical and writing choices.

Professors are often dismayed when students are unable to apply what they have already learned to new situations. Such difficulty
in transferring knowledge, however, is part of the learning process. For novices, the recognition of patterns and routines is simply more difficult than it is for experts, and this should be anticipated. While many legal educators treat legal writing as a singular activity, legal educators will better meet the needs of their students if they recognize that legal writing takes various forms, covers different subjects, speaks to different audiences, and serves different purposes. Students will be better served if professors acknowledge the breadth of legal writing and avoid setting expectations for them based upon a one-size-fits-all perspective.

While the above study focused on exemplary legal writing and sought to illustrate the best that legal writing professors can realistically expect of their students, it must also be acknowledged that not all students will be able to reach this level of proficiency when they complete their first year. Many students, despite their best efforts, simply do not fully grasp legal writing by the end of their first year of law school. As two legal scholars aptly pointed out, becoming an effective legal writer is a journey that will naturally take longer for some than others:

Students cannot have the law and legal patterns of analysis drilled into them so much as they must acquire them, in a manner analogous to the ways in which other students learn a foreign language. When students have difficulty writing legal analysis or making strong legal arguments, they are not necessarily hindered by poor thinking so much as they are struggling with the unfamiliarity of legal discourse and striving to master their entry into it. To label them as faulty writers is misleading; they are more like travelers, searching for a destination that is sometimes unclear to them and arriving at that destination at different rates.

56. See Kowalski, supra note 25, at 290 (discussing the problem of transfer of knowledge and noting that the correct question is “how can [professors] help students to transfer their learning . . . ?”) (citing SARAH LIBERMAN, LEX MACDONALD & STEPHANIE DOYLE, THE TRANSFER OF LEARNING; PARTICIPANTS’ PERSPECTIVES OF ADULT EDUCATION AND TRAINING 1–8 (2006)).

57. See Schrup, supra note 2, at 315–16 (discussing experts ability “to detect and remember patterns in complex phenomena that are essentially invisible to novices”) (quoting Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory, 45 J. LEGAL EDUC. 313, 344 (1995) (explaining that experts are more able to recognize and remember patterns)).

58. Id. at 63–64, n. 105 (“This is evidenced most clearly by the phenomenon of different first-year law students’ getting the hang of legal analysis at different points during the first year (and some not until the second year). Using the journey metaphor, we do not intend to
For those students who are not as successful in their first–year legal writing courses, it seems that their problems with legal analysis and writing may be compounded in later years. These students’ less impressive work in legal writing may signal that they did not fully understand the relevant law and aspects of legal practice needed for successful legal analysis, or that even if they did, they were unable to communicate their analysis in a manner that is effective in a legal practice context. Their work suggests that they need additional practice engaging in legal analysis and writing under the close supervision of professors with expertise in its teaching. When these students leave the legal writing classroom, most legal writing professors would not be surprised to learn that they struggle as they confront new legal problems and writing assignments that vary in substance and form from the work they previously did, with less expert guidance. For example, these writers may not adapt easily when they are called upon to make additional considerations in their analysis and writing as they take on the additional responsibility of navigating attorney–client relationships in their legal clinics.

CONCLUSION

Professors’ concerns about student writing may stem in part from their observations that students are entering law school increasingly less prepared. However, legal educators must be careful not to overestimate the extent of this problem. Many problems with students’ legal writing have long been assumed to be indicative of students’ lack of general writing ability, rather than being acknowledged as unique to the type of analysis and writing that is required in legal practice. Students’ initial struggles with legal writing often have less to do with technical writing skills, and more to do with implying that all students are equal in their traveling abilities; different students arrive at expertise at different speeds (and, occasionally, do not arrive). That is, different students master the conventions and strategies of an unfamiliar discourse, and especially of a difficult one like law, at different rates, drawing upon different abilities and prior learning experiences. The point, however, is that their mastery is largely developmental, and especially in the early stages of law school, marked differences in performance can in many ways be attributed to different positions along a developmental scale—or along the journey.

59. See Lysaght & Lockwood, supra note 4; Rideout & Ramsfield, supra note 4.
60. See Schrup, supra note 2, at 317 (discussing the differences between legal writing and clinical teaching methodologies and explaining how legal writing professors necessarily focus more on an “institutionalized legal audience” and that “teaching styles must by their very nature be directive,” while clinical faculty embrace “progressive, client–centered lawyering” and adopt teaching methods “that are experiential, reflective, and non–interventionist.”).
61. See Rideout & Ramsfield, supra note 4, at 75 (“A consequence of the formalist view is that legal writing programs may erroneously set the goal of attempting to prepare students
the process of introducing these legal novices to the new experience of writing in a legal context.\textsuperscript{62}

More important than identifying appropriate expectations, is the task of trying to figure out how legal educators are to address students who, despite their best efforts, are unable to reach a sufficient level of proficiency in legal writing in only two semesters. The ABA has recognized the importance of teaching legal writing by requiring law schools to establish learning outcomes designed to help students gain competency in this skill. In order to meet the needs of all students, law schools must establish goals that go beyond introducing students to legal analysis and writing. Students will benefit if more law schools commit to exposing their students to increasingly complex legal analysis and engaging students repeatedly in the worthwhile activity of writing, with the needed level of faculty supervision. Perhaps, instead of setting expectations that are realistic for some, but not all law students, more law schools can take a closer look at what their students need to learn in order to become sufficiently prepared to write when they enter legal practice, and adapt their existing curriculums in order to better meet this worthwhile goal.

\textsuperscript{62.} See Williams, \textit{supra} note 54; Rodriguez, \textit{supra} note 54.

for law practice in only one year. When the program fails to meet this goal, questions are raised; but this question–raising ignores students' novice status and the time it takes each student to become properly socialized.


Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence

Ruth Vance & Susan Stuart*

“[Over]confidence is going after Moby Dick in a rowboat and taking the tartar sauce with you.”1

INTRODUCTION

The legal academy and others in higher education know that the academic skills of many of their students are lacking, both at the time of matriculation and at graduation.2 Indeed, it has been shown that the learning gained through four years of college is precious

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little for most students.\(^3\) This state of affairs has been the norm for the last several years and is verified by objective studies and personal experience.\(^4\) Hence, many matriculating law students arrive at law school woefully underprepared\(^5\) at the same time legal educators are challenged with the task of producing practice–ready graduates.\(^6\)

The likely cause of law students’ underpreparedness is a unique combination of factors that came together while the Millennial Generation matured. For starters, Millennials’ K–12 education was affected by the No Child Left Behind Act\(^7\) where teachers taught students to pass standardized tests, and higher education lowered its once rigorous standards, resulting in a significant number of college students graduating without learning the higher–level cognitive skills necessary to deal successfully with complex issues.\(^8\) Add to that the dawn of the digital age at the Millennials’ birth,\(^9\) making cell phones, the Internet, and social media necessities of modern life. The ubiquitous habit of multi–tasking\(^10\) was not far behind, bringing with it a shortened attention span\(^11\) due to the pruning of brain circuits used for sustained, deep thinking.\(^12\) The pruning of old neural circuitry occurred to make way for the strengthening of the brain circuits used for the quick shifts of attention that enable multitasking.\(^13\) Finally, Millennials were raised and protected by Baby–Boomer parents and society to avoid failure,\(^14\) have high self–esteem,\(^15\) be confident,\(^16\) and believe that they are special.\(^17\) These

\(^3\) Id.
\(^4\) Stuart & Vance, supra note 2, at 57–59.
\(^5\) Id. at 41 (citing ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION & A ROAD MAP 8 (2007)).
\(^6\) Stuart & Vance, supra note 2, at 46.
\(^8\) Stuart & Vance, supra note 2, at 55, 61.
\(^9\) DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 26 (2009).
\(^11\) Id.
\(^12\) NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 34 (2010).
\(^13\) Id. at 10.
\(^14\) Id. at 140.
\(^15\) Stuart & Vance, supra note 2, at 66–67.
\(^16\) Id. at 62.
\(^17\) Id. at 62 (citing JEAN M. TWENGE, GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE 26 (2006) (“Even the book sponsored by the California Task Force to Promote Self–Esteem and Personal and Social Responsibility . . . found that self–esteem isn’t linked to academic achievement, good behavior, or any other outcome the Task Force was formed to address.”)); ALSOP, supra note 10, at 102.
traits, in turn, have led to Millennials’ overconfidence, high expectations, and sense of entitlement.

The good news is that underprepared law students can learn critical thinking and writing skills; our brains’ plasticity makes it possible for anyone to learn new skills. For those who are willing to put forth the effort, the cognitive skills required for being a successful law student and competent lawyer are attainable. Educators are designing teaching methods to assist these students. But what of the subset of underprepared law students who are nonetheless confident they are competent in the requisite skills despite evidence to the contrary? How does one get an overconfident law student to accept critical feedback and learn from it when that student is convinced he needn’t change a process that has helped him reap good grades over his lifetime? How do educators inculcate a will to change in a student that is not motivated to change? We don’t pretend to have all the answers, but this phenomenon of the extremely overconfident incompetent student is something the legal academy has to confront as long as underprepared students keep entering law school.

Realizing that the legal academy is faced with increasing numbers of underprepared law students and that we must bring those students “up to speed” if we are to graduate practice–ready lawyers, means that we must gain an understanding of the reasons that


Neuroplasticity is "[t]he brain’s ability to reorganize itself by forming new neural connections throughout life. Neuroplasticity allows the neurons (nerve cells) in the brain to compensate for injury and disease and to adjust their activities in response to new situations or to changes in their environment. Brain reorganization takes place by mechanisms such as “axonal sprouting” in which undamaged axons grow new nerve endings to reconnect neurons whose links were injured or severed. Undamaged axons can also sprout nerve endings and connect with other undamaged nerve cells, forming new neural pathways to accomplish a needed function.

Id.
23. See infra text accompanying footnotes 95–108.
many law students are underprepared. This understanding includes their cultural background; the neurological underpinnings of learning, unlearning, and critical thinking; and the psychological phenomenon of overconfidence known as the Dunning–Kruger effect in order to determine the best means of educating this group. Part I of this Article reviews the several reasons many of today’s law students are underprepared and describes the traits of the Millennial generation, the largest group of current law students, and goes on to show how their traits of feeling special, entitled, and confident can lead to narcissism, high expectations, and overconfidence. Part II delves deeper into the trait of overconfidence by exploring the Dunning–Kruger effect, namely that “overconfidence in one’s skills [is] often a hallmark of the incompetent” and its relationship to underprepared law students. Finally, Part III shares strategies to help those individual students exhibiting the overconfidence–incompetence phenomenon and the institutional changes that would help law students become better self–evaluators and more competent law students and future lawyers.

I. THE GENESIS OF THE PROBLEM: “IGNORANCE IS BLISS”

Various data show a decline in the academic skills of American youth. Their skills also fall far below those of youth from other countries. The Department of Education issued a report in 2007 showing that students’ scores in reading to perform a task, to gather information, and to experience literature fell from 1992 to 2005. The largest decline, twelve percent, was in aptitude for literary reading. Other studies conclude that many high school students cannot “synthesize or assess information, express complex thoughts, or analyze arguments.” Sixty percent of American fifteen–year–olds score at or below the most basic level of problem–

25. See generally Stuart & Vance, supra note 2, at 75–80, n.253–99 (suggesting that intense training in reasoning skills will rewire the brain to sustain the focus necessary for deep thinking and problem–solving). How the brain can be retrained to enable the mastery of skills needed for success as a law student and as a practicing lawyer is left for a future article.
26. See infra Parts II and III.
27. See infra text accompanying footnotes 31–94.
28. See infra text accompanying footnote 105.
29. See infra text accompanying footnotes 137–180.
30. See infra text accompanying footnotes 181–229.
32. CARR, supra note 12, at 146.
33. Id.
solving, while all American fifteen-year-olds rank twenty-fourth out of twenty-nine developed countries. American parents, employers, and leaders lament this situation. Sociologists, psychologists, educators, and scientists have tried to determine why young Americans’ academic skills have been in free fall.

The Millennials are products of this American education system and teachers who “taught to the test” so that their students could meet the short-term goal of passing the standardized tests mandated by the No Child Left Behind Act. Teachers no longer had time to teach fundamental critical thinking, writing, and problem-solving skills. The majority of state-approved standardized tests still focus on factual knowledge, not mastery of fundamental skills. Most primary and secondary education does not instill “a love of learning for learning’s sake,” which would supply the motivation to dig deeper into sources to understand complex ideas.

Additionally, the decline in academic skills from 1992 to 2005 occurred at about the same time public schools introduced computers into the classroom. Millennial students used computers as early as kindergarten. A few years later, they were taught to use online resources instead of books. Growing up as digital natives, however, does not guarantee that all Millennials are digitally literate. Experts blame the high use of computers, other digital media, and


35. JACKSON, supra note 34, at 18. “[T]he most basic level of problem-solving . . . involves] using single sources of well-defined information to solve challenges such as plotting a route on a map.” Id. (citing ORGANIZATION OF ECONOMIC CO–OPERATION & DEVELOPMENT, PROBLEM SOLVING FOR TOMORROW’S WORLD 40–42, 47, & 144 (2004), available at http://www.oecd.org/dataoecd/25/12/34009000.pdf.

36. Id. at 18. “[United States] fifteen–year–olds rank twenty–fourth out of twenty–nine developed countries on an Organization for Economic Cooperation and Development (OECD) test of problem–solving skills related to analytic reasoning—the sort of skills demanded in today’s workforce.” Id.


39. Id.


41. THOMSON, supra note 31, at 26–27; Interview with Katelyn Holub, Millennial, in Valparaiso, Ind. (Oct. 8, 2014) (interviewee started kindergarten in 1994 in the Valparaiso, Ind. Public Schools and had access to computers in one of the classroom learning centers) (notes on file with author).

42. Id.

43. CARR, supra note 12, at 92–93. “Public schools are pushing students to use online reference materials in place of [books].” Id.

44. Stuart & Vance, supra note 2 at 64 (citing DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 14, 28 (2009)).
multi–tasking for the decline in students’ academic skills. Nearly one–third of students, ages fourteen to twenty–one, attend five to eight open media sites while doing their homework. Multitasking is not really concentrating on several things at once. What these students are doing is switching their attention quickly, which “saps attention from full, concentrated engagement.” No wonder students are losing or missing skills in critical reading, critical thinking, and problem–solving.

Trying to multitask comes with “switch costs,” including the time it takes for the brain to change its goals, come up with the rules needed for the new goal, and block out thoughts regarding old tasks. Studies on workers of all ages show that multitasking takes a huge toll on productivity. A year–long study found that workers switch tasks every three minutes, and that workers interrupt themselves to switch tasks about half the time. Workers only spend an average of eleven minutes on a project until they switch to another project; within a project, workers change tasks approximately every three minutes. Furthermore, it takes about twenty–five minutes after a distraction before returning to the original task, and during that time two other projects usually disrupt attention. Those who are adept at the quick switching demanded by multitasking, most of whom are Millennials, may be proficient at routine tasks such as keeping up with smart–phones, iPads, laptops, Facebook, texting, and other social media, but cannot competently handle work that requires focus, deep thinking, or critical analysis.

45. JACkSON, supra note 34, at 18 (citing VICTORIA RIDEOUT & DONALD ROBERTS, Generation M: Media In The Lives Of Eight To Eighteen–Year–Olds 6, 23 (2005)). But cf. CATHY N. DAVIDSON, Now You See It: HOW THE BRAIN SCIENCE OF ATTENTION WILL TRANSFORM THE WAY WE LIVE, WORK, AND LEARN (2011). Head of creativity at Mozilla, Aza Raskin, says that multi–tasking is not new; it is the same as “lassoing an injured bull in the field and keeping track of an infant and toddler while making dinner.” Id.
46. JACkSON, supra note 34, at 18.
48. JACkSON, supra note 34, at 22.
49. Id. at 79.
50. Id.
51. Id. at 17, 79, 80, 84–85; see ALSOp, supra note 10, at 154. A study by Microsoft found that frequent distractions from the main task hurt productivity and that their workers took from ten to fifteen minutes to return to their main task of writing reports or computer code after being interrupted by email. Id.
53. Id. at 84–85.
54. Id. at 85.
55. ALSOp, supra note 10, at 12, 153.
Experts believe that multitasking has produced a shortened attention span. They believe that multitasking has produced a shortened attention span. Those with short attention spans become bored and easily distracted. The skills needed for success in the workplace and higher education demand longer attention spans. Further impeding critical analysis is the fact that the average person can only focus on a few things at a time. Working memory’s small capacity corroborates the opinion that the brain was not meant for multitasking. The brain’s abilities for multitasking and deep thinking are neither good nor bad, they are just a fact of life. It is important to understand the brain’s processes and how it is affected by what one asks of it, so law students may be taught more effectively.

Without practice in focusing on deep thoughts, complex issues, and communicating them, many high school graduates arrive at college underprepared for the traditional college curriculum that moves on to “higher–order critical thinking and complex reasoning.” Ever more underprepared college students must take remedial courses. Despite the remedial coursework, most college students graduate without learning the critical thinking, analysis, and writing skills that used to be the hallmark of a college education. They may learn some factual knowledge and be able to repeat it on exams, but they soon forget those facts and never really master higher–order thinking. Despite this shallow thinking, most students graduate with high grades. Historical data reveals that students are not putting in the necessary study time for such high

56. Id. at 12, 37, 153.
57. Id. at 153.
58. Id. at 12. Texting has lowered writing and interpersonal communication skills. Id. at 153. People with short attention spans cannot do their best work on tasks that require focus, critical analysis, or deeper thinking. Id. at 154. A University of Oregon study involving lab experiments with eighteen–to thirty–year–olds found they could hold only four items in active memory. Id.
59. Id. at 154.
60. Id.
61. THOMSON, supra note 31, at 39.
62. Id.
63. ARUM & ROKSA, supra note 40, at 126.
64. Id. at 126 (citing Clifford Adelman, The Toolbox Revisited: Paths to Degree Completion from High School Through College 34 WASH D.C.: U.S. DEPT. OF EDUC. (2006) (one–third of recent four–year college students took at least one remedial course in college.”)).
65. Id. at 18. A 2006 study by the United States Department of Education found that “the quality of student learning at U.S. colleges and universities is inadequate, and in some cases, declining.” (citing U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 3 (2006); KEELING & HERSH, supra note 38, at 38 (reporting that “a 2007 National Center for Education Statistics study found that only 31% of college graduates could read a complex book and take away lessons or messages from the text”).
66. KEELING & HERSH, supra note 38, at 9.
67. Id. at 9, 36.
grades. From the 1920s to the early 1960s students averaged forty hours of academic activities per week. From the 1920s to the early 1960s students averaged forty hours of academic activities per week. Currently, full-time college students only average twenty-seven hours per week on those activities.

Now, the college years are more focused on social integration than on academics. The majority of college professors no longer create high expectations for their students. They have succumbed to student complaints of not being able to concentrate on reading long texts, giving them book excerpts, essays, and short articles instead. Higher education researcher, George Kuh, has found that students and professors make a silent “disengagement compact” where students are not required to put in much effort to get decent grades and professors do not have as much grading or the unenviable task of explaining why some of their students did not master the material and consequently failed or received low grades.

Even though many college students lack the self-discipline to study sufficiently, they have very high expectations for their careers. For instance, almost half the starting athletes at Division I colleges believe they will play in the NFL or the NBA, when “less than two percent ever receive as much as a tryout and many fewer last a single season.” Architect students who aspire to be as famous as Frank Gehry or I.M. Pei are being unrealistic when few architects will ever be the primary designer of a private home, and fewer still will design multiple public buildings. Millennial college students may have high expectations for their professional lives, but most of them do not know what steps they need to take to reach their goals. Some of these college graduates find their way to law

68. ARUM & ROKSA, supra note 40, at 3.
69. Id.; KEELING & HERSH, supra note 38, at 36 (stating that ten to fifteen hours a week spent on homework gets students Bs or higher in courses).
70. ARUM & ROKSA, supra note 40, at 31.
71. KEELING & HERSH, supra note 38, at 35–36.
72. ALSOOP, supra note 12, at 155 (explaining how Millennials resist reading long assigned texts from professors).
73. ARUM & ROKSA, supra note 40, at 5.
74. Id. at 5. Decent grades are Bs or higher. Id.
75. Id.
76. DEREK BOK, OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN & WHY THEY SHOULD BE LEARNING MORE 306 (2006) (stating that students lack self-discipline because they receive above-average grades for sloppy work and no penalties for not following directions).
77. Id. at 285.
78. Id. at 285–86.
79. ARUM & ROKSA, supra note 40, at 126.
school not much better prepared than they were when they arrived at college.\textsuperscript{80}

For whatever reason, be it colleges that do not provide the necessary teaching, or students who are unable or unwilling to put forth the necessary effort to learn, many college students gain nothing more than a cursory knowledge of a particular field of study.\textsuperscript{81} Students, for the most part, do not graduate with any fundamental problem-solving or writing skills\textsuperscript{82} that they can transfer to the study of law. Yet, these law students firmly believe, perhaps based on their inflated grades and their unmerited “trophies,” that their career expectations will be met.\textsuperscript{83} Perhaps explained by the Dunning–Kruger effect,\textsuperscript{84} they believe their academic skills are better than they are.

Because they have experienced academic success thus far with minimal effort, they believe the same amount of effort should continue to yield success in law school. When minimal effort does not yield success, it must be because their instructor failed to teach them.\textsuperscript{85} Students probably never thought of learning as a joint effort between professor and student.\textsuperscript{86} The kind of deep thinking and analysis necessary in law school is not possible without focused attention for a sustained time period.\textsuperscript{87} That kind of attention is antithetical to the disruptions and quick thinking students are used to in this digital age.\textsuperscript{88}

\textsuperscript{80} All law students are not underprepared, but a surprising number are. Of those underprepared law students, some understand they need to change their study habits to succeed and are willing to do so. However, the remaining students do not see why they need to change their study habits because their methods yielded success in college. These law students resist changing and working harder. They have attitudinal problems and, having been told they were special for years, they are convinced the problem lies outside themselves.

\textsuperscript{81} KEELING & HERSHEY, supra note 38, at 9.

\textsuperscript{82} Id. at 38. “The American Institutes for Research (AIR) found that 75 percent of two-year college students and 50 percent of four-year college students did not perform at proficient levels of literacy on tasks such as summarizing competing arguments in newspaper editorials or comparing competing credit card offers with differing interest rates.” Id.

\textsuperscript{83} See supra text accompanying footnotes 38–42.

\textsuperscript{84} See infra text accompanying footnotes 96–139.

\textsuperscript{85} CARR, supra note 12, at 141.

\textsuperscript{86} BOK, supra note 76, at 305–06. “There seems to be a breakdown of shared responsibility for learning–on the part of faculty members who allow students to get by with far less than maximal effort, and on the part of students who are not taking full advantage of the resources institutions provide.” Id. (citing George D. Kuh, What We’re Learning About Student Engagement from NSSE, 35 CHANGE 28 (March–April 2003).

\textsuperscript{87} CARR, supra note 12, at 141.

\textsuperscript{88} See supra text accompanying notes 16–18.
Indeed, we do live in a distracted society that is constantly moving and multitasking, losing the ability to distinguish what is relevant from what is not.\textsuperscript{89} The distractions result in “losing our capacity to create and preserve wisdom and slipping toward a time of ignorance that is paradoxically born amid an abundance of information and connectivity.”\textsuperscript{90} Some believe that we are headed toward a dark age.\textsuperscript{91} Despite all the connections made possible through technology, one-fourth of Americans say they do not have a confidant, which is twice that of twenty years ago.\textsuperscript{92} With all the information on the Internet, half of American eighteen–to twenty-four–year-olds cannot find New York State on a map.\textsuperscript{93} Employers lament that “young workers are less and less able to concentrate, think deeply, or mine a vein of inquiry.”\textsuperscript{94} Several factors have likely worked together to cause the decline in academic skills: elementary and secondary educators teaching knowledge rather than foundational thinking and writing skills; colleges focusing more on social adjustment than on academics; Millennials’ heavy use of the Internet and social media; and the Millennial traits of being special and confident. Besides the decline of academic skills, the generally positive traits of being special and confident have been taken to the extreme by Millennials, creating a focus on self to the point of narcissism and overconfidence.

II. THE PROBLEM: “ALL YOU NEED IS IGNORANCE AND CONFIDENCE, AND THEN SUCCESS IS SURE.”\textsuperscript{95}

One of the more exasperating features of the academically underprepared student, particularly the academically underprepared Millennial student, is her overweening sense that she is more competent than she really is. A number of cultural and social factors are in play in feeding that overconfidence, much of it derived from the generational culture previously described, such as her egocentrism and her narcissism. She has also long been told that she is a consumer–student who is competent enough to determine whether or not she is being taught according to her own tastes and perceived

\textsuperscript{89} J\textsc{ackson}, supra note 34, at 14.  
\textsuperscript{90} Id. at 16.  
\textsuperscript{91} Id. at 15.  
\textsuperscript{92} Id. at 22.  
\textsuperscript{93} Id. at 22 (citing Miller McPherson, Matthew Brashears & Lynn Smith–Loven, Social Isolation in America: Changes in Core Discussion Networks over Two Decades, 71 Am. Soc. Rev. 353–75 (2006)).  
\textsuperscript{94} J\textsc{ackson}, supra note 34, at 19.  
needs.\textsuperscript{96} Perhaps just as important is her social motivation to be overconfident because it signals to society that one is competent.\textsuperscript{97} But therein lies the rub: overconfidence and competence are inversely related. The overconfident student is usually less competent, and her overconfidence makes her unable to recognize her incompetence and thereby limits her ability to improve her performance.\textsuperscript{98} Significant empirical evidence supports this conclusion.

In 1999, psychologists David Dunning and Justin Kruger conducted four studies on Cornell University students that examined this inverse relationship of overconfidence to incompetence, specifically to test the hypothesis that “incompetent individuals have more difficulty recognizing their true level of ability than do more competent individuals.”\textsuperscript{99} These studies assessed students’ ability to accurately estimate their performance on tests of humor, logical reasoning, and English grammar,\textsuperscript{100} to measure whether or not “incompetence . . . not only causes poor performance but also the inability to recognize that one’s performance is poor.”\textsuperscript{101} Dunning and Kruger’s studies revealed several conclusions regarding the relationship of confidence and competence. First, test subjects in the bottom quartile of each of the studies overestimated both their performance and their quartile placement, thinking themselves above average.\textsuperscript{102} Second, bottom–quartile performers were less proficient at distinguishing between correct and incorrect answers.\textsuperscript{103} Third, bottom–quartile performers were less able to discern the difference between superior and inferior performance of their peers.\textsuperscript{104} Fourth, improving metacognitive skills improved the recognition of incompetence, leading to the conclusion that “one way to make people recognize their incompetence is to make them competent.”\textsuperscript{105}

Perhaps what puzzled Dunning and Kruger the most was how little

\textsuperscript{96} Catherine J. Wasson & Barbara J. Tyler, \textit{How Metacognitive Deficiencies of Law Students Lead to Biased Ratings of Law Professors}, 28 Touro L. Rev. 1305, 1316 (2012); see also Tracy Vaillancourt, \textit{Students Aggress Against Professors in Reaction to Receiving Poor Grades: An Effect Moderated by Student Narcissism and Self-Esteem}, 39 Aggressive Behav. 71, 81 (2013) (“[S]tudents [are] much more focused on the grades they received, and how those grades [are] justified by the instructor seem[s] inconsequential.”).

\textsuperscript{97} Cameron Anderson et al., \textit{A Status-Enhancement Account of Overconfidence}, 103 J. Personality & Soc. Psychol. 718, 730 (2012).


\textsuperscript{99} Id. at 1122.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 1130.

\textsuperscript{102} Id.

\textsuperscript{103} Id. at 1131.

\textsuperscript{104} Id.

\textsuperscript{105} Id.
the incompetent failed to learn from feedback and, more specifically, “how the incompetent fail, through life experience, to learn that they are unskilled.”

Thus, the Dunning–Kruger effect was born, the proposition that overconfidence in one’s skills is often a hallmark of the incompetent. Later studies support Kruger and Dunning’s work, contributing additional nuances to its broad conclusions as well as exploring the dilemmas posed by the overconfidence–incompetence dichotomy, especially in academic performance.

For example, a later series of five studies substantiated the basic proposition that incompetent performers do not have the skills to recognize their own deficiencies and thereby tend to overestimate their performance. Those participants were also college students engaged in a variety of tasks in which they would be variously measured for their skill and their ability to accurately self-assess. The researchers specifically tested three possible explanations for overconfidence in poor performers: it is an artifact of experimental methodology and statistics; poor performers are not motivated to be accurate in their self-assessments; and poor performers are unable to distinguish between strong and weak performance. The studies’ tasks included taking a difficult in-class examination; self-evaluating debate tournament performance; partic-

106. Id.
107. On the other hand, top performers tend to have less confidence in their abilities and therefore underestimate their performance. “Simply put, these participants assumed that because they performed so well, their peers must have performed well likewise.” Id. at 1131.
110. Id. at 101.
111. Id. at 117.
participating in a Trap and Skeet competition in exchange for $5; completing a logical reasoning test for $100; and completing a logical reasoning test with an accountability manipulation.\(^\text{112}\) The researchers’ results supported the third explanation—the poor performers’ inability to distinguish strong and weak performance—and that Dunning and Kruger’s conclusions were accurate: “a lack of skill leaves individuals both performing poorly and unable to recognize their poor performances.”\(^\text{113}\) Indeed, poor performers have little insight into their deficits relative to their peers and evince dramatic overconfidence in their abilities, despite having received clear and repeated feedback to the contrary.\(^\text{114}\)

Kruger and Dunning’s puzzle about the failure of the unskilled to use feedback to improve their performance also has been researched. The overconfidence of less skilled competitive bridge players persisted despite their knowledge of the subject domain and feedback on their performance.\(^\text{115}\) A comparison of examination scores taken four weeks apart in a systems analysis and design course revealed that poor performers’ overconfidence persisted, but their performance did not improve despite feedback between the examinations designed to do so.\(^\text{116}\) In three studies of masters–level students’ managerial skills, poor performers showed an inverse relationship between their perceived emotional intelligence and their actual skill, demonstrating little insight into their serious deficiencies and indeed resentment at receiving negative feedback.\(^\text{117}\) Unfortunately, while the empirical evidence offers overwhelming support for Dunning and Kruger’s inverse relationship of confidence to competence, the source of the barrier between overconfidence and feedback is still somewhat of a mystery.

\(^{112}\) Id. at 103, 105, 108, 110, 112.
\(^{113}\) Id. at 117.
\(^{114}\) Id. at 118–19. A different study revealed that unskilled medical laboratory technicians did not recognize incompetence performance of skills they used every day in the lab. Id. at 118. Likewise, a small study of nursing students revealed the inverse relationship of confidence to competent performance in a simulated crisis situation, calling into question the value of self–assessments in nursing education. Pamela Baxter & Geoff Norman, Self–Assessment or Self Deception? A Lack of Association Between Nursing Students’ Self–Assessment and Performance, 67 J. ADVANCED NURSING 2406, 2411 (2011). Similarly, less competent third–year medical students could assess neither the quality of their own performance nor that of their peers. Vicki Langendyk, Not Knowing that They Do Not Know: Self–Assessment Accuracy of Third–Year Medical Students, 40 M. E DUC. 173, 173 (2006).
\(^{116}\) Moores & Chang, supra note 108, at 74.
Dunning and Kruger’s original studies suggest that poor performers’ lack of metacognitive skills is that barrier.\textsuperscript{118} In the fourth task of their original studies, the participants were first administered a logic test based on the Wason selection task then asked to estimate their performance.\textsuperscript{119} Then half the participants were trained to improve their logical reasoning skills after which all the participants were asked to indicate which problems they answered correctly and incorrectly. Last, the subjects again rated their ability and performance.\textsuperscript{120} The bottom–quartile performers who received training were just as accurate in the self–assessment of their test performance as the top–quartile performers although the impact of the training on their self–assessments depended upon their initial performance.\textsuperscript{121} While the training did not completely eliminate the poor performers’ overestimation of their performance, their estimations were better calibrated.\textsuperscript{122} Thus, although evidence suggests that poor performers are somewhat aware of their own ineptitude,\textsuperscript{123} they still tend to be resistant to feedback.\textsuperscript{124}

This resistance to feedback may be overconfidence itself. “Generally, overconfidence is defined as inaccurate, overly positive perceptions of one’s abilities or knowledge . . . [It] is a genuine yet flawed perception of one’s own abilities.”\textsuperscript{125} Overconfidence seems greater in those who score below average than those who score above average.\textsuperscript{126} And overconfidence in one’s own judgment and knowledge–based tasks wanes with easy tasks—where one’s ability to self–monitor is easier—while it tends to run rampant with hard

\begin{thebibliography}{9}
\bibitem{118} Kruger & Dunning, supra note 98, at 1128.
\bibitem{119} The Wason selection task works as follows: “Each problem described four cards (e.g., A, 7, B and 4) and a rule about the cards (e.g., “If the card has a vowel on one side, then it must have an odd number on the other”). Participants then were instructed to indicate which card or cards must be turned over in order to test the rule,” here A and 4. \textit{Id.} at 1128.
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Id.} at 1128–29.
\bibitem{122} \textit{Id.} at 1129.
\bibitem{125} Anderson et al., supra note 97, at 719. “The more confident people are, the more overconfident they are, and, overall, confidence tends to exceed accuracy.” Joshua Klayman et al., \textit{Overconfidence: It Depends on How, What, and Whom You Ask}, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 216, 217 (1999).
\bibitem{126} \textit{E.g.}, John Dunlosky & Katherine A. Rawson, \textit{Overconfidence Produces Underachievement: Inaccurate Self Evaluations Undermine Students’ Learning and Retention}, 22 LEARNING & INSTRUCTION 271, 276 (2012); Anastasia Efklides, \textit{How Does Metacognition Contribute to the Regulation of Learning? An Integrative Approach}, 23 PSYCHOL. TOPICS 1, 9–10 (2014); Miller & Geraci, supra note 123, at 505.
\end{thebibliography}
The sad fact is that overconfidence itself breeds continued underachievement by seducing students to terminate their studies prematurely, leading them to retain less knowledge and thereby feeding the vicious cycle of continued poor performance. Overconfidence, however, remains unshakable despite that continued poor performance.

One explanation is that people are not especially “adept” at judging their own limitations, be it lack of knowledge or lack of skills. People tend to have a “top–down” perception of their abilities with a starting point that is overinflated and unjustifiable. Poor performers’ overinflated and unjustifiable perceptions are also based on their lack of awareness—or even acceptance—of their deficits, perhaps fueled by their desire to enhance their own view of themselves. Underlying such self–enhancement are processes that include wishful thinking, egocentrism, and “self–serving resolutions of ambiguity.” The overconfident poor performer possesses an over–optimism that does not comport with reality. Such overconfidence especially fuels over–optimism about poor performers’ “talents, expertise, and future prospects.” In crude terms, poor performers—as do most people—want to believe themselves above average. “[P]eople say they are ‘above average’ in skill (a conclusion that defies statistical possibility), overestimate the likelihood that they will engage in desirable behaviors and achieve favorable outcomes.”

On the other hand, poor performers may improve their confidence levels if their past performance on difficult knowledge tasks is viewed as a reliable predictor of future performance or even to save face. Pulford & Colman, supra note 124, at 132. When performance is measured against the competition in skill–based tasks, empirical evidence suggests that confidence recedes when the tasks become more difficult. Don A. Moore & Daylian M. Cain, Overconfidence and Underconfidence: When and Why People Underestimate (and Overestimate) the Competition, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 197, 207 (2007). Unfortunately, “[w]hen [college] students are left to their own devices, many of them use ineffective methods to monitor their learning, which can produce overconfidence and underachievement.” Id. at 278.

David Dunning et al., Why People Fail to Recognize Their Own Incompetence, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 83, 83 (2003).

Wishful thinking, egocentrism, and “self–serving resolutions of ambiguity” underlie such self–enhancement processes. Overconfidence especially fuels over–optimism about poor performers’ “talents, expertise, and future prospects.” In crude terms, poor performers—as do most people—want to believe themselves above average. “[P]eople say they are ‘above average’ in skill (a conclusion that defies statistical possibility), overestimate the likelihood that they will engage in desirable behaviors and achieve favorable outcomes.”

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127. Klayman et al., supra note 125, at 217. On the other hand, poor performers may improve their confidence levels if their past performance on difficult knowledge tasks is viewed as a reliable predictor of future performance or even to save face. Pulford & Colman, supra note 124, at 132. When performance is measured against the competition in skill–based tasks, empirical evidence suggests that confidence recedes when the tasks become more difficult. Don A. Moore & Daylian M. Cain, Overconfidence and Underconfidence: When and Why People Underestimate (and Overestimate) the Competition, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 197, 207 (2007).

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129. David Dunning et al., Why People Fail to Recognize Their Own Incompetence, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 83, 83 (2003).

130. Id. at 86.

131. Id.


133. Id.


135. Id. at 69.
comes, furnish overly optimistic estimates of when they will complete future projects, and reach judgments with too much confidence.”

However, success in law school depends upon accurate self-assessment at the individual level—not overconfidence in one’s placement in the general population—because accurate self-assessment “is especially crucial in higher education and professional school settings, particularly as some schools move to a problem-based or case-based model of instruction.” In particular, law students must be able to self-assess accurately in order to be autonomous agents of their own learning: “An essential component of problem-based learning is that students must identify what skills they need to acquire and what knowledge they must gain—in short, they must make correct self-assessments of strengths and deficits.”

That leaves the conundrum of persuading the overconfident law student to become competent through the mechanism of feedback, which their overconfidence inclines them to resist.

III. ADDRESSING THE PROBLEM: “CONFIDENCE IS THE ILLUSION BORN OF ACCIDENTAL SUCCESS.”

Teaching the overconfident law student to become competent is not as simple as identifying a one-size-fits-all methodology. If we accept Dunning and Kruger’s basic proposition that teaching the necessary skills to poor performers will improve both their self-assessment and their performance, then we necessarily start with metacognition as a key intellectual skill necessary for success in law school. “Metacognition refers to the self-monitoring by an individual of his own unique cognitive processes.” Metacognition is critical to advancing to skills basic to being a lawyer, critical thinking and problem solving. However, the overconfident do not have the predisposition to self-assessment that would make them skilled at

136. Id.
137. Id. at 85.
138. Id.
139. Id.
141. Anthony S. Niedwiecki, LAWYERS AND LEARNING: A METACOGNITIVE APPROACH TO LEGAL EDUCATION, 13 WIDENER L. REV. 33, 35 (2006). “Generally, metacognition refers to having both awareness and control over one’s learning and thinking. Specifically, learners must have awareness over what they bring to the learning experience, such as their own cognitive abilities, learning styles, and learning preferences.” Id.
metacognition. Furthermore, an increasing number of students enter law school without the intellectual skills that are foundational for the more advanced metacognitive skills needed to become lawyers. The overconfident are especially problematic because they not only resist engaging in a classroom that uses metacognitive techniques, they resist learning those skills despite feedback and indisputable proof of their incompetence. Given these conditions, success at reaching some overconfident students may be difficult and will be dependent upon the confluence of both the individual student and the institutional practices.

A. The Student

A deeper exploration of an individual’s tendency to be overconfident—in the face of continued poor performance—is crucial for reaching and teaching that individual to become competent. One basic conclusion from Dunning and Kruger’s initial studies is that the incompetent are simply unaware of their incompetence. However, other psychological explanations may account for the overconfidence phenomenon besides unawareness.

Take for instance the overconfident poor performer who has some skills but “gambles” that, the next time, things will be different and she really will perform well despite feedback to the contrary.142 Such “unmerited optimism” may actually be a motivating factor to continue in a particular endeavor as the poor performer experiences “a gambler’s fallacy, a belief that [he] is due for a good night.”143 Related to that optimism is the poor performer’s tendency to rely less on one’s past actual performance and to rely more on one’s own aspirations for future performance.144

Poor performers’ overconfidence may also be engendered by decision consistency.145 Confidence is distinctly linked with consistency in decisional processes, even more so than with accuracy in those decisions.146 Confidence wanes when different rules may suggest different conclusions.147 In a study of political “experts,” those with a grand, overarching theory—the “hedgehogs”—tended to be more

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142. Simons, supra note 115, at 606.
143. Id.
144. Id. But see Pulford & Colman, supra note 124, at 132 (opining that, if past performance is viewed as a valid predictor of future performance on hard tasks, poor performers may better calibrate their predictions).
146. Id. at 978.
147. Id.
overconfident in their predictions of world events than the “foxes,” who tailored their analyses of their predictions based on a variety of “rules.” The “foxes,” however, were more accurate.148 Thus, the uninformed were more confident in their decisions—and therefore their self-assessments—even though they were less accurate. Likewise, overconfidence persists even if decision consistency relies on a flawed, or incorrect, rule—a product of being misinformed.149 Either uninformed or misinformed, overconfident students are likely to embrace the consistency of a single rule than the ambiguity created by several rules, which is endemic to legal analysis.

Another emerging explanation is that overconfidence is the result of a psychological bias that protects an individual’s self-image of being better than average.150 “[P]ositive illusions contribute to mental health and well-being... They foster self-esteem and enhance the motivation to act.”151 Although perhaps distinct from the estimation of one’s absolute performance,152 students seem to calibrate their performance in relation to a perceived standard, “roughly half way from their actual scores to some norm... that appears to be the average GPA of the university [because they] appear to hold a common subjective level of performance and compare their own with that level.”153 A similar conclusion was reached in a study of business students. Those students were asked questions “about their skills and abilities in several domains,”154 and the researchers found that “[p]articipants on average state[d] high probabilities for quantiles above average while they regard[ed] it as unlikely that they should fall into the bottom quantiles.”155 So the very nature of the educational enterprise—where students believe they are compared to each other on what they believe are absolute terms—encourages students to rank themselves as above average as a self-protective behavior. This self-protective behavior, arising from a motivated bias, has psychological benefits that boost one’s self-esteem.156 As a consequence, poor performers’ overconfidence

148. Id.
149. Id. at 992.
151. Id. at 269; see Alexander H. Jordan & Pino G. Audia, Self-Enhancement and Learning from Performance Feedback, 37 ACAD. MGMT. REV. 211, 223 (2012).
155. Id. at 269. Indeed, poorly performing business students can become quite defensive when given negative feedback and may be less inclined to improve their performance. Sheldon et al., supra note 117, at 133.
156. Anderson et al., supra note 97, at 718.
becomes self-serving and egocentric and acts as a “bias blind-spot.” Such overconfidence may be a way of protecting poor performers from the negative implications of their incompetence, especially in those students who are achievement-oriented.

A related benefit of overconfidence is the social currency inherent in convincing others that one is more competent than she actually is, “including control over group decisions, access to scarce resources, and reproductive success.” This self-enhancement explanation was the thrust of six studies involving 664 participants that employed self-reports, peer-ratings, and outside raters. The researchers found:

(a) Overconfident individuals were perceived by others as more competent and, in turn, afforded higher status, (b) overconfident individuals displayed the behaviors that are used by others to infer competence, and (c) the desire for status—both naturally occurring and experimentally induced—leads to higher levels of overconfidence.

All these internal reasons for being overconfident create a stew of actual and perceived benefits for becoming and remaining overconfident, reasons that may require individual “diagnosis” and “treatment.” However, regardless of the psychological reasons that may motivate overconfidence, the overconfidence itself is often impervious to efforts to improve performance, even through direct instruction.

In order to address the growing overconfidence—incompetence phenomenon in law students, we have to be attentive to at least one basic underlying problem that arises from their academic underpreparedness for critical thinking and problem solving. Matriculating law students are confident that their previous educational experiences have trained them to tackle the challenges of law school. However, they are woefully underprepared for tackling those challenges. That underpreparedness is not necessarily their fault. Their previous educational experiences have been framed by the unfortunate and misguided governmental policy that standardized testing adequately measures the K–12 student learning outcomes.

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157. Williams & Gilovich, supra note 132, at 1126.
158. Gramzow et al., supra note 108, at 56.
159. Anderson et al., supra note 97, at 718–19; see also Briony D. Pulford & Andrew M. Colman, Overconfidence: Feedback and Item Difficulty Effects, 23 PERSONALITY & INDIVIDUAL DIFFERENCES 125, 127 (1997).
161. Id. at 730.
162. See generally Stuart & Vance, supra note 2.
that will make our children educated citizens. Such shallow learning has little or no usefulness in the more complex cognitive skills needed to succeed in higher education. Indeed, such shallow learning may actually inhibit any awareness that such higher–order thinking is necessary. \(^{163}\) However, many of our matriculating students’ undergraduate experiences also have been woefully deficient in building more complex critical–thinking and problem–solving skills. \(^{164}\) As a result, there is inherent resistance—and increasingly so—to changing to a more difficult learning modality in law school that is alien to most and difficult for many. This dilemma is further exacerbated by the poor performers’ overconfidence in their undergraduate skills and therefore their particular resistance to change.

At the most fundamental level, poor performers resist instruction on skills that will improve their learning. One basic hurdle is that many of them do not seek help. \(^{165}\) Poorly performing students—those below C+ range—are often the least likely to seek academic assistance and, if required to seek it, fail to use it. \(^{166}\) Second, they do not have the internal motivation necessary to improve their learning skills, sometimes for the most illogical reasons: “I can’t change”; “I don’t want to change”; “I don’t know what to change”; and “I don’t know how to change.” \(^{167}\)

The first type of poorly performing student believes she cannot change and gives up easily when confronted with changes in her learning skills. \(^{168}\) This student is convinced that she does not have the ability to succeed and therefore is not inclined to change her skills. Such students with low self–efficacy are less likely “to choose difficult tasks, they expend less effort, persist for shorter periods of time, use less deep processing skills, do not ask for help when they need it, and experience fear and anxiety regarding academic

163. See, e.g., Melissa Gross & Don Latham, Undergraduate Perceptions of Information Literacy: Defining, Attaining, and Self–Assessing Skills, 70 C. & RES. LIBR. 336, 346 (2009). In a study designed to examine college freshmen’s basic information literacy, the researchers learned that students are more interested in product than process:

   [Proficient information seekers] present a view of information seeking that is very focused on product or outcome (can you find what is needed?) rather than the knowledge base and skills that lie behind the ability to achieve this result. . . . Computer literacy, library skills, searching skills, and other “background” abilities such as assessing the quality of sources, thinking critically about information, and having an awareness of the legal and ethical issues related to information use are largely absent whether they are being overlooked or assumed.

Id. at 345–46.

164. Stuart & Vance, supra note 2, at 57–61.


166. Id.

167. Id. at 3–5.

168. Id. at 3.
Therefore, she falls back on her automated learning behavior or just gives up. This student is more likely to believe that her innate ability is a fixed trait and that her poor performance is a consequence of that uncontrollable factor. This student, however, can change her learning when told that her poor performance is actually a controllable factor—her lack of effort.

The second type of poor performer does not want to change and is therefore not motivated to put in the time and effort to do so. This type of poor performer often presents as the most intractable to change because she has succeeded at lower-level learning skills in earlier educational experiences but lacks the critical thinking skills to advance to the next level. This student does not want to change her learning skills because doing so conflicts with her image of herself. This student is often more intent on merely outperforming her classmates rather than attaining mastery of the materials. Finally, this student is prone to blame her professors for her poor performance, not on grounds of perceived unfairness but because doing so excuses her from having to change.

The last two types of poorly performing students—those who do not know what to change and those who do not know how to change—have similar metacognitive problems. The first has problems monitoring her own learning behavior and cannot match the appropriate learning strategy in the face of different tasks. She cannot discern the difference between learning strategies for recall tasks and those for more analytical tasks. The poor performer who does not know how to change, on the other hand, either has not had enough practice in a particular learning strategy or does not know how to use it. Thus, in addition to having individual reasons for maintaining overconfidence in the face of poor performance,
these poor performers have different reasons for refusing—or fail-
ing—to use the metacognitive skills that we might furnish them
that would make them competent.

As might be suggested by the characteristics of the students out-
lined above, some of the hard–core overconfident will refuse to
change because they see little or no value in changing their learning
strategies\textsuperscript{181} or will even admit to doing nothing to affect projected
negative outcomes.\textsuperscript{182} For those students, no amount of feedback
will change their behaviors. However, the remaining overconfident
yet poorly performing students might benefit from feedback if we
both address the underlying motivations for their overconfidence
and resistance to change and use effective strategies for making
them more competent.

One such strategy is to persuade poor performers that intelli-
gence is malleable.\textsuperscript{183} “[Students] who are taught that intelligence
is malleable get more excited about learning, become more moti-
vated in the classroom and achieve better grades.”\textsuperscript{184} A student who
is aware that her intelligence is not a fixed trait, or attribute, is
more likely to change and becomes less overconfident in her single
strategy for learning.\textsuperscript{185} Belief in her own ability to mediate new
learning strategies within the complexities of the law will make her
better able to self–asses her performance and to adjust her learning
for new situations.

Inextricably intertwined in the belief in intellectual malleability
is changing the student’s fixed mindset.\textsuperscript{186} The emerging literature
on changing fixed mindset details specific strategies that may
change the reliance on fixed traits.\textsuperscript{187} Perhaps the most significant
strategy that affects both the students and the teachers is the no-
tion that the feedback we give to students is metacognitive, specifi-
cally that the students can intentionally learn critical thinking
skills by praising their work ethic, or process, rather than praising

\textsuperscript{181} Debra A. Bercher, Self–Monitoring Tools and Student Academic Success: When Per-
ception Matches Reality, 41 J. C. SCI. TEACHING 26, 31 (2012).

\textsuperscript{182} Id. at 32. In a study of at–risk students taking a developmental, or remedial, under-
graduate biology class, nearly twenty–five percent of those who failed the class reported that
doing work for extra credit was not worth the effort. Randy Moore, Academic Motivation and
Performance of Developmental Education Biology Students, 31 J. DEVELOPMENTAL EDUC. 24,
30 (2007).

\textsuperscript{183} Ehrlinger et al., supra note 109, at 119.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} See, e.g., Sarah J. Adams–Schoen, Of Old Dogs and New Tricks—Can Law Schools
Really Fix Students’ Fixed Mindsets?, 19 LEGAL WRITING 1, 1–2 (2014), http://pa-
pers.ssrn.com/sol3/papers.cfm?abstract_id=2463853; see generally CAROL S. DWEECK,

\textsuperscript{187} Adams–Schoen, supra note 186, at 34–37.
the student’s innate ability to succeed.\(^\text{188}\) In other words, “effort” praise is more effective at increasing problem-solving skills than “ability” praise, upon which students become fixated and fail to improve.\(^\text{189}\) Implicitly, effort praise is heightened by “robust criticism with a message that the student is being held to a high standard and an assurance that the student can with persistence and effort meet that standard[, which leads] to increased task motivation, trust in the critic, and identification with the skill at issue.”\(^\text{190}\)

Another emerging area of study in legal pedagogy is the role of students’ responsibility for their own learning, focusing on the interior motivation for a student to achieve rather than on external pressures.\(^\text{191}\) Factored into that undertaking is whether or not students perceive the educational institution as a place for learning; whether or not students understand that they are responsible for their learning; and whether or not students actually view themselves as responsible.\(^\text{192}\) The latter cognate—the underlying foundation for any undertaking of metacognition—is often conditioned on whether or not the students believe they “are responsible” in contrast to “being held responsible.”\(^\text{193}\) The distinction is that students who believe they are “being held responsible” feel forced to learn and will only do the minimum amount of work to get by.\(^\text{194}\) On the other hand, those students who “are responsible” for their learning exhibit the characteristics of the self–regulated learner.

“Self–regulation refers to the self–generated thoughts, feelings, and actions for attaining one’s goals . . . and involves the relationship between the person, [her] behaviors, and the environment.”\(^\text{195}\)

\(^{188}\) \textit{Id.} at 38.


\(^{190}\) Adams–Schoen, \textit{supra} note 186, at 39. However, negative feedback may also be perceived as less accurate than positive feedback, leading to decreased motivation. Traci Sitzmann & Stefanie K. Johnson, \textit{When Is Ignorance Bliss? The Effects of Inaccurate Self-Assessments of Knowledge on Learning and Attrition}, 117 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 192, 192 (2012).


\(^{193}\) Hill, \textit{supra} note 192, at 461; see Pam Schuetz & Jim Barr, \textit{Transmuting Resistance to Change}, 144 NEW DIRECTIONS FOR COMMUNITY COLLEGES 105, 112 (2008) (suggesting that top–down hierarchies in higher education cast “students as relatively passive recipients of education rather than active participants.”).

\(^{194}\) Hill, \textit{supra} note 192, at 461.

Self-regulation in learning relies on the related constructs of metacognition and self-monitoring strategies. “Self-regulated learners are interested in subject matter, well-prepared, ready with comments and insights, are able to admit if they do not understand, and are driven to construct understanding.” On the other hand, poor performers exhibit lower self-regulation by employing “more rehearsal and memorization strategies, [suggesting] that they are less likely to use elaborative or organizational strategies, which prevents them from having a deep understanding of the material.”

Self-regulated learning has also been linked to better regulation of one’s self-assessment of skills and confidence. For instance, science majors—who have a curriculum of problem-solving and critical thinking—have a much better calibrated sense of their skills and confidence because of the rigor of the knowledge domain than do business majors, where confidence is more highly prized. Insofar as legal analysis engages those cognitive processes that are more like that of the science major, we have to solve the dilemma of teaching an increasing number of students who are short on logical and mathematical skills. Doing so might also mitigate those students’ overconfidence.

Bridging that chasm of few or nonexistent logical skills will be dependent upon teaching these cognitive skills intentionally and encouraging learning as learning. Indeed, intentional learners exhibit less overconfidence than incidental learners, who are exposed to the same material but make no deliberate attempt to learn it. Deliberative learners have greater correct metacognitive skills and are aware of and can distinguish between deliberative

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196. Id. at 893; Karee E. Dunn et al., Influence of Academic Self-Regulation, Critical Thinking, and Age on Online Graduate Students’ Academic Help-Seeking, 35 Distance Educ. 75, 77 (2014); see generally Efklides, supra note 126.
198. Cohen, supra note 196, at 896.
200. Indeed, business majors had the largest discrepancies between their self-reported knowledge and actual performance across all four knowledge domains tested: science, civics, humanities, and business/law. Ackerman et al., supra note 108, at 602–03.
201. Numeracy tests—examining an essential ingredient of scientific thinking—“predict superior judgment and decision making because they assess (i) heuristic–based deliberation and metacognition . . . (ii) affective numerical intuition . . . and (iii) meaningful intuitive understanding.” Ghazal et al., supra note 200, at 28–29.
202. Ehrlinger et al., supra note 109, at 119.
203. Pulford & Colman, supra note 159, at 127.
and intuitive solutions. And their confidence levels were more realistic. Intuitive learners, however, are highly confident because they are solely reliant on their intuitive solutions and are oblivious to the deliberative solutions.

Specific strategies for intentionally teaching deliberative learning skills constitute, happily, a rich field for legal scholarship, especially by those who have—by date—been the primary source for teaching legal skills and not just imparting knowledge. To name just a few contributors, Anthony Niedwiecki has developed an arc of literature that speaks specifically to teaching metacognition skills to law students while Robin Boyle has added active learning techniques to the literature. And Elizabeth Bloom has added a rich dimension that derives from academic support to teach law students how to become self-regulated learners.

By using such intentional teaching, we can provide feedback that serves as both the means for a student to measure her learning and an opportunity to change poor learning skills. Overconfidence enters the equation at the feedback for “change” stage, when poor performers fail—or refuse—to embrace the initial intentional teaching then fail the assessment. Addressing overconfidence in those poor performers is a task that is both psychological and pedagogical in which figures a variety of personal motivations that are not easily accessed in the literature. For this, there is no one single strategy although understanding the sources of overconfidence is a useful tool. There is, however, one especial barrier—the institution itself and its resistance to change.

205. Id. at 367.
206. Id. at 368.
B. The Institution

One major contributor to the overconfidence of law students and their consequent incompetence is inherent in higher education itself, including law schools. Only at this education level are few, if any, teachers actually trained in educational practices and teaching methods. Without doubt, gifted teachers exist in the legal academy, especially in the skills courses. But those few are not enough to break through the silos built up by those teachers who are not as skilled and are themselves resistant to change. To date, the academy’s solution has been to offer developmental and remedial courses and to hire academic support professionals to take up the slack. However, doing so ignores the collective responsibility of the academy to address the fundamental learning deficits our students present when they matriculate. Instead, the basic teaching model for doctrinal classes instills overconfidence in law students because they perceive they are “learning” in the large lecture classes with which they are already familiar—and have experienced success—in their undergraduate institutions.

Effective learning has two components: retention and transfer. Retention is “the ability to recall information or perform a skill over the long term.”\(^{211}\) Transfer is “the ability to apply the knowledge or perform the skill across a number of relevant situations.”\(^{212}\) However, the common and cost-effective way to deliver education—“massed training”—effectively and rapidly delivers knowledge and proficiency but without retention.\(^{213}\) Students like massed training because they confuse the speed and ease of learning in large lecture classes with the attainment of competence, and with that confusion comes overconfidence in their skills.\(^{214}\) “Students and instructors both assume that if a skill has been learned quickly and the student finds it easy to perform, then the student will maintain the skill in the long–term . . . Short–term excellence is mistaken for long–term competence.”\(^{215}\) Instead, the knowledge and skill learned in that environment is forgotten rapidly,\(^{216}\) leaving nothing to transfer.

So law students who sit through lectures and understand what is going on assume that they have learned the materials, and if they have not, they study for the short–term goal of studying intensely

\(^{211}\) Flawed Self–Assessment, supra note 134, at 86.
\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) Id. at 87.
\(^{215}\) Id.
\(^{216}\) Id. at 86.
for an end–of–semester examination. Often with only one opportunity to receive feedback, the overconfident are not going to attain enough information about their incompetence in order to improve during the course. Instead, it increases their opportunities for blaming external influences for their failures without the ability to better calibrate their self–assessments. Indeed, the traditional “chalk and talk” approach to teaching “contributes to overconfidence and unmet expectations . . . because students are not actively involved and do not receive significant amounts of instructional feedback concerning the state of their understanding and mastery of the material.”

In addition, large lecture classes often rely on multiple–choice examinations as the ultimate—and sometimes only—feedback instrument for a course. Unfortunately, those examinations are not designed to measure students’ problem–solving and higher–order critical thinking skills they will need in the profession: a real–life client is unlikely to present the lawyer with four choices from which to pick the correct solution. Multiple–choice examinations have value in assessing, objectively, students’ knowledge and comprehension of materials, but they tap only into students’ recognition skills, rather than recall skills, and cannot be designed to test the more complex skills of synthesis and evaluation required for legal analysis.

Our students have become so inured to multiple–choice testing that they can now “game” the system by studying intensely right before the examination, but doing so is at the expense of long–term retention. As long as success in multiple–choice examinations communicates success as a law student and thus engenders confidence in that success, those students who perform poorly in other critical–thinking and problem–solving skills have little incentive to change for those narrowly perceived courses.

The academy has no choice but to start changing its teaching techniques in order to better address students’ underlying lack of cognitive skills. For instance, mass training in large classes can be made more effective with continuous feedback and more problem–solving. Furthermore, our teaching must become more integrally

218. Stuart & Vance, supra note 2, at 55 n.67.
219. Multiple–choice questions can be used to improve better calibration of confidence if poor performers are required to write out all the reasons why each answer was right or wrong, not just one. Pulford & Colman, supra note 159, at 126.
220. Flawed Self–Assessment, supra note 134, at 86. In addition, spaced, or distributed, one–hour classes for a longer time are more effective for long–term retention than two–hour classes in a more compressed period of time. Id. at 87.
involved in engaging students’ intentional learning and attainment of metacognitive skills whereby appropriately tailored feedback—and the more the better—will help students become more competent. Lawyering requires accurate self-assessment, and overcoming unwarranted overconfidence in our students to improve their self-assessment skills requires “explicit training, clear learning goals and the provision of feedback and other sources of evaluative data.”

Learning is also improved when the teacher “changes up” the learning circumstances with variability and unpredictability. That change-up may include the withholding of both feedback and modeling and thereby allowing students to fail. Introducing “desirable difficulties” into instruction creates better retention and transfer of learning because the students have to work harder at their cognitive skills. Indeed, unguided learning provides greater retention when the student has to do more for herself than guided learning when the information is provided to the student. Those who solve problems on their own tend to be more proactive and thereby create better and more efficient strategies for solving problems.

Changing teaching strategies to meet those needs will be difficult for those accustomed to the large–class lecture format. Instructors who are trained to teach critical thinking skills as a distinct component of the course not only improved their students’ performance but provided modeling for student learning. Instructors, however, tend to shy away from doing so because it takes more effort than traditional teaching methods. That is a discussion from which the academy can no longer run, especially given the new ABA Standards that require law schools to formulate student learning

221. Langendyk, supra note 114, at 40.
222. Flawed Self-Assessment, supra note 134, at 87.
223. Id.
224. Id. at 88.
226. Van Nimwegen & van Oostendorp, supra note 226, at 507.
227. Dunn et al., supra note 197, at 84.
228. Id.
outcomes and implement formative and summative assessments. But it is a discussion we must have.

IV. **Final Thoughts:** “**Modest Doubt is Called the Beacon of the Wise.**”

Overconfidence is not an immutable characteristic, but it is a detrimental characteristic for our law students. Overconfidence often makes our students impervious to learning changes, which law school—by its very nature—is designed to accomplish. Overconfidence therefore inhibits many of our students from learning the critical-thinking and problem-solving skills that will make them lawyers.

Addressing this dynamic has both personal and pedagogical challenges with which the legal academy is just now coming to grips. This Article articulates those challenges but does not—indeed, cannot—address all the possible solutions. Those solutions will necessarily invoke intentional teaching of both cognitive and metacognitive skills, difficult tasks in the best of times but more so now as many of our students present themselves with only rudimentary reasoning skills emblematic of their ages, their inadequate educational backgrounds, and their overuse of technology as the answer to all questions. And, of course, their overconfidence makes them resistant to change, a vicious and recursive circle of the curse of the incompetent. These are times that will test the dedication of the legal academy to the enterprise in which we are all engaged. But our very survival depends on changing the rules of that engagement.

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230. WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA, act II, sc. 2.
Eye of the Beholder: 
How Perception Management Can Counter Stereotype Threat Among Struggling Law Students

Catherine Martin Christopher*

ABSTRACT

When individuals belong to a group about which there is a negative stereotype, their fear of confirming that stereotype will often suppress their performance ability. This phenomenon is known as “stereotype threat,” and it has been documented with regard to gender, race, age, social class, athletic ability, and any number of other classifications, so long as a negative stereotype exists about that group.

Law students with low grade point averages (GPAs) are at greater risk than their higher–GPA peers of failing the bar exam, and they know it. Left unchecked, the pressure of this correlation—the stereotype threat—may itself depress their bar exam performance.

Together with school–wide efforts, however, academic support programs and messages can be developed so as to diffuse the negative stereotype of low GPA resulting automatically in bar failure. This Article discusses how the bar exam can be reframed, its consistency emphasized, and other techniques to help move students away from the fear that struggling in law school means bar exam failure. The Article also discusses how law schools can create a positive stereotype for students participating in bar preparation programming, by manufacturing a sense of belonging to a group that is stereotyped to do well on the bar exam. Such positive affiliation may result in a “stereotype boost,” or overperformance compared with peers.

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INTRODUCTION

Incoming law students are perceived as lacking in critical thinking, problem-solving, and other lawyering skills. It is natural that these students will struggle to adapt to the rigors of law school, and many of them will continue to struggle throughout their legal education. In addition to the academic pressures students face in preparing for class, completing assignments, outlining, working in study groups, and studying for exams, students in law school also face a new level of pressure: grading curves and the resulting class ranks.

In law school, for the first time, students who all excelled in college are forced into a paradigm where a C or C+ is the median grade. Half of all law students find themselves in the bottom half of the class—it’s a mathematical certainty, but it comes as a shock, and it has repercussions.

Low grades in law school bring with them academic, professional, and emotional tolls. Students fear that a poor GPA will prevent them from landing a job after graduation. An extremely low GPA may result in academic probation, restrictions from participation in extracurricular activities, or academic dismissal. Students with low GPAs may spend their remaining law school semesters attempting to dig out from their bad starts, ideally by changing their approach to studying or by seeking academic support. Students may also attempt to boost their GPAs through course selection, taking courses they perceive as being easy, or choosing courses with different grade determinants (papers and class participation, for example, instead of a cumulative final).

Students are also becoming increasingly aware of the correlation between low grades and bar exam failure. GPA at graduation is not

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a perfect indicator of bar exam success, but statistically, at some schools, it does show a stronger correlation with bar passage than other factors.\textsuperscript{2} The “danger zone” of low GPAs may vary from school to school—for some law schools, students in the bottom quartile of the class may be at risk of bar failure, whereas for other schools, the risk may be spread across the bottom half—but students are aware of a correlation, and students with low GPAs are very afraid of their bar passage prospects.\textsuperscript{3}

Psychologist Claude M. Steele, along with his colleagues and collaborators, has identified and studied a dangerous concept for at-risk individuals: stereotype threat.\textsuperscript{4} Stereotype threat will be discussed in greater detail in Part I below, but put briefly, when an individual is placed in a pressured situation where she would stereotypically be believed to perform poorly, she will. In fact, the more the negative stereotype is pointed out to her ahead of time, and the more she cares about doing well, the worse she will perform.\textsuperscript{5} Stereotype threat has been proven to affect individuals of various races, genders, ages, social classes, and a variety of other characteristics\textsuperscript{6}—so long as the individuals are stereotyped to perform in a certain (typically negative) way.

Stereotype threat also poses a danger to law students at the bottom of their graduating classes: the fact that they know they’re expected to perform badly on the bar exam may mean, in fact, that many will regardless of their individual abilities. This concept is explored in more detail in Part II. The pressure to perform, and to


\textsuperscript{3} \textit{See infra} Part II.

\textsuperscript{4} \textit{See generally} CLAUDE M. STEELE, \textit{WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO} (2010).

\textsuperscript{5} \textit{Id.} at 59, 98.

\textsuperscript{6} \textit{Id.} at 97–98. (“In the nearly fifteen years since its first demonstration was published, research on stereotype threat effects has blossomed throughout the world. The effect has been observed in women, African Americans, white males, Latino Americans, third–grade American schoolgirls, Asian American students, European males aspiring to be clinical psychologists (under the threat of negative stereotypes about men’s ability to understand feelings), French college students, German grade school girls, U.S. soldiers on army bases in Italy, women business school students, white and black athletes, older Americans, and so on. It has been shown to affect many performances: math, verbal, analytic, and IQ test performance, golf putting, reaction time performance, language usage, aggressiveness in negotiations, memory performance, the height of athletic jumping, and so on.”).
counter the stereotype, may actually inhibit students from performing up to their natural capabilities, like an athlete who “chokes” in a crucial moment.  

The good news is that stereotype threat can be countered. Steele and others have explored and identified concrete ways to reduce or dissolve stereotype threat, and these techniques can be used to help law students with low GPAs prepare for, and pass, the bar exam. These techniques are discussed in Part III below, in the context of how academic support programs can be designed and marketed in such a way as to reduce negative stereotypes and even create positive stereotypes, which may in turn generate a performance boost.

I. STEREOTYPE THREAT GENERALLY

Stereotype threat is a concept first researched and identified by psychologist Claude Steele in the 1990s. Steele and his colleagues began their research by exploring how women performed in advanced college math classes. Women, as a group, are often stereotyped to have poor math skills, and Steele wondered whether the existence of that stereotype had any effect on women’s actual performance. The initial experiment was simple: undergraduate men and women—with comparable math SAT scores, good grades in calculus, and for whom math was an important personal and professional goal—came into Steele’s lab one at a time and took either a difficult math or English test. The women performed worse than the men on the math exam, but the groups performed equally on the English exam. Although there were other possible explanations for this disparity, Steele and his collaborators theorized that “it was the pressure not to confirm a stigmatizing view of oneself that made women underperform in this experiment.”

As Steele’s research progressed, he and his colleagues began to focus on racial stereotypes, using a similar experimental setup to test the implications of the stereotype that black individuals have

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7. Id. at 124.
8. See generally id.
9. Id. at 32–33.
10. Id.
11. Id.
12. Id. at 33. The tests were taken from the advanced GRE subject exams.
13. Id. at 34.
14. Id.
lesser intellectual ability. A difficult verbal test was administered to both white and black Stanford undergraduates.  

[Steele] assumed that the frustration [the test] caused would be enough to make black students feel this threat [of confirming the negative stereotype]. White students wouldn’t like frustration either. But they wouldn’t worry that it was confirming anything about their group, since there is no broadly held negative stereotype in this society about whites[] having lower intelligence.  

The white students did in fact outperform the black students on the test.  

So the next experiment regarding racial stereotypes introduced a new variable: participants were given the same test, but were given a new explanation as to the test’s purpose. The psychologists explained to the new participants “that the test was a ‘task’ for studying problem solving in general, and [the test administrators] emphasized that it did not measure a person’s intellectual ability.” 

There is no stereotype that blacks are not good at problem solving, and in fact, once freed from the possibility of confirming a negative stereotype about intelligence, the black students performed at the same level as white participants.  

Steele concluded that the black and female students who believed they were being tested on something they are stereotyped as being bad at risked a “double consequence”: that the test would reveal they were individually unsuccessful, but also that their group as a whole would be unsuccessful at such a task. 

Steele also concluded more broadly that when individuals perceive themselves to be at risk of confirming a negative stereotype about themselves, their increased anxiety disrupts their performance: “a mind trying to defeat a stereotype leaves little mental capacity free for anything else we’re doing.”

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16. STEELE, supra note 4, at 50. Again the test was taken from the advanced GRE subject exam.  
17. Id.  
18. Id.  
19. Id. at 51.  
20. Id.  
21. Id.  
23. STEELE, supra note 4, at 123.
Further research into stereotype threat demonstrates that members of majority groups also experience similar effects when they perceive themselves to be reinforcing a negative stereotype. Researchers at Princeton discovered that white men on a miniature golf course perform badly when told the course was a test of natural athletic ability—after all, whites stereotypically lack athletic ability, and the pressure of confirming or disproving that stereotype interrupted their actual performance. But when white participants were told the miniature golf course was a test of “sports strategic intelligence,” they did just fine. Black participants, by contrast, performed well under the belief they were being tested on natural athletic ability, but performed poorly when under the belief they were being tested on strategic intelligence, again in relation to stereotypes about blacks’ natural athletic ability but lesser intelligence.

The effects of stereotype threat have been identified in many populations by many other researchers, so long as a negative stereotype exists for that group. Stereotype threat “can . . . impair women during negotiations, cause white males to act more prejudiced, and cause elderly people to be more forgetful.” It even depresses the verbal agility of lower-class French citizens, based on a specific stereotype among the French. “The breadth of findings shows that stereotype threat is a general psychological process that can impact anyone who belongs to a group for which there exists negative stereotypes.”

Another heartbreaking finding is that the more an individual cares about succeeding on a given task, the more stereotype threat is likely to hamper their performance. Black high school students who self-identify as caring about school performed worse on a simulated verbal SAT when told it was a test of verbal ability than when told it was a test of problem-solving ability. On the other hand, black students who self-identify as not caring about school

24. Id. at 8–11.
25. Id. at 10.
26. Id. at 9–11.
29. Stone, supra note 27, at 182.
30. STEELE, supra note 4, at 56.
performed equally no matter what they believed the test’s purpose was.\textsuperscript{31}

How does this happen? The best understanding so far is that the pressure to disprove a damaging stereotype actually disrupts individuals’ cognitive abilities, “probably as a result of alternating their attention between trying to answer the items and trying to assess the self–significance of their frustration.”\textsuperscript{32} “For example, women who are faced with the stereotype that men are better at math devote more of their thoughts to worrying about and monitoring their performance on math problems compared to nonthreatened women.”\textsuperscript{33} The mere act of “monitoring a situation for evidence of threat[,] and controlling one’s behavior to offset threat[,] each require cognitive effort.”\textsuperscript{34}

Not all research on stereotype threat is distressing, however. As research in this field has evolved, interesting nuances have been discovered. Most significantly, a positive stereotype has been shown to incite a performance boost.\textsuperscript{35} For example, one researcher demonstrated that when a group of Asian–American women were given a math test, those who were subtly reminded beforehand that they were female (thereby triggering the stereotype that women are bad at math) underperformed as compared to a control group.\textsuperscript{36} But those who were reminded of their Asian heritage (and thus the corresponding stereotype that Asians are good at math) actually over–performed when compared to the control group.\textsuperscript{37}

\textsuperscript{31} Id. at 57. It’s important to note that those who didn’t care about school didn’t do well on either test—they just performed equally poorly on both. Id.
\textsuperscript{34} Id. at 570.
\textsuperscript{35} Some literature in fact refers to this kind of positive–stereotype threat as “stereotype boost.” See Kang, supra note 22, at 1521 n.151 (citations omitted).
\textsuperscript{36} See Margaret Shih et al., Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance, 10 PSYCHOL. SCI. 80, 81 (1999). Participants took a questionnaire before the test, which was designed to trigger their association with a particular part of their identity. Id. at 80. Some participants answered questions about their living situations, including whether they lived on a single–sex or coed floor, and whether they would prefer living on one or the other—this triggered their association with being female. Id. at 81. Other participants answered questions about the languages their parents and grandparents spoke, and about how many generations their family had been in America—this triggered their association with being Asian. Id. The control group answered race–neutral and gender–neutral questions, such as whether they used the university telephone service, or whether they subscribed to cable. Id.
\textsuperscript{37} See id. at 80–81.
Research into stereotype threat may continue to reveal new insights and nuances, but even the existing research has important implications for struggling law students.

II. STEREOTYPE THREAT AND STRUGGLING LAW STUDENTS

Stereotype threat is a phenomenon that exists anywhere there is a negative stereotype about a particular group’s performance. The more an individual cares about success, the greater power that negative stereotype has to depress the individual’s performance.

Our best assessment is that stereotype threat causes an inefficiency of processing . . . . Stereotype-threatened participants spent more time doing fewer items more inaccurately—probably as a result of alternating their attention between trying to answer the items and trying to assess the self–significance of their frustration. This form of debilitation—reduced speed and accuracy—has been shown as a reaction to evaluative apprehension; test anxiety; the presence of an audience; and competition.

Evaluative apprehension, test anxiety, the presence of an audience, and competition—is there a better description of law school? Among struggling law students, the most damning stereotype is that students who graduate near the bottom of their class are more likely to fail the bar exam. Statistics bear out the correlation, though some schools may find that the bottom third of the class is disproportionately at risk, while other schools may find that risk to be restricted primarily to the bottom quintile, perhaps, or spread across the bottom half. In any case, the fact that stereotype threat is “thought to be the most serious on standardized exams” puts struggling law students at real risk of bar exam failure over and above any existing academic deficiencies.

38. Kidder, supra note 28, at 1086.
39. See STEELE, supra note 4, at 98.
40. Marks, supra note 32, at 127.
41. E.g., Georgakopoulos, supra note 2, at 7. But see DAY, supra note 2, at 329.
42. At Texas Tech, for instance, the bulk of the graduates who fail the bar exam on their first attempt graduated in the bottom quarter of their classes. In years with lower bar pass rates, the graduates who failed the bar were spread evenly throughout the fourth quartile. In years with higher bar pass rates, however, the graduates who failed the bar were concentrated in the lowest octile of their graduating class—that is, the bottom half of the bottom quarter. This leads to the conclusion that the bar prep program at Texas Tech can be most effective with students in the seventh octile of the graduating class—those in the top half of the bottom quarter.
As any lawyer or law professor knows, failing the bar exam has enormous financial and emotional consequences for an individual. Career plans are set back by at least six months, law school debts continue to loom un-repaid, and the individual must cope with the public and personal humiliation of failing an exam that seventy, eighty, or ninety percent of classmates passed. These setbacks exist even for those who go on to pass a bar exam on a second or later attempt.\(^\text{44}\) Those strugglers who never pass a bar exam lag behind their lawyer peers “on every measure—earnings, employment stability, even marriage and divorce rates.”\(^\text{45}\) For the first five to ten years out of law school, these non-lawyer J.D.s even underperform as compared to average college graduates.\(^\text{46}\)

Many law schools have implemented robust academic support programs, which are diverse in structure and demonstrably successful.\(^\text{47}\) Engaging with struggling students, giving them new and different tools to study material and perform on exams, is proven to be effective in improving struggling students’ grades and bar passage rates.\(^\text{48}\)

Given the damaging power of stereotype threat, however, academic support is potentially a double-edged sword. As soon as students get their class ranks, the majority find themselves in a place in the class none of them have ever been before—remember, most law students excelled in college, many without breaking a sweat. Now, however, half of them find themselves in the bottom half of the class. Word gets around quickly: being at the bottom of your class means you’re going to fail the bar. An academic support program that appears to be remedial can reinforce this stereotype, actually putting students more at risk of bar failure because of the stereotype threat implications.

Instead, academic support interventions can be designed thoughtfully, so as to avoid increasing the stigma placed on students with low GPAs. It may even be possible to design an academic support program that creates a positive stereotype, creating a stereotype boost for the participants. These concepts are discussed in more detail in Part III.

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\(^\text{44}\) Bar passage on the first attempt is ideal, whether from the perspective of the students, the law school, the alumni base, or the public.


\(^\text{46}\) Id.


\(^\text{48}\) See id.
III. MANAGING PERCEPTIONS

A weak GPA is widely known to correlate with failure on the bar exam, and research into stereotype threat suggests that struggling law students, once identified, may follow a self–fulfilling prophecy of failure on the bar exam. Academic support programs have been demonstrably successful in improving bar passage rates for struggling law students.\(^49\) It is important, however, that academic support programs not emphasize the stereotype that students who perform poorly in law school go on to fail the bar exam—emphasizing the stereotype will only make the problem worse; moreover, these are the students specifically in need of academic support, and none of the students at the law school should begin to associate academic support with bar failure.

This Part explores methods to reduce or dissolve negative stereotypes about students at the bottom of the class, as well as ways to create a positive stereotype about the students who participate in academic support.

A. Reducing Negative Stereotypes

Negative stereotypes can be reduced by reframing students’ understanding of the bar exam, emphasizing its consistency, celebrating students’ struggles, and allowing students to interact with role models who also struggled on the bar exam.

Reframing. As mentioned above,\(^50\) changing the perceived purpose of a test can remove the pressure of confirming negative stereotypes. Recall that white men struggled to complete a miniature golf course when they believed they were being tested on natural athletic ability, but they performed just fine when told the test was of their “sports strategic intelligence”; for black men, the results were the opposite.\(^51\) Nothing was different about the putt–putt course—the only thing that changed was how the men thought about it.

Students who struggle in law school may believe that they are less intelligent than their peers, so academic support should definitely send the message that the bar exam is not a test of intelligence (and it isn’t!). Instead, the bar exam can be framed as a test of preparation—how efficiently students study and how many practice questions they answer as they prepare.

\(^49\) See id.
\(^50\) See supra text accompanying notes 24–26.
\(^51\) See supra text accompanying notes 24–26.
When counseling students about the bar exam, academic support staff should speak almost exclusively about the eight-week preparation period. It is not necessary to discuss the exam days themselves in any detail. The bar exam can be described as an obstacle course that the bar examiners have set up and that the examiners will watch students run at the end of February or July. The examiners provide the layout of the obstacle course ahead of time (MBE, MPT, and essay questions), and students need to understand that they’re going to spend the summer training to run that obstacle course.

This rebranding also moves exam preparation away from something students have no control over—their IQ—and places it in an area they have complete control over—their study efforts. Research shows that “individuals tolerate frustration better, persevere in completing tasks, and are generally more successful[]” when they perceive they have control over a process. A student preparing for the bar exam is far more likely to come back to the frustrating process of studying if she senses that bar skills can be learned rather than being an ability she was born with (or without).

Consistency. Research suggests that emphasizing the fairness of a test may help eliminate stereotype threat. “Underperformance appears to be rooted less in self-doubt than in social mistrust.”

While credible arguments can be made that the bar exam is an imperfect measure of an individual’s competency to practice law, it is at least very consistent from year to year. Emphasizing the bar exam’s consistency may help students appreciate that something predictable is something for which they can prepare. In Texas, for instance, an oil and gas essay question that appeared on the July 2009 exam reappeared almost verbatim on the February 2014

52. Sports metaphors are often useful to drive home the idea of practicing for the bar exam. The bar as a wrestling match: “You have a wrestling match at the end of the summer, with an opponent who’s pretty tough. Are you going to spend the summer reading about wrestling, or are you going to practice wrestling?” (This metaphor works equally well with boxing, golf, or nearly any other sport). The bar as a marathon: “You’re training for a marathon. Can you run a marathon today? No, you cannot. Can you run one if you train for eight weeks? Yes, you can.” For those tightly wound overachievers: “If the bar exam is a sport, you don’t need to be in the big leagues. You just need to make the farm team. The farm team is good enough.”


54. Id.

55. Marks, supra note 52, at 127.

56. Id. at 127 (citing Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, Atlantic Monthly, August 1999, at 52).

57. See, e.g., Glen, supra note 53, at 1709.
A different oil and gas question that appeared on the July 2010 exam reappeared almost verbatim on the July 2013 exam.\(^{59}\)

Even where essays are not reproduced exactly, the topics tested repeat frequently, and the twists and turns in the fact patterns reflect the nuances and exceptions to these regularly-tested rules.

Consistency appears not only on the essay portion of the bar exam. The MBE is famously consistent across examination periods,\(^{60}\) and the MPT, though it varies in subject matter, almost always contains a fact pattern, a statute (or other rule, such as ordinances or dictionary definitions) and a handful of interpreting cases.\(^{61}\)

The consistency of the bar exam is a boon to examinees. It is difficult, but it is also predictable. As they do practice questions, students can see for themselves that they are learning specific information and specific skills that they will be able to deploy on the exam itself.


Celebrate struggle. Individual faculty members can applaud a student’s intellectual struggle as a sign of emotional strength, rather than denigrate it as a sign of intellectual weakness. Celebrating struggle allows students to feel like they’re going through a difficult rite of passage, rather than simply being the dumb kid who doesn’t get it.

Representation. It is incredibly powerful for students to see someone who looks like them doing the thing they want to do. It has been suggested, for example, that one way to combat the underperformance of blacks on the LSAT is to have “a course available only to African–American students and taught by African–American instructors, with the assurances that the course has the same high standards of those offered elsewhere . . . .”63 Borrowing from this, if possible, bar preparation programs can be run by lawyers who graduated from law school with low GPAs but went on to pass the bar exam. These individuals can model for students how to successfully prepare for the bar exam, sharing their own experiences, struggles, and successes.

B. Creating Positive Stereotypes: “We few, we happy few, we band of brothers . . . .”64

In the absolute reverse of stereotype threat, individuals who associate themselves with a group’s positive stereotypes may experience a stereotype boost. Recall that Asian–American women outperformed a control group on a math test when cued to identify themselves as Asian rather than female.65 The simple sense of belonging can reaffirm positive performance.66 Along with rebranding the bar exam so as to remove its threatening aspect, it may be possible to manufacture a positive stereotype about an academic support program that could transmit a stereotype boost to participants.

Borrowing from athletics. This rebranding approach has some precedent. The Scholar–Baller curriculum, developed by athletics

64. WILLIAM SHAKESPEARE, HENRY V act 4, sc. 3.
65. See supra text accompanying notes 38–40.
66. Shakespeare understood. The quotation accompanying this subpart B comes from the scene in Henry V when, on St. Crispin’s Day, hopelessly outnumbered by the French, Henry rallies his men: “We few, we happy few, we band of brot hers;/For he to-day that sheds his blood with me/Shall be my brother; be he ne’er so vile,/This day shall gentle his condition:/And gentlemen in England, now a-bed,/Shall think themselves accursed they were not here,/And hold their manhoods cheap whiles any speaks/That fought with us upon St. Crispin’s Day.” HENRY V act 4, sc. 3.
and academic directors and endorsed by the NCAA, is designed to eliminate the association of “student–athlete” with “dumb jock.”\textsuperscript{67} The Scholar–Baller organization initiates high school, college, and university athletes into the program if they maintain a certain GPA or demonstrate academic improvement.\textsuperscript{68} Inductees receive jersey patches, helmet stickers, plaques and other items that advertise their membership.\textsuperscript{69} The program is aspirational, its goals are not easy to achieve, and it works to remove the stereotype that anyone who is an athlete cannot also be smart.\textsuperscript{70}

Empirical evidence of the effect of the Scholar–Baller program on student–athlete GPAs is difficult to come by, but the Scholar–Baller organization itself highlights successes among individual programs.\textsuperscript{71} According to Scholar–Baller, Arizona State University’s football program implemented the Scholar–Baller curriculum in 2001 and saw increased GPAs among the players, near–disappearance of academic ineligibility, and triple or quadruple the number of players with GPAs over 3.0.\textsuperscript{72} The Scholar–Baller program has not proven to be a panacea, however. Academic weakness continues to plague college athletics,\textsuperscript{73} and at least one study found that student–athletes participating in Scholar–Baller programs demonstrate less academic motivation than those participating in non–Scholar–Baller programs.\textsuperscript{74}

Celebrating academic achievement, however, appears to have helped at least some student–athletes improve their academic performance. This may be attributable to stereotype boost: athletes in
the Scholar–Baller program may begin to associate themselves with strong academic performance, and may see improved academic performance because of this association. Similar celebration of aspirational performance may help struggling law students’ success in their bar exam preparation and performance.

Creating an “in” club. Aspirational, difficult–to–get–into, stereotype–removing programming can also be developed and implemented in academic support programs to incentivize and encourage law students with low GPAs to succeed on the bar exam. Texas Tech University School of Law, for example, offers a for–credit bar prep course called Texas Practice. The course does not have “bar prep” in the name, but it is advertised as such. The course focuses almost exclusively on essay writing, because of an institutional belief that essay writing is a skill that must be practiced and developed over a period of time, rather than crammed in June and July. One section of the course is offered each semester, with an advertised cap of twenty students. (The course usually ends up with twenty–three or twenty–four enrolled students.)

Students apply to get in the course. The application process is not complicated—applicants provide a copy of their transcripts and a cover letter explaining why they believe they will benefit from the course. Students are selected based on their perceived level of need for academic support. Enthusiasm counts, too; almost any student in the bottom third of the class who makes an in–person pitch will be accepted into the course.

The application process serves several purposes. First, it ensures that the students in the class really want to be there. Second, it allows school resources to be devoted to the students who need (and want) the most help. Third, it allows the students in the class to feel that they’re in. They got a coveted prize that was denied to other students. From here, the club–membership feeling is emphasized by underscoring how far ahead of the game these students are—saying things like, “So many of your classmates won’t write a single practice essay until after the Fourth of July! You have such a leg up on them!” This is followed, naturally, by pointing out that they will have to keep practicing until the bar.

Like the Scholar–Baller program, though, the Texas Practice course has not proven to be a magic wand, solving all the school’s bar passage difficulties. As the course is quite new, only twenty–four students have completed the course and sat for a bar exam at the time of this writing. These students did not outperform their

75. See supra text accompanying notes 35–37.
similarly–situated peers on the bar exam; they passed the bar exam at the same rate as non–takers with similar GPAs. It is hoped, however, that as the course evolves and improves, and as the sample size of students taking it and taking a bar exam increases, a more positive effect of the course on bar passage will be seen.

**Messaging and advertising.** Academic support programs and participants should be tracked and assessed for success, which can then be advertised.\(^{76}\) This advertising is a direct form of perception management, shaping the way the law school community views academic support and academic struggle. Bar success cannot, of course, be relegated solely to academic support offices; the entire curriculum and the entire faculty are responsible for students’ success on the bar exam.

Of note, if academic support programs are targeting students with lower GPAs, bar passage rate may still be below the school–wide average. For instance, if the bottom quarter of a law school class is passing the bar at a fifty percent rate, improving that passage rate to sixty–seven percent is still a marked improvement, even if the school–wide bar pass rate is eighty–five percent. Rather than advertising a sixty–seven percent pass rate which is less than the school–wide rate, the messaging can emphasize the increase in bar passage relative to similarly–situated students: “Students who took ABC course performed XY% better on the bar exam than their peers!”

Through these and other methods, law schools can manufacture a positive association for struggling students to hang their hats on. Research into stereotype threat suggests that once a negative stereotype has been dissolved, either by changing the individuals’ sense of affiliation or rebranding the test as something unrelated to the stereotype, at–risk individuals will perform on par with their peers. Going a step further, if these at–risk individuals can affiliate themselves with a positive stereotype, they may even outperform their peers.

**Conclusion**

When individuals belong to a group about which there is a negative stereotype, their fear of confirming that stereotype will often suppress their performance ability. Women taking a math test under pressure of confirming that women are bad at math will perform
worse than men, and they will also perform worse than women who do not feel the pressure of the stereotype. The phenomenon has been documented with regard to gender, race, age, social class, athletic ability, and any number of other classifications, so long as a negative stereotype exists about that group.

Law students with low GPAs are at greater risk than their higher-GPA peers of failing the bar exam, and they know it. Left unchecked, the pressure of this correlation may itself depress their bar exam performance.

Together with school-wide efforts, however, academic support programs and messages can be developed so as to diffuse the negative stereotype of a low GPA resulting automatically in bar failure. The bar exam can be reframed for students: it’s not a test of intelligence; it’s a test of how early you start doing practice questions. The predictable nature of the bar exam should be stressed—it’s difficult, sure, but it’s so very similar from year to year! This helps move students away from the fear that the bar exam is unfair. Moreover, law schools can create a positive stereotype for students participating in bar preparation programming. Affiliating oneself with a positive stereotype can result in a “stereotype boost,” or over-performance compared with peers.

Making these changes to the perception of underperforming law students can allow law schools to help these students overcome the effects of stereotype threat and realize success on the bar exam. This will not only allow law schools to see their bar passage rate rise but will also enable students, who once seemed at risk of failure, to become successful attorneys.
Empowering Law Students to Overcome Extreme Public Speaking Anxiety: Why “Just Be It” Works and “Just Do It” Doesn’t

Heidi K. Brown*

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INTRODUCTION

For law students experiencing extreme public speaking anxiety, which can manifest from variations of introversion, shyness, social anxiety, or social phobia, the Socratic method of intellectual discourse—either in the classroom or in the first–year oral argument experience—can trigger such a high level of apprehension that it may threaten even an otherwise strong student’s confidence in his or her future as an attorney. Extreme public speaking anxiety can pose a serious impediment to processing and comprehending legal concepts, and engaging with professors, classmates, and substantive material. Unless the anxious law student takes steps to address the roots of this particular issue, extreme public speaking anxiety can plague him or her unnecessarily throughout an otherwise promising legal career.

In the academic environment, many of these students try to hide, hoping to avoid being called on, and then flounder when “cold-called.” Some otherwise diligent and conscientious students skip
classes run by the Socratic Method because the fear of random mandatory participation becomes overwhelming. Even those who admit this anxiety and boldly seek help from professors, mentors, or academic support professionals often are left to fend for themselves if the particular advisor (who may have never experienced this affliction personally) does not fully understand the psychological depth of this issue. Unfortunately, trite advice from well-meaning authority figures and peers urging, “Just Do It!” does not help . . . as if these students could don a pair of Nike high-tops and bungee-jump their way to psychic freedom. Many law school administrators, professors, parents, and classmates who are life-long extraverts, or believe they conquered their own public speaking anxiety simply by “getting out there and doing it,” regrettably are not very helpful to those students who need a deeper examination of the roots of this problem.

Many law professors give the impression that students automatically should be able to deal with the rigors of the Socratic Method or other “command” speaking performances, and if they cannot, then they probably should choose another vocation. This article urges that this is a misguided mindset and message. Psychology-based research supports the notion that many introverted, shy, and socially anxious or social phobic individuals are capable of offering an even more nuanced, thoughtful, and empathetic perspective on legal issues than classroom “talkers,” but law school, and indeed society in general, rewards the loquacious. The legal academy and broader legal community need to hear from the subtler voices.

In her illuminating study of introverts in Quiet: The Power of Introverts in a World That Can’t Stop Talking, author Susan Cain suggests that introvert traits like “alertness, sensitivity to nuance, complex emotionality—turn out to be highly underrated powers.” Likewise, Dr. Laurie Helgoe comments, “[a]n introvert who sits back in a meeting, taking in the arguments, dreamily reflecting on the big picture, may be seen as not contributing—that is, until he works out the solution that all the contributors missed.”

Cain further notes, “the most spectacularly creative people in many fields are often introverted . . . [A] person sitting quietly under a tree in

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2. Susan Cain, Quiet: The Power of Introverts in a World That Can’t Stop Talking 4–5 (2012) (“[R]esearch shows that the voluble are considered smarter than the reticent—even though there’s zero correlation between the gift of gab and good ideas.”).
3. Id. at 104.
the backyard, while everyone else is clinking glasses on the patio, is more likely to have an apple land on his head.”

Other psychology experts reiterate that people who experience shyness or social anxiety might be more readily able to tap into empathy for others—an important trait for aspiring lawyers, and one we should encourage and foster in law school. According to author M.F. Fensholt, “[c]reativity and emotional sensitivity are two positive traits often shared by people who experience anxiety.” In describing his own battle with overcoming shyness, author of The Mindful Path Through Shyness, psychotherapist Steve Flowers wrote:

Shyness has become the source of empathy and compassion in my heart for others who feel frightened and alone, because I can see that their suffering is no different from my own . . . . Not only can shyness be valuable for driving this sort of growth and self--inquiry, it also has qualities that can be endearing.

He further imparted, “I realized the most interesting people are the most interested people. Interest in others helps you find and give expression to your caring heart, and you show your interest by how you listen.”

Author Barbara G. Markaway, Ph.D., shared her own experience of recovery from shyness and social anxiety: “I realize that my struggles, although not necessarily ones I would’ve chosen, have helped me to grow and develop into a sensitive, caring person who can understand and help others through their pain.” Author Erika B. Hilliard, MSW, RSW, also reflected on her life experience with anxiety, commenting that sensitivity, a by–product of shyness, primed her for her role as a therapist. She urges, “[a] lot of good qualities go along with shyness. There is sensitivity to nuances, to subtle differences. There is empathy for others. These are great qualities for certain life occupations and for solid friendships.”

9. Id. at 158–159.
12. Id. at 38.
Unfortunately, instead of regarding shyness and its accompanying traits of “sensitivity toward others, thoughtfulness, and endearing modesty” as a boon to any group dynamic, our society often tags it a weakness.\textsuperscript{13} Indeed, in our celebrity–driven culture, which lauds the most outspoken, outrageous, and outlandish, quiet thinkers often are dismissed or sidelined. Hilliard describes how “society sends many messages that tell us shyness is not okay . . . . [W]e need to challenge these messages.”\textsuperscript{14} Drs. Barbara G. Markway and Gregory P. Markway echo this principle: “We need quiet, thoughtful people in the world.”\textsuperscript{15} The field of law is no exception. In the legal academy, instead of forcing introverted, shy, socially anxious, or socially phobic students to fake or force extroversion which can exacerbate an underlying inhibition, we should encourage these students to “Just Be It”: be themselves while they gather confidence in thoughtful rumination about the law, and build strength to experiment with their “lawyer voice.” The results could be astounding when they are ready to own the podium.

Part I of this article defines the often–intertwined “labels” of introversion, shyness, social anxiety and social phobia. Part II explains why the “Just Do It!” mantra is not helpful to students experiencing extreme public speaking anxiety, and instead, why a mindful “Just Be It” approach is more appropriate. Part III describes tangible and practical steps comprising one “mindful” approach to overcoming extreme public speaking anxiety. Part IV captures the results of three years of Overcoming Public Speaking Anxiety (OPSA) workshops conducted at New York Law School and sponsored by the New York State Bar Association. In OPSA, law students volunteered for and participated in a five–part workshop series in anticipation of their spring first–year oral arguments. In their own words, participants of these workshops share their views on why “Just Do It” is not the right message in this context; they explain how taking time to examine their individual anxiety triggers, and realizing they are not alone in this experience, enabled them to make strides to overcome this challenge. Part V offers strategies for professors and other mentors to identify law students experiencing this battle (whether outwardly or secretly), exhibit empathy for their challenge (and potential embarrassment or shame), and motivate these individuals to tap into the underlying roots of this fear in order to ultimately “find their lawyer voice.”

\textsuperscript{13} Id. at 32–33.
\textsuperscript{14} Id. at 37.
\textsuperscript{15} MARKWAY & MARKWAY, supra note 10, at 68.
I. CLARIFYING THE LABELS ASSOCIATED WITH EXTREME PUBLIC SPEAKING ANXIETY

Society typecasts the successful lawyer as an extraverted, verbose, outspoken individual with the “gift of gab,” often portrayed in Hollywood by smooth-talking, larger-than-life, A–list actors. Yet, many intelligent attorneys would never use such adjectives to describe themselves. Within all of our law school classrooms, there exist students who qualify as “introverted,” “shy,” “socially anxious,” or “socially phobic,” yet have great potential to be highly effective legal counselors. Because each of these aspects of students’ personas impact their law school experience in different ways, it is important to understand the distinct meanings of each label.

A. Introversion

In common parlance, we think of extraverts as gregarious and outgoing, and introverts as quiet, and possibly even socially aloof. However, according to The Myers & Briggs Foundation, Swiss psychiatrist Carl G. Jung originally “used the words to describe the preferred focus of one’s energy on either the outer or the inner world. Extraverts orient their energy to the outer world, while [i]ntroverts orient their energy to the inner world.”16 Hilliard points out that not all introverts are necessarily shy. Non–shy introverts can engage with others with ease, maintaining a “pace of high social energy, but only for a limited amount of time” before needing to retreat to quiet solitude to re–energize.17 Indeed, “[s]hyness is often confused with introversion . . . Introverts prefer solitary rather than social activities because that’s satisfying for them; people who feel shy, on the other hand, choose solitary activities out of fear or anxiety.”18

The typical law school method of classroom interaction forces students to act like extraverts. However, rapid–fire Q&A does not necessarily mesh with the classic introvert’s most effective mode of learning or analytical thinking. Introverted students use different

17. HILLIARD, supra note 11, at 10.
18. FLOWERS, supra note 8, at 19.
processes than extraverts for learning and digesting complex information. Dr. Helgoe notes, “[i]ntroverts think before speaking, and need time within conversations to develop their ideas and responses.” Many introverts naturally prefer to pause, think, anticipate, reflect, sometimes reconsider, and possibly even mentally rehearse before reacting to a question. Many times, an introvert will be contemplating a thought, and pondering the best way to express that notion most cogently, while the extraverts in the room already have transitioned through a cornucopia of new topics. Often, the introvert’s kernel of an idea gets lost, shelved, or discarded along the way.

Forcing introverted law students to be extraverts can trigger anxiety. It is unnatural for an introvert to speak up solely to score “face time.” Such internal conflict can have deep psychological repercussions that many extraverts do not realize. Cain’s research reveals “introverts are significantly more likely than extraverts to fear public speaking.” Indeed, Cain acknowledges that “[i]f you’re an introvert, you also know that the bias against quiet can cause deep psychic pain.”

B. Shyness

Shyness is distinct from introversion. As noted above, shyness can reflect positive characteristics such as modesty, deference to others, and humility. However, Flowers explains that some individuals experience “problematic shyness,” marked by “feelings of being unsafe in interpersonal relationships and . . . social anxiety, which lead[s] to protective behaviors.” Flowers and Drs. Markway and Markway distinguish between being shy and “painfully shy.” Naturally shy people simply warm up to social encounters more slowly than non-shy individuals. However, “painfully shy” indi-

19. CAIN, supra note 2, at 255 (“Extroverts tend to like movement, stimulation, collaborative work. Introverts prefer lectures, downtime, and independent projects.”).
20. HELGOE, supra note 4, at 234.
21. Id. at 13 (“Introverts appear to do their best thinking in anticipation rather than on the spot; it now seems clear that this is because their minds are so naturally abuzz with activity that they need to shut out external distractions in order to prepare their ideas.”).
22. CAIN, supra note 2, at 108.
23. Id. at 6.
24. FLOWERS, supra note 8, at 18.
25. MARKWAY & MARKWAY, supra note 10, at 13; FLOWERS, supra note 8, at 2.
26. HILLIARD, supra note 11, at 9.
individuals experience fundamental angst in their daily social interactions; “[i]t’s painful to feel anxious and unsafe in the world and to think there’s something wrong with you.”

Painfully shy individuals struggle with feeling evaluated, judged, critiqued, shamed, and rejected in their everyday interfaces with other human beings—some on a merely uncomfortable level and others on a potentially disabling level. To each law school classroom experience, painfully shy law students lug mental suitcases full of “labels, concepts, judgments, generalizations from past experiences, and projections of future possibilities.” The painfully shy person works overtime in constantly “self-blaming and self-shaming,” relentlessly “building the walls of the prison that is shyness.”

C. Social Anxiety and Social Phobia

Anxiety is ubiquitous in American society, which is not surprising considering our daily news dose of global strife and economic upheaval, plus the ups and downs of our run–of–the–mill personal pressures and responsibilities. Experts indicate “anxiety is the most common emotional problem in our society, if not the entire world. Yet only twenty–five percent of people with anxiety seek professional guidance, and only a fraction receive effective help.” Unfortunately, shyness and social anxiety “are among the most debilitating forms of anxiety.” Although the mental health profession recognizes social anxiety disorder and social phobia, these terms are rarely discussed in the law school context.

Flowers provides the American Psychiatric Association’s definition of social anxiety disorder:

Social anxiety disorder, also called social phobia, is an intense fear or even terror of humiliation or embarrassment in relation to groups of people. It’s very difficult to overcome and can be very disabling. For this reason, social phobia is substantially

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27. FLOWERS, supra note 8, at 2.
28. Id. at 18–19.
29. Id. at 91.
30. Id. at 95.
32. Id.
different from shyness and is classified as a mental health disorder in the *Diagnostic and Statistical Manual of Mental Disorders*.\(^{33}\)

This form of anxiety perpetuates from negative, self–critical, and self–shaming words, phrases, and messages that individuals accept as truths earlier in life and then replay over and over in their minds throughout adulthood.\(^{34}\)

The terminology often overlaps; “[s]ocial anxiety and social phobia are close cousins.”\(^{35}\) Social anxiety that rises to the level of impacting an individual’s personal and professional engagements qualifies as social phobia or social anxiety disorder.\(^{36}\) The disorder is “characterized by a persistent fear of criticism or rejection by others.”\(^{37}\) An individual feels and experiences the disorder, while a mental health professional establishes the psychiatric diagnosis. A person’s particular symptoms of social anxiety disorder fall into three buckets: cognitive (the unique messages the individual replays in his or her head); physical (the individual’s instinctive biological responses to anxiety such as blushing, sweating, shaking, etc.); and behavioral (how the individual acts toward himself and others when the anxiety is triggered).\(^{38}\)

Experts estimate that social phobia affects up to thirteen percent of the American population,\(^{39}\) which means there is a good chance that socially phobic students sit in every law school classroom. The good news is: “Social anxiety is a condition that can change.”\(^{40}\) It is “not a fixed state. It is fluid. [An individual] can change its shape and its quantity.”\(^{41}\)

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33. FLOWERS, *supra* note 8, at 20 (citing the AMERICAN PSYCHIATRIC ASSOCIATION (2004)).
34. FLOWERS, *supra* note 8, at 69 (“Social anxiety is essentially created and perpetuated by the words in our heads about ourselves and other people. Anxiety feeds on the things we say to ourselves and therefore requires frequent verbal maintenance to keep regenerating itself.”).
36. Id.
40. HILLIARD, *supra* note 11, at xvi.
41. Id. at 25.
II. WHY THE NIKE–INSPIRED “JUST DO IT” APPROACH DOESN’T WORK FOR EXTREME PUBLIC SPEAKING ANXIETY IN LAW STUDENTS

The sports apparel company, Nike, has an inspirational slogan: “Just Do It.” It is one of the most motivational advertising messages of all time, urging the average American to get off the couch, slap on a pair of Air Jordans, and tap into one’s inner athlete. In fact, Nike is the name of the Greek goddess of victory, “both in battle and peaceful competition.”\(^{42}\) The brand’s rousing call to action promotes the empowering message that we can do anything to which we set our minds; we just have to go do it.

In the context of coping with extreme public speaking anxiety, however, some law students are so fearful of “just doing it” that they engage in creative avoidance behaviors: hiding behind laptop screens in the back of the classroom, taking a “pass” when on–call in the Socratic Method (even if such abstention affects their grade), skipping Socratic–driven classes altogether (accepting absence penalties), and choosing transactional law careers (where they believe verbal confrontation will be minimized, and deposition and courtroom experiences will be eschewed) instead of litigation jobs. Other law students experiencing similar levels of trepidation toward public speaking indeed have tried the opposite approach; they have been “just doing it,” forcing themselves to speak in class as their hearts pound, boldly enrolling in trial advocacy courses to try to will the nerves away, some even joining Toastmasters groups, hoping the rote practice will eliminate the anxiety of speaking before others. For many of the latter cohort, despite their admirable and courageous aspirations, this approach still nosedives, and, worse, can exacerbate the underlying anxiety as the perceived weakness metastasizes into another self–flagellating cycle. Not realizing these potential repercussions, many law professors, academic support professionals, mentors, parents, and classmates continue to urge these reticent advocates, “Just Do It!”

Drs. Barbara G. Markway, Cheryl N. Carmin, C. Alec Pollard, and Teresa Flynn, Ph. D., corroborate that “well–meaning” quips like, “Big deal! Everyone is nervous getting up in front of a crowd,” can be “trivializing.”\(^{43}\) But why exactly don’t these well–intentioned mantras work? It’s because the “Just Do It” approach is rational and logical, while extreme public speaking anxiety stems from irra--

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\(^{43}\) MARKWAY ET AL., supra note 39, at 14.
tional, illogical, unpredictable emotions and feelings. Flowers explains that “[o]ne of the problems with [the “doing”] approach is that it’s linear and goal oriented, whereas feelings are neither.”\textsuperscript{44} He elaborates:

Most people attempt to overcome shyness using rational thought, which isn’t surprising, as this is the mental orientation in which we generally spend most of our time . . . This is the kind of thinking that enables us to create lifesaving medications or build spacecraft, and it sometimes comes in handy for figuring out where you placed your car keys, but it can cause problems when it’s the only approach you use to manage fear and anxiety.\textsuperscript{45}

Sufferers of extreme public speaking anxiety often either take the self-protective “avoidance” route—to temporarily elude the painful feelings—or the “Just Do It” path—to rationally will the angst away—thinking those are the only two options, but neither is a long-term viable holistic solution.

For the avoiders, Drs. Markway, Carmin et al., describe such “Band-Aid” panaceas as “maladaptive coping” methods:

[Y]ou might avoid all potentially embarrassing social situations; you might medicate yourself with drugs or alcohol when facing a social situation is unavoidable. Both of these strategies are maladaptive. Although maladaptive coping often provides temporary relief, it can quickly become part of the problem. In the long run, such strategies feed your anxiety and keep your fear of disapproval alive.\textsuperscript{46}

Flowers echoes this principle: “Unfortunately, the very effort to escape thoughts, or even suppress or control them, usually intensifies them.”\textsuperscript{47}

Similarly, the “Just Do It” folks valiantly try to force themselves to “get over it,” as often advised by mentors and peers, but this pursuit soon takes on the character of punishment—which, well, hurts. As Drs. Markway and Markway describe, “[w]e think if we punish

\begin{thebibliography}{99}
\bibitem{44} Flowers, supra note 8, at 41.
\bibitem{45} Id. at 41.
\bibitem{46} Markway et al., supra note 39, at 24–25.
\end{thebibliography}
ourselves enough, we'll change.”48 The “Just Do It” strivers hurl themselves right into the scary judgmental fray, hoping that one day, the dark hovering cloud of shame will vanish, and the self-criticism and fear of disapproval will dissipate. However, as Flowers counsels, “[a]s long as you’re looking at yourself from somewhere outside yourself and trying to perform to what you believe to be the standards of others, you will be judging and striving. You’ll be trapped in doing mode and out of touch with your more authentic, whole self.”49 Like other experts, Flowers encourages individuals to stop doing, and instead start being and observing. He cautions, “[n]othing can cause quite so much trouble as an unexamined mind.”50 Left unexplored, embedded patterns repeat, and negative thoughts further entrench. Something truly awesome and earth-shattering needs to happen to stop this vicious cycle once and for all.

Thus, instead of reinforcing the foregoing punitive, almost disciplinarian or self-flagellating approach (reflective of the hazing-style rite of passage romanticized in The Paper Chase and reinforced to at least some degree every day in many law school classrooms across the country), experts who truly understand how to help individuals suffering with extreme public speaking anxiety recommend a “mindful” and gradual course of action. Instead of “Just Do It,” why not “Just Be It”?

The “Just Be It” approach to overcoming public speaking anxiety gives law students permission to: (1) take time to examine themselves—as human beings, students, and future attorneys; (2) identify and understand individual sensitivities and anxiety triggers and their mental and physical manifestations; and then (3) develop a gradual realistic plan to convert those perceived weaknesses into strengths, to better embrace the law school experience and eventually become transformative powerhouses in law practice. Flowers, in his book, The Mindful Path Through Shyness, offers a process of self-examination that really is the opposite of “Just Do It”; “[i]t’s certainly not a matter of toughing it out or shutting down your emotions and forcing yourself to endure things you hate.”51 Instead, he suggests, “[i]f you can create a little distance between yourself and your thoughts and learn to examine these creative narratives as

48. MARKWAY & MARKWAY, supra note 10, at 63.
49. FLOWERS, supra note 8, at 108.
50. Id. at 90.
51. Id. at 148–149.
mental events rather than facts of reality, you can begin to dismantle some of the personal narratives that create so much anxiety.”52 He distinguishes between a rational, analytical, harsh, judgmental “taskmaster” method of change and a non–judgmental, “non–striving,” “mindful” approach, focused on enhancing personal “awareness, intuition, acceptance, and compassion.”53 Drs. Markway and Markway emphasize that overcoming shyness and social anxiety is a gradual process: “Don’t do too much too soon.”54 There is no overnight, instant, “quick fix.” This road less traveled takes time, but can be powerful, not only for the individuals who commit to the journey, but potentially our law school communities and legal system. Through this process, we can help remove a weighty layer of stress from a cadre of law students who have potential to be truly great, empathetic, discerning, thoughtful advocates, and change our legal community for the better.

So, how can law students start to “Just Be It”?

III. THE MINDFUL “JUST BE IT” APPROACH TO OVERCOMING EXTREME PUBLIC SPEAKING ANXIETY

A. What is “Mindfulness”?

So what exactly is this concept of mindfulness, and how in the world could it apply in our competitive high–pressured law school environment? According to Flowers, “[m]indfulness is the awareness that grows from being present in the unfolding moments of our lives without judging or trying to change anything that we experience.”55 Drs. Markway and Markway offer a similar definition, stating:

[M]indful awareness is an ancient Buddhist concept involving being conscious of your thoughts, yet not clinging to them. Instead of holding on to your thoughts and obsessively analyzing them, you allow your thoughts to gently and effortlessly flow through you. This can take some practice. For many people, “letting go” doesn’t come naturally—especially when anxious thoughts can seem so believable at the time.56

52. Id. at 90.
53. Id. at 42.
54. MARKWAY & MARKWAY, supra note 10, at 152.
55. FLOWERS, supra note 8, at 3.
56. MARKWAY & MARKWAY, supra note 10, at 116.
Hilliard explains that “[m]indfulness usually requires slowing down, taking the time to reflect.”\(^{57}\) By getting off the “Just Do It” treadmill, decelerating one’s pace, and taking the time to observe what is happening cognitively, physically, and behaviorally when a person experiences extreme public speaking anxiety, that individual can recognize patterns and automatic reactions (for possibly the first time ever), understand their triggers, and eventually begin to “regulate” them.\(^{58}\) Mindfulness does not mean pretending anxiety does not exist and forging onward; in fact, it means the opposite. As Flowers describes, “[t]he mindful path involves becoming better acquainted with anxiety and learning how to work with it more consciously.”\(^{59}\)

As described in more detail below, one mindful approach to conquering extreme public speaking anxiety entails: (1) digging into possible historical root causes of fear of public speaking and/or interactions with others; (2) taking time to consciously observe and recognize automatic “maladaptive” mental and physical responses to public speaking scenarios; (3) thoughtfully constructing new and strategic cognitive, physical, and behavioral responses to known anxiety triggers; and (4) creating an agenda of gradual “exposure” opportunities, to practice riding out the rise and fall of a series of anxiety–producing public speaking experiences with success.

B. Reflecting on Possible Roots of Extreme Public Speaking Anxiety to Extirpate Them and Let Them Go

Before an individual can tackle extreme public speaking anxiety, he or she must take time to reflect on possible root causes of “painful shyness” and/or social phobia. Experts indicate that the seeds of this anxiety can be planted through biological facilitators such as “genetics, neurobiology, and temperament,” and environmental stimuli such as “humiliating experiences, parenting styles, and other learning.”\(^{60}\) Flowers explains that shyness can derive from “the usual intertwined sources of genetics and life experiences,” including “the influence of primary caregivers in early childhood and other socializing influences throughout life.”\(^{61}\)

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57. Hilliard, supra note 11, at 273.
59. Id. at 27.
60. Markway & Markway, supra note 10, at 50.
to handle emotions—positive and negative—early in life, through reinforcement by caregivers. Hilliard reinforces that adult shyness and social anxiety can germinate from environmental dynamics such as: (1) how “parents or caretakers soothed or irritated [a child’s] nervous system, training it into a state of alertness or cautiousness”; (2) positive or negative messages delivered by family or other authority figures, which either generated and nurtured feelings of “being loved, respected, and safe” or conversely of “being flawed, unworthy, unsafe, inhibited, or inadequate”; (3) being labeled as “shy” in a negative way as a child; (4) traumatic experiences; and (5) other life circumstances. When coping with distressing emotions such as fear, anger, shame, or guilt, for example, if a child learns from a parent or caregiver that “it’s not safe to be seen and heard” in the form of expressing these emotions through normal outlets, the child becomes “quietly invisible by developing complex patterns of avoidance and self-protection.” For these children, a pattern of “censorship” by authority figures “can ‘prime the pump’ for social anxiety to develop at a later point.”

Law students who have spent years cementing schema of avoidance and self-protection from painful emotions such as fear, anger, shame, and guilt need to re-learn how to manage these emotions in a healthy manner. To do so, these students must gently identify the sources of negative judgment-oriented messages in the past, identify how such scripts may have been reinforced by other powerful figures throughout adolescence and early adulthood, and then acknowledge that those messages no longer apply and can be silenced forever. As adults, these individuals can press “stop” on the endless loop of critical messages, and compose fresh new maxims that encourage rather than censor.

For some shy or socially anxious individuals, maladaptive coping mechanisms may not have sparked from a lifelong pattern of repressing hurtful emotions, but instead from a single traumatic event. According to Drs. Markway and Markway, “[a] study con-

62. FLOWERS, supra note 8, at 105.
63. HILLIARD, supra note 11, at 20–21.
64. Id. at 150.
65. MARKWAY & MARKWAY, supra note 10, at 38.
66. For some law students, this step may require the assistance of professional counseling. It is also not intended to encourage the student to engage in a “blame game,” but it is essential for the student to understand where negative messages originated so that he can delete or edit them going forward.
67. FLOWERS, supra note 8, at 175 (adults can “learn how to give [them]selves the safe and secure base of self-compassion that [they] never had before.”).
ducted in 1985 by Professor Lars–Goran Ost at Stockholm University found that fifty–eight percent of people with social phobia attributed the onset of their disorder to a traumatic experience.”

Whether genetic factors or environmental contributors, either throughout childhood or a single difficult event, forged an individual’s extreme public speaking anxiety, the first step is noting and acknowledging these catalysts, and then understanding and celebrating the fact that their suffocating grip can be released forever.

C. Recognizing Maladaptive Automatic Responses to Stressful Public Speaking Scenarios

Another reason why “Just Do It” is not a realistic solution for eliminating extreme public speaking anxiety is that detrimental and often painful cognitive, physical, and behavioral responses to stress are automatic and unstoppable without thoughtful observation, reflection, and reframing. Simply forcing oneself into yet another torturous scenario does nothing to solve the problem; the individual must first subdue the automatic response, which is impossible without (a) awareness of their nature and occurrence, (b) recognition that they are impermanent, and (c) resolve to re–purpose their energy into something useful.

It can be quite revelatory for an anxious public speaker to realize—for the first time—that the troubling cognitive, physical, and behavioral responses that accompany a harrowing public speaking performance are simply knee–jerk automatic reactions from years of conditioning, which can be stopped, checked, and redirected in a healthy direction. Flowers points out that, “[a]s our emotions are shaped and conditioned so early in life, they are deeply ingrained in our personalities and happen automatically.” Typically, we meander through life completely unaware of these reflexive emotional loops, and therefore do not investigate and study them, “even though they can be extremely predictable and create a great deal of suffering.”

When lifelong anxiety sufferers finally stop and transcribe the negative messages re–playing in their heads, identify disturbing physical responses, and note unhealthy reactionary behaviors (avoidance, self–shaming, self–criticism), they can interrupt the vicious cycle and start a new sequence of positive thoughts, emotions, physical responses, and behavioral actions. Flowers emphasizes that, even though past patterns may be well–ensconced, they

68. MARKWAY & MARKWAY, supra note 10, at 37.
69. FLOWERS, supra note 8, at 105.
70. Id. at 31.
are not permanently etched in marble; “the most troublesome components of shyness are things you can work with: thoughts, emotions, sensations, and behaviors that are impermanent, malleable, and within your personal capacity to change.”  

He reassures individuals ready to conquer this challenge that they “can take the whole thing off automatic pilot.”

D. “Just Be It”: Using Mindfulness to Find One’s Voice

While “Just Doing It” unwittingly can harden and fortify harmful automatic responses to stress, “Just Being It” allows anxious individuals the space to discover the toxic cognitive, physical, and behavioral reactions ignited by public speaking scenarios, and let them go. Flowers describes how “human beings have two principle modes of operation: being mode and doing mode.” He reveals, “[b]eing mode offers resources for learning, healing, and well–being that doing mode can’t access. In being mode there is no judgment or striving, whereas in doing mode it’s hard to stop judging and striving.”

Brave yet misled souls who try to conquer anxiety by “Just Doing It” throw themselves into the same fire that they have jumped into many times before, hoping for a different outcome. Albert Einstein is attributed (though writers say the true source cannot be confirmed) as saying, “the definition of insanity is doing the same thing over and over again and expecting different results.” Flowers distinguishes “doing mode” from “being mode” in the same vein:

When we operate from the goal–oriented mind, we’re in doing mode—the mind state that creates and perpetuates shyness patterns and, as you may have noticed, hadn’t been able to break free of those patterns. To paraphrase Albert Einstein, we can’t solve our problems using the same level of thinking

71. Id. at 27.
72. Id. at 38.
73. Id. at 43 (citing M.G. WILLIAMS, J. TEASDALE, Z. SEGAL, & J. KARAT–ZINN, THE MINDFUL WAY THROUGH DEPRESSION: FREEING YOURSELF FROM CHRONIC UNHAPPINESS (2007)).
74. FLOWERS, supra note 8, at 43.
that created them. In other words, we need to think outside the box.\textsuperscript{76}

Instead of trying to “do something” about public speaking anxiety, individuals first need to just “be” shy or socially anxious about a public speaking performance; “[t]his allows you to look into your shyness pattern, which you may discover is mostly created by your doing mode of operation.”\textsuperscript{77} Shifting to “being mode” affords the luxury of observation, creating “distance from those patterns of thought and emotion.”\textsuperscript{78}

Flowers offers a great quote from Tao philosopher Lao Tsu: “To be, don’t do.”\textsuperscript{79} Likewise, Drs. Markway and Markway advise individuals to “stop working so hard to prevent your anxious reactions.”\textsuperscript{80} People need to “Just Be It,” and let the knee-jerk reactions happen so they can be “illuminated,”\textsuperscript{81} and then re–purposed. The following summarizes one approach to this transformative process.

1. “\textit{Just Be It}” Journeyers Must Understand That the Solution is a Process, Not a “Quick–Fix”

Individuals seeking to overcome extreme public speaking anxiety can start the “\textit{Just Be It}” trek by acknowledging that “[a]lthough getting rid of all anxiety is not possible, handling anxiety is both achievable and desirable.”\textsuperscript{82} As mentioned above, this is not an issue that can be solved in one immediate swoop by ripping off a psychological Band-Aid, bungee–jumping away from a painful past, or diving into the deep end of emotional confrontation. It is a process that starts slowly, and consciously builds with small successes, each a necessary component part of the overall greater triumph, which occurs later.

\textsuperscript{76} FLOWERS, supra note 8, at 43.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} MARKWAY & MARKWAY, supra note 10, at 185.
\textsuperscript{81} FLOWERS, supra note 8, at 84 (“These are the habits of mind and behavior that can get you lost in your shyness patterns and keep you there. So the more you can illuminate them, the more you may be able to uncouple from some of these automatic reactions.”).
\textsuperscript{82} MARKWAY ET AL., supra note 39, at 50.
2. **Individuals Must Quiet Down to Be Able to Hear, Transcribe, and then Overwrite Their Personal, Unique, and Automatic Harmful Mental Messages**

When thrust into stressful public speaking scenarios, the brains of many shy and socially phobic individuals, and those who suffer from extreme public speaking anxiety, generate maladaptive “cognitive messages” as automatically as ATM machines spit out receipts. The public speaking performance begins; the negative scripts start tapping like Morse code or a court reporter’s stenography machine. Even in a short oral interaction with another human being, these individuals can sustain repeated cognitive blows through: (1) over–anticipating negative events that have not happened yet;\(^83\) (2) catastrophizing;\(^84\) (3) self–judgment;\(^85\) (4) feelings of inadequacy;\(^86\) and (5) projections of self–criticism.\(^87\) Drs. Markway and Markway train individuals to spot these poisonous thoughts as soon as they appear (almost as if they pop up in bright red “thought bubbles” above our heads), identify them as “misleading and maladaptive,”\(^88\) and “label” them as dangerous. Flowers concurs: “Through mindful awareness, [people] can learn to recognize these thoughts for what they are.”\(^89\)

Individuals working the “Just Be It” process need to learn, or be taught, that when these noxious messages flare up, they are “impermanent, very short–term visitors.”\(^90\) This can be a huge revelation for anxiety–sufferers who are convinced that the feeling of being out–of–control will persist forever. But it always subsides. Part of this re–programming process involves training oneself to recognize (more quickly) the “red alert” messages, emotions, and feelings that normally initiate a tailspin, let the thoughts be, realize they are transient, and let them pass.\(^91\)

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83. FLOWERS, supra note 8, at 94.
84. Id. at 95.
85. Id.
86. Id. at 97.
87. Id. at 94.
88. MARKWAY & MARKWAY, supra note 10, at 115.
89. FLOWERS, supra note 8, at 99.
90. Id. at 104.
91. Id. at 119 ("When you shift your awareness into a physical place grounded in the body and attend to what’s happening right now, your attention can stop contracting around some idea of a future calamity and expand to take in the whole spectrum of sensations, emotions, and thoughts occurring right now. Notice the changing and impermanent nature of each of these mental and physical events and allow your attention to settle in the physical sensations. You might acknowledge that this is just another anxiety event, and that it too will pass."); see also MARKWAY & MARKWAY, supra note 10, at 57 ("If you’re feeling anxious, you’re feeling anxious. That’s all. It doesn’t mean it’s horrible or catastrophic. It doesn’t..."
Anxiety sufferers will start to appreciate their internal power in “hav[ing] a choice about whether or not to jump on trains of thought.”\(^92\) What may previously have been an automatic response to a twinge of anxiety can now become a conscious choice. By “Just Being It,” individuals can linger (momentarily) when the troublesome slogans of the past reappear,\(^93\) and realize that they are just words that can be edited or deleted. As Flowers emphasizes, “[j]ust finding ways to step outside of your thoughts and investigate them without identifying with them or trying to push them away is a powerful practice that can help break their spell.”\(^94\) This stage is simply about letting the old mantras begin to run their automatic course, then eventually breaking the harmful reactive chain.\(^95\) It is about “no longer feeding the fear body with more fear.”\(^96\)

To do this, “Just Be It” trekkers should note and write down, or transcribe, the destructive cognitive messages, thoughts, and feelings as they materialize.\(^97\) Flowers encourages, “[n]otating is a way to build and nourish your ability to observe without attachment or resistance.”\(^98\) Hilliard reiterates the effectiveness of “writing these negative messages down on a piece of paper . . . moving them from inside your head to outside on paper, or into the air.”\(^99\) Further, “if you write or speak out loud, you are using your body, which helps to strengthen the new messages you wish to cultivate.”\(^100\)

Allowing harmful verbal messages from the past to arrive—uninvited as usual—so they can be dealt with is a much more effective long-term solution than “Just Doing It,” compartmentalizing the messages, shoving them into a mental suitcase, and temporarily pretending they do not exist in order to get through a public speaking challenge. In the latter mode, the baggage forever lurks, taking mean the anxiety will last forever. It doesn’t mean you won’t be able to handle it. It doesn’t mean anything except that you’re feeling anxious at a particular moment.”).
up precious intellectual space. In the former, it can be excised permanently. As Flowers summarizes:

[T]he more you try to block, avoid, control, or escape difficult emotions, the more certain they are to revisit you time and time again and become problematic. On the other hand, if you’re swept up by each passing emotion, you’ll find yourself careening from one overwhelming event to the next. But if you can learn to attend to difficult emotions with clear awareness and acceptance, you may be able to find a middle ground where you can work with your emotional states more skillfully.\footnote{FLOWERS, supra note 8, at 106.}

The objective is to accept that a challenging message, emotion, or feeling will probably reappear automatically time and time again, like an old, irksome acquaintance. Instead of letting the intruder inflame an undesirable reflex response, the individual can recall (more quickly each time) that this is a temporary interloper, let the message, thought, or feeling be and then pass, and then re-frame the internal dialogue in a more positive light.\footnote{Id. at 106–107.} This new course of action takes practice and will not entrench without repeated reflective opportunities. Ultimately, “[t]he key is learning to respond to anxiety with clarity and skill rather than denial and shame.”\footnote{Id. at 109.}

3. “Just Be It” Trekkers Can Learn How to Refrain from Overreacting to Physical Manifestations of Anxiety

For many anxious public speakers, physical manifestations of stress exacerbate the emotional effects. Not only can it feel scary or unnerving to sweat, flush, blush, shake, or experience a racing heart, shortness of breath, or tightening of the throat, these biological responses can be visible to an audience, causing unwarranted embarrassment or shame to the anxious public speaker. Interestingly, Hilliard reports that “[r]oughly twenty to thirty percent of the participants in [her public speaking support] groups have rated their physical symptoms as their number–one concern. They describe their physical symptoms as ‘excruciating’.”\footnote{HILLIARD, supra note 11, at 43.}

Shy or socially anxious individuals fret that when others observe these physical responses, they make negative judgments. Ironically, the body’s response to stress is not one of abandonment wor-
thy of self–chastisement or self–doubt; it is a prudent self–protective response, “your body’s effort to help you in some way.” Hilliard concurs, “[t]hese are the same bodily responses that are activated in an emergency involving some sort of physical threat.”

Instead of being ashamed of or embarrassed by one’s visible reactions to public speaking stress, anxious public speakers should embrace these outward symptoms as “life coursing through [the] body.” Individuals should acknowledge, “[t]his is just adrenalin passing through my body. This will pass.” In fact, experts emphasize that “[t]he body is a place where you can become more grounded and stable in working with difficult emotions like anxiety and fear. It can be an important ally in meeting challenging emotions and dealing with them well.”

By way of illustration, let’s focus on extreme blushing. Imagine that an anxious public speaker senses the first flash of a blush, which then creeps around her neck and up her cheeks like ivy vines. Rather than immediately feeling self–conscious (which of course perpetuates and flares the fiery burn of the blush), she can try to “Be the Blush.” Hillard urges, “[t]o see a blush is to celebrate life’s living . . . fullness, ripeness, color, and flourishing life.” Hillard advises life–long blushers, “[t]hink of your blushing as footprints left by the blood surging into the blood vessels under your skin. They symbolize the fact that life is coursing through you.” Further, “[b]lushing is a reminder that you are a vibrant human being, complete with a rich array of emotions. It’s a package deal. We laugh, we cry, we fume, we flame.”

Like the negative messages, feelings, and emotions identified in the prior section of this article, physical symptoms are also impermanent. Sweat will evaporate, shaking will settle, a blush will fade. While “Just Being It,” anxious speakers can practice: (1) recogniz-

105. FLOWERS, supra note 8, at 119.
106. HILLIARD, supra note 11, at 44.
107. Id. at 166.
108. Id. at 151.
109. FLOWERS, supra note 8, at 109.
110. The author of this article suffers from extreme blushing when stressed in any public speaking environment; she has learned that if she consciously acknowledges, “Yes, I am blushing. No, there is nothing I can do about it,” it will pass. If she tries to fight or control it, the blush intensifies. See HILLIARD, supra note 11, at 58 (“[I]nterestingly, [blushing] is a topic often ignored or only briefly mentioned in most social anxiety literature.”).
111. Id. at 63 (encouraging individuals to “take ownership” of blushing by stating, “I am blushing myself.”).
112. Id. at 60.
113. Id. at 64.
114. Id. at 62.
ing the moment when a disagreeable physical sensation commences; (2) disrupting the automatic panic/self–judging reaction; (3) letting the physical manifestation run its course; and (4) marveling as it wanes.

4. “Just Be It” Warriors Can Flip the Message

The next step of the “Just Be It” journey is to flip the unhelpful messages from the past into emboldening personal taglines for the future. Drs. Markway, Carmin et al., suggest, “[t]o get rid of self–defeating thoughts . . . you must learn to replace them with more adaptive and constructive thoughts, called *coping statements.*”¹¹⁵ Instead of harmful rebukes such as, “I’m such a wimp; I can’t do this; I’ll never cut it as a lawyer; everyone can see my stupid red blotchy face,” Drs. Markway, Carmin et al., encourage the anxious speaker to flip these jibes into “realistic” and “brief and simple” affirmations, such as:¹¹⁶

“Most people will accept it if [my face turns fire engine red when I deliver my oral argument.] I can cope with disapproval. It’s not that bad.”¹¹⁷

“Most professors will accept it if I stumble over a word or phrase. I can cope with a disapproving look. It’s not that bad.”

“Most of my fellow law students will accept it if I don’t know the answer to a confusing Socratic question. I can cope with not being perfect. It’s not that bad.”

Drs. Markway, Carmin et al., recommend crafting new “coping statements” to disrupt “maladaptive thoughts,”¹¹⁸ and writing out a “coping card”¹¹⁹ if a physical tangible reminder is necessary to stop the negative cycle. Hilliard agrees that anxious speakers should “listen to the negative messages that you tend to give yourself, and then . . . invent an antidote, a completely opposite message.”¹²⁰ When the “voice” chimes in with a totally unworkable “you can’t do this,” the speaker must perform the mental version of “stop, drop, and roll,” and say, “wait a minute, I can actually do this.”

¹¹⁵. MARKWAY ET AL., supra note 39, at 69.
¹¹⁶. Id.
¹¹⁷. Id.
¹¹⁸. Id. at 70.
¹¹⁹. Id.
¹²⁰. HILLIARD, supra note 11, at 151.
pattern might continue: “But what if it doesn’t go well?” Oh, “but what if it does?”

5. “Just Be It” Soldiers Will Achieve Success through Gradual “Exposures” with a Deliberate Agenda and Purpose

Once a hesitant speaker learns the basics of “Just Being It,” through: (a) observing cognitive and physical responses; (b) re–programming previously maladaptive secondary responses; and (c) flipping the message, it is time to practice this new cycle. Once again, this is not a no–holds–barred “Just Do It!” approach; rather, experts advise anxious speakers to develop a measured “exposure agenda” and engage in a gradual sequence of “winnable” public speaking scenarios. Flowers describes the notion of “exposure” as follows:

Sometimes the very things that hurt and scare us also offer a healing balm. In regard to shyness and social anxiety, this means finding healing by turning toward and looking within interpersonal relationships. In the parlance of psychology this is called exposure, and it’s an important part of cognitive behavioral therapy for the treatment of shyness.121

Drs. Markway, Carmin, et al., relay that “[t]he term exposure simply refers to the process of facing your fears, rather than avoiding situations that engender them.”122 Of course, there is a critical distinction between confronting one’s fears via measured exposure versus all–out “Just Do It” anarchy.

An effective exposure involves allowing an anxious public speaker to enter the realm of a public speaking scenario, experience the swell of the often scary mental and physical responses, make subtle changes in cognitive, physical, and behavioral reactions, linger in the episode long enough for the undesirable reflexive reactions to recede, and complete the event in a calmer state. Flowers describes how, within the exposure, individuals “approach and stay near the edge of [the] social anxiety and fear deliberately. Gradually, [they will] develop a different relationship with these emotions and the people [they are] interacting with.”123

The first step is to develop an exposure plan or agenda. Flowers describes the process as follows:

121. FLOWERS, supra note 8, at 145.
122. MARKWAY ET AL., supra note 39, at 81.
123. FLOWERS, supra note 8, at 149.
[Individuals should] come up with a list of social situations that are likely to elicit anxiety or shyness, and rate the severity of the anxiety, fear, or avoidance they’re likely to provoke. Then you arrange the situations in a hierarchy from least to most distressing and begin to intentionally expose yourself to these situations to build tolerance, beginning with a low-ranked item.\textsuperscript{124}

The ideal agenda reflects a thoughtfully-constructed incremental progression, rather than a series of abrupt confrontations, starting with less daunting public speaking scenarios and working up to more stressful ones.\textsuperscript{125} Experts confirm that “gradual practice [is] clearly superior to taking on the most frightening tasks early on . . . [Individuals] want to be challenged, not overwhelmed.”\textsuperscript{126} Interestingly, psychologists indicate that exposures do not need to be in live social, professional, classroom, or courtroom environments; some agenda events can be visualized in the comfort and safety of a person’s home. “In vivo” exposure is the term experts use to describe a scenario that “takes place in the actual situation”\textsuperscript{127} while “imaginal” exposure “is carried out in your mind.”\textsuperscript{128}

Regardless of the type of exposure, the critical requirement is that the individual stays in the exercise long enough “to feel the rise and fall of anxiety symptoms.”\textsuperscript{129} Flowers says, “in most cases, once a strong reaction has happened, it can take fifteen or twenty minutes for the body to physically assimilate all of the self-calming hormones and chemicals it has produced and once again find its steady state.”\textsuperscript{130} In order for each exposure to contribute worthily to a long-term holistic amelioration of extreme public speaking anxiety—rather than undermine this aspiration—the individual must dwell in the discomfort until his or her “anxiety level begins

\textsuperscript{124} Id. at 163.
\textsuperscript{125} MARKWAY & MARKWAY, supra note 10, at 152 (“The trick is to break your fears into a series of steps, with the first few steps being only mildly challenging, with later steps increasing in difficulty. To do this, you create what’s called a ‘hierarchy’—a list of the situations that elicit anxiety, rank ordered by the amount of distress each would lead to if you entered the situation.”). Id. at 99.
\textsuperscript{126} MARKWAY ET AL., supra note 36, at 107 (citing a 1981 study by Drs. Andrew Matthews, Matthew Gelder, and Derek Johnson).
\textsuperscript{127} MARKWAY & MARKWAY, supra note 10, at 157.
\textsuperscript{128} Id.; see also HILLIARD, supra note 11, at 106 (“Studies have shown that in the process of imagining, people experience changes in muscle activity, oxygen consumption, blood flow, and blood pressure.”); HILLIARD, supra note 11, at 120 (“The power of imagination is formidable. It can direct physiological responses in the body, evoke emotions, heal and save lives, and enhance performance.”).
\textsuperscript{129} HILLIARD, supra note 11, at 175.
\textsuperscript{130} FLOWERS, supra note 8, at 120.
to decline, preferably to a mild level. The theory is that if you leave the situation while your anxiety is still high it reinforces your fear and can do more harm than good.” 131 Hilliard cautions, “[i]f you quit while your sympathetic nervous system is on full blast, with your heart racing and your breath speeding, you don’t get to experience the relief of anxiety reduction. You don’t have the opportunity to develop trust that things will work out.”132 This principle is why many attempts at “Just Do It” fail and indeed can have further detrimental effects on a sufferer of extreme public speaking anxiety.

Drs. Markway and Markway reassure individuals that “[f]acing your fears can be powerful, especially when you stay in the situation long enough to learn that you can cope with it and that a catastrophe isn’t likely to occur.”133 Anxious speakers who embrace this process will start to realize that the unpleasant mental and physical reactions always subside.134 With a well–planned exposure agenda, “Just Be It” explorers soon learn to trust the system. They become more adept at staying in the moment, riding the rise and fall of the automatic responses, flipping the message, and noticing the retreat of the pulse of anxiety to a calmer state.

The end result involves “habituation” and “desensitization.” Habituation is the lessening of the natural or innate response to a given trigger.135 Desensitization is a decrease in the harmful emotional reaction to a particular catalyst.136 This author, however, does not want to encourage a definition of desensitization that would extinguish all emotional responses; as mentioned earlier in this article, according to author M.F. Fensholt, “[c]reativity and emotional sensitivity are two positive traits often shared by people who experience anxiety.”137 In the law school context, we want creative and empathetic law students and aspiring lawyers. But we can help channel emotional sensitivity in a healthy direction.

Experts consistently highlight the important of gradational exposure—in calculated increments. Drs. Markway and Markway emphasize that the “key to successful exposure treatment is to go slowly and don’t take on more than you can handle. Obviously, ex-
poses are going to create some anxiety. That’s necessary for habituation to take place.”\textsuperscript{138} Further, desensitization “can be accomplished in a ‘systematic’ way. The system is to expose yourself very gradually to the situation that intimidates you.”\textsuperscript{139} After recurrent successful exposures (and perhaps recovery from intermittent unsuccessful ones), the process of habituation should eventually occur. Drs. Markway, Carmin et al., explain that “[w]ith repeated, properly executed exposures, your body begins to react more calmly in a situation that used to make you nervous. This occurs naturally (to some extent) with repetition. We call this habituation.”\textsuperscript{140} As the reticent speaker moves through a well–plotted exposure plan, he becomes adept at cycling through “(1) sensing the automatic reactions, (2) acknowledging the reactions, (3) flipping the message and making subtle adjustments in mental and physical stance, (4) calming down” more quickly. As the body and mind adjust to settling down faster, the individual reframes his or her attitude toward public speaking experiences, gaining confidence along the way.

The beauty of this process is that it redirects all the negative and destructive energy formerly expended in resisting, avoiding, or reacting to stress into positive and constructive power; “[e]nergy and attention that formerly had no place to go can now be channeled.”\textsuperscript{141} Of course, the foregoing sequence is not an easy, one–size–fits–all, overnight quick–fix. Flowers underscores that “[a]nxiety is an intense emotion, and one of the most challenging to work with.”\textsuperscript{142} The end goal in working with individuals who suffer with extreme public speaking anxiety is to help them “cultivate clarity and equanimity, or composure, so that [they] welcome emotions without being overwhelmed by them.”\textsuperscript{143} These individuals irrefutably can learn “to listen to and honor [their] emotions without being taken over by them.”\textsuperscript{144} This is a very freeing idea.

IV. LAW SCHOOL STUDENTS BENEFIT FROM THE MINDFUL “JUST BE IT” APPROACH

A law school in New York has experimented with the “Just Be It” approach via a pilot program tailored to help first–year students address extreme public speaking anxiety. In advance of the Spring

\textsuperscript{138} MARKWAY & MARKWAY, supra note 10, at 152.
\textsuperscript{139} HILLIARD, supra note 11, at 113.
\textsuperscript{140} MARKWAY ET AL., supra note 36, at 82.
\textsuperscript{141} HILLIARD, supra note 11, at 124.
\textsuperscript{142} FLOWERS, supra note 8, at 110.
\textsuperscript{143} Id. at 104.
\textsuperscript{144} Id. at 105.
In the first year, fifty-five students expressed interest in the workshop series, indicating in emails that they suffered from “major” public speaking anxiety and were fearful of the upcoming oral arguments. Approximately twenty-four of those students attended all five workshops. In 2013, another twenty-two students participated, and in 2014 a smaller group engaged in the entire workshop sequence. Interestingly, in all three series, the overwhelming majority of workshop attendees were women. Most participants considered themselves to be introverts but some declared they were extroverts for whom law school had sparked this new anxiety. Many attendees were minority students. Some participants noted that they had upbringings cloaked with religious or cultural expectations to act a certain way or play a designated role within family or social interactions.

The arc of the five OPSA workshop sessions tracked chapters of a book by Ivy Naistadt entitled, *Speak Without Fear*: (1) “Workshop #1” reassured students that they were not alone in this particular law school challenge, and prompted participants to identify their individual “nervousness profile”; (2) “Workshop #2” explained potential environmental contributors to public speaking anxiety, and gently encouraged students to (a) reflect on possible negative messages received in their past from authority figures, (b) identify self-perpetuating “myths” about their public speaking, and (c) dig for deeper hidden barriers; (3) “Workshop #3” explored physical manifestations of stress during public speaking, and offered techniques for adopting a balanced “athlete-style” physical stance during public speaking episodes, to un-block breath and blood flow; (4) “Workshop #4” concentrated on “flipping” self-defeating emotional messages into positive personal taglines, establishing new

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145. At NYLS, the oral argument is the final graded assignment in the students’ four-credit spring–semester Legal Practice class, which is a full–year, eight–credit class overall. The oral argument comprises ten percent of the students’ final grade and occurs at the end of the spring semester after the students have submitted appellate briefs.


147. Naistadt identifies four “nervousness profiles”: Avoider, Anticipator, Adrenalizer, and Improviser. *Id.* at 20–28. “Workshop #1” explained the nature of these four profiles and asked students to “free write” about why they believed they fit in certain categories.
coping/conquering techniques, and developing physical and psychological “pre-game” routines; and (5) “Workshop #5” presented strategies for re-framing and re-inventing oneself for a particular public speaking scenario, such as an upcoming oral argument. Each week the students read chapters of the Naistadt book, and completed short writing/self-reflection exercises (kept by the students for personal use only).

In response to a follow-up email invitation, some of the OPSA participants, and members of the NYLS Moot Court Association who generously served as mentors to program attendees, shared their opinions about the “Just Be It” approach, as contrasted with “Just Do It.” The following is a sampling of their responses.

Matt James, Chair of the Executive Board of the NYLS Moot Court Association in 2012–2013, supported the “Just Be It” process, stating:

Depending on students’ level of anxiety, they may not be able to simply throw themselves at their worst fear any more than someone with a fear of heights could go rock climbing. Simply telling them to “just do it” is just a demonstration of the way the world mistakenly treats psychological conditions. The manic are told to “calm down,” the depressed to “cheer up,” the traumatized to “move on,” and the terrified to “man up.” Each of these might be appropriate for a mentally healthy friend, but are not useful in motivating someone who truly struggles with a psychological condition. Without claiming to have any particular clinical expertise, I’ve found that the more appropriate point to make to a student (especially a law student) struggling to overcome this fear is a slightly different message than “just do it.” The message should be, “something must be done.”

This acknowledges that the student’s fear is genuine and not just a general dislike for the activity. It also drives home the point that while they need not throw themselves into deep water, it is imperative that they seek out guidance, counseling, or treatment in order to overcome their fears. It’s that message that places students in [the OPSA] classroom every year looking for help. Students receiving the alternative message that they must simply do what they are not yet mentally prepared to do are likely to avoid public speaking altogether (to their own personal/professional detriment). Without [a psychological] approach, students needing help are faced with the false choice of either competing against their peers while under the added pressure of crippling anxiety or placing limits on their potential
by removing themselves from public speaking assignments altogether. As with most things, the most extreme positions are not meant to be taken. Instead those positions should serve as guideposts marking the more reasonable path that falls somewhere between them. Students need to know that OPSA and programs like it are that path forward.

Three students described the benefits of realizing that they were not alone with their fears. For example, New York Law School student, Miranda Fansher, 2L, who participated in the OPSA workshops in Spring 2014, wrote:

[I]t helped a lot to know that other students feel the same fears as I do. “Just do it” does not work—my anxiety is deeply rooted, some originated from my parents, myself, my environment, some comes from the audience, how much exercise/sleep [I have had and] how happy I am in general. I was a shy child and my mother reinforced “ladylike” behavior . . . [I now know] I am the one who is acting like prey and only I can control my fear and its physical manifestations.

Another student, Molly Rogowski, 3L, who participated in the 2012 workshops, and who is now a Justice Action Center Rapoport Fellow and Vice President of the Anti–Trafficking Law Students Association, noted, “[k]nowing that I wasn’t the only one who had a fear of public speaking was very comforting to me when I started the [OPSA workshop].” Further, Haoejung Min, a 2014 NYLS graduate, noted:

The OPSA workshop helped me a lot. My biggest encouragement from the workshop was the shared past experiences. No one would really think that professors who have a litigation background would have undergone the same type of anxiety. But when [the workshop leader] “confessed” during our first meeting that [she] got rashes, that [she was] afraid to stand in the courtroom, it somehow eased my mind. Knowing that I am not the only one who fears public speech, and learning that there is nothing wrong with it, really helps . . . . I still have my moments of difficulty but I have trained myself to “breathe” since then. My speaking anxiety never fades away. It is still there. But now I know that there is nothing wrong with it.
Finally, Andrew Heymann, a 2014 graduate of NYLS, and a member of the inaugural 2012 workshop series who eventually became a wildly successful member of the NYLS Moot Court Association, described his experience as follows:

The root of my public speaking anxiety is and was a feeling of subordination [and] inferiority to those older and more experienced than me. I felt that older people (professors, attorneys) were therefore smarter and more knowledgeable than me. I felt that despite how well I prepared, they could see through the “act” and tell that I was just playing at understanding the law. What helped me most with the OPSA classes was to think of myself on an equal footing as my audience (and maybe even a little better a footing [because of my preparation]). I now turn that outward focus, inward. Less “your audience is in their underwear” and more “I am a rockstar, let’s rock.” Because of the OPSA classes, I made Moot Court and my school’s prosecution clinic, in which I stood up on the record in NYC Criminal Court.

The foregoing voices support the notion that “Just Be It” can be more helpful to law students than just forcing them to jump into the fray without understanding and mindful reflection.

V. SUGGESTIONS FOR PROVIDING MEANINGFUL SUPPORT FOR LAW STUDENTS STRUGGLING WITH EXTREME PUBLIC SPEAKING ANXIETY

Law professors and administrators can assist students struggling with extreme public speaking anxiety by openly acknowledging this issue, reassuring students that their anxiety is in no way an indicator of future success (or lack thereof) as an attorney, and facilitating a mindful process for addressing it. Willing mentors can offer small informal roundtable groups, or more formal workshops like OPSA, to invite students to openly discuss and work on the following: (1) recognizing that this is not a quick-fix, but rather a process that will work with the right level of commitment and openness to self-examination; (2) hearing and transcribing the student’s negative messages automatically triggered by public speaking experiences, and acknowledging that those past slogans are impermanent, no longer relevant, and therefore changeable; (3) identifying the student’s physical manifestations of stress and understanding that biological reactions are temporary and will dissipate; (4) “flipping” the unhelpful messages from the past, and re-writing them
into useful cognitive prompts for the future; (5) developing a reasonable exposure agenda; and (6) engaging in gradual exposures to “winnable” public speaking episodes.

Many extraverted professors who never experienced public speaking anxiety believe they are helping reticent students by requiring them to push through challenging Socratic questioning or perform routine oral arguments in daily classroom interactions. Yet, as this article has explained, without the student’s deeper look at the underlying root causes of the anxiety and thoughtful development of a mindful and gradual plan for overcoming it, these rote command performances will never solve the problem, and unfortunately can exacerbate it. While professors should not excuse hesitant public speakers from these law school experiences, they should realize that these mandated “rite–of–passage” performances can do more harm than good for some students. Instead, if professors indicate they are willing to work with particularly anxious students, they can help create effective exposure agendas that allow students to start small and work toward more intense performance–oriented situations. For example, the professor might encourage a student to do the following:

1. Pre–Work:
   a. Listen to, transcribe, and label the negative messages that routinely and automatically materialize during a public speaking performance;
   b. Identify the physical manifestations of stress that appear uninvited during each stressful public speaking experience;
   c. Flip the negative messages by writing out positive and encouraging personal taglines;
   d. Resolve to do the following during each exposure event:
      i. Allow the uncomfortable automatic mental and physical reactions to appear without resistance or attempt to control them;
      ii. Take note of the negative messages and unpleasant physical sensations and acknowledge that they are impermanent;
      iii. Re–focus on one or two positively re–framed messages;
      iv. Make subtle adjustments to physical posture and stance to make way for breath and blood flow;
Try to note at least a gradual “fall” of the anxiety symptoms, even if the subsidence does not occur until a self-imposed reflection period after the exposure event ends.

2. Gradual Exposure Agenda:
   a. Make an appointment with an approachable law professor in office hours, to practice an intellectually-challenging one-on-one interaction;
   b. Make an appointment with a more intimidating law professor in one-on-one office hours;
   c. Raise his or her hand in class to voluntarily answer a single question;
   d. Volunteer to be on-call in a class with an approachable law professor;
   e. Practice a “moot” of a ninety-second oral argument before a classmate (with no judgment or feedback);
   f. Practice a “moot” of a ninety-second oral argument before a single professor (with no judgment or feedback);
   g. Practice a “moot” of a ninety-second oral argument before a single professor and an opponent (with no judgment or feedback);
   h. Practice a “moot” of a ninety-second oral argument before a single professor and opponent (with feedback);
   i. Conduct an oral argument before a panel of judges and an opponent.

With each of these exposures, the student needs the opportunity to (a) experience the rise of the negative and automatic emotional and physical responses, (b) practice “being in the moment,” not panicking at the automatic reflexes, but instead pausing, letting the emotions and physical reactions materialize, (c) flip the negative messages into positive ones, and make slight adjustments to physical stance to try to release some of the biological manifestations of the anxiety; and (d) then ride out the eventual descent of the intensity, to end the public speaking scenario (hopefully) in a more relaxed state. Because a ninety-second public speaking event is too short a period of time for anxiety symptoms to rise and fall entirely, professors should build in post-public-speaking-episode reflection periods (i.e., discussion, free writing, journaling) in which the student has time to verbalize or write out thoughts and feelings while returning to the more relaxed and calm steady state, instead of
brusquely returning to a classroom dynamic or jetting off to another class. Without completion of the rise and fall arc, the exposure loses efficacy as a building block in the gradual progression.

CONCLUSION

Law schools continue to operate—in administration and classrooms—as they have been for decades, and yet the daily message from market forces and practitioners is that legal education needs to change. One transformation we can make is to stop expecting all first–year students to fit the mold of the garrulous courtroom orator, and instead make space for the contemplative thinkers in our classrooms. Law school is stressful in general, but we foist heaps of unnecessary angst upon a particular cadre of students by forcing introverts to be extraverts, quiet students to be strident, collaborative students to be competitive, and thinkers to be talkers.

Ralph Waldo Emerson said, “[t]o be yourself in a world that is constantly trying to make you something else is the greatest accomplishment.”148 This article strongly contends that if we allow introverted, shy, and socially anxious law students to “Just Be It,” minimizing—even for moments at a time—the judgment and critique that law school engages in on a daily basis, we might create a platform for these individuals to open up and truly stun the legal world.

The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness

Shailini Jandial George*

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INTRODUCTION

Ian the intern is working on answers to interrogatories. The supervising attorney asked him to get these done as soon as possible. This particular attorney makes him nervous; in fact, Ian gets a stomachache whenever the attorney comes into his cubicle. The attorney has never been happy with anything Ian has done. Ian is not sure if what the attorney wants him to say is accurate and he does not know what to do. No law school class prepared him for this! Ian spins the answer around and around, when ding! Ian receives a text message from his roommate reminding him to upload his résumé to the law school career center for an upcoming interview. He logs in and sees two rejection letters from the last interviews. His heart sinks. How will he repay his loans without a high-paying job? Then he notices an email from the attorney, subject: “Are you done yet????” and the stomachache is back. He knows his supervisor won’t be happy. He glances down at the clock. Half an hour has passed and he hasn’t even finished one interrogatory answer. He can’t bill the client for this! Why can’t he concentrate?

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This scenario illustrates the intersection of two phenomena affecting law students and lawyers today: the constant state of distraction in which we operate and the failure of the traditional law school format to adequately address skills, ethics, and professionalism. By offering instruction in mindfulness, law schools can better equip their students to face these two challenges. If Ian had learned mindfulness techniques allowing him to focus, concentrate, and deal with this stress and anxiety, he may have avoided this scenario.

Building on scientific evidence that mindfulness meditation can improve attention, learning, working memory capacity, academic achievement, empathy, self-compassion, and creativity, and that it can reduce stress and anxiety, this Article proposes that mindfulness should be an essential element in law school curriculum. Part I discusses how distractedness has impacted attention and learning. Part II describes the last decade of research showing the cognitive and physical benefits of mindfulness. Part III discusses the critique of the traditional law school format and advocates that law schools should follow medicine and industry in using mindfulness training to address these issues.
I. DISTRACTION NEGATIVELY IMPACTS ATTENTION AND LEARNING

Today’s students operate in a state of distractedness. Many have blamed the combination of multitasking and the widespread use of digital devices. As “digital natives,” today’s law students have grown up on the Internet and most have been using computers since before they entered elementary school. In addition to computers, they use many other types of digital devices, such as smartphones and tablets, often simultaneously.

This use of technology often carries over to the classroom. While student use of these devices allows for access to information, “research shows their use is causing more classroom learning distractions.” Nearly 100% of college graduate and undergraduate students have access to the Internet during class, and many are using that access. Many teachers believe that “constant use of digital devices and a lack of focus in the classroom is negatively affecting students.”


4. See George, supra note 1, at 170–71 (describing Millenials as a multitasking generation, using numerous technology forms at the same time); Gorlick, supra note 2 (“High tech jugglers are everywhere—keeping up several e-mail and instant message conversations at once, text messaging while watching television and jumping from one website to another while plowing through homework assignments”); Bernard McCoy, Digital Distractions in the Classroom: Student Classroom Use of Digital Devices for Non–Class Related Purposes, FAC. PUBL’N, C. JOURNALISM & MASS COMM. (Sept. 1, 2013), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1070&context=journalismfacpub (analyzing learning effects of today’s students using laptops, tablets, and smartphones while in classroom).

5. See McCoy, supra note 4.

6. Id.

7. Id. (citing Aaron Smith, Lee Rainie & Kathryn Zickuhr, College Students and Technology, PEW RES. CTR’S INTERNET & AM. LIFE PROJECT (July 19, 2011), http://www.pewinternet.org/2011/07/19/college-students-and-technology/).
technology hampered their student’s attention spans and ability to persevere in the face of challenging tasks . . . [and that] digital technologies did ‘more to distract students than to help them academically.’”

All of this technology leads students to try to perform many activities at the same time, and their attention becomes divided. In an academic setting, “[d]ivision of attention can have deleterious effects on student performance.” Students often believe they are master multitaskers. Research shows, however, that “heavy media multitaskers . . . [are] suckers for irrelevancy . . . [because] everything distracts them.” While many think they can simultaneously attend to many things at once, research shows this is not true. Rather than simultaneously processing all the information, the brain actually toggles among tasks, “leaking a little mental efficiency with every switch.”

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11. Parry, supra note 2 (discussing student tendencies to “flip among Words with Friends, e-mail, Words with Friends, Spotify, Words with Friends, and [a] goofy video of a cat rolling up against a sake bottle” and that “[s]ome are disturbed to observe that they got so distracted they forgot to work on the main task they had set out to accomplish, like reading an article.”).


13. James Hamblin, Study: Meditation Improves Memory, Attention, The Atlantic (May 6, 2013), http://www.theatlantic.com/health/archive/2013/05/study-meditation-improves-memory-attention/275564/ (ruminating “the Internet is probably destroying our attention spans and working memories, but companies still want employees who are able to ‘focus’”; see Interview by FrontLine with Clifford Nass, founder and director of Communication Between Humans and Interactive Media (CHIMe) Lab and professor, Stan. U. (Dec. 1, 2009), available at http://www.pbs.org/wgbh/pages/frontline/digitalnation/interviews/nass.html (responding “in general, no, our brain can’t do two things at once.”).)

14. See George, supra note 1, at 171 (quoting Sam Anderson, In Defense of Distraction, N.Y. Mag. (May 17, 2009), http://nymag.com/news/features/56793); see also Maria Konni-
the effect this multitasking is having on students and “feeding worries that widespread multitasking practices are compromising learning and attention.” In fact, experts say, “[t]he cost of classroom multitasking . . . can be a failure to learn.”

Learning theorists agree that this divided attention detracts from the ability to learn. “Attention is critically important to the mental processing central to learning.” Simply put, “adults learn by paying attention, processing information, and using it.” Learning involves a complicated process whereby information is received and briefly registered in the brain’s working memory. Depending upon the attention given to those pieces of information, they are either forgotten or moved toward long–term memory by the process of “encoding” or “chunking.” Once stored in long–term memory, the information must be retrieved in order to be used. Thus, short and long–term memory work in a constant exchange. Without attention, however, there is no encoding or chunking, and thus, no learning.

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15. Levy et al., supra note 14, at 45.
16. Parry, supra note 2.
17. Shapiro et al., supra note 9, at 9.
18. See George, supra note 1, at 173. For a discussion of students’ cognitive ability to filter stimuli as compared with adults, see id.
20. See George, supra note 1, at 174–75 & nn.87–92 (explaining process of encoding and chunking involves information traveling from short–term to long–term memory by rehearsal, memorization, association with prior knowledge). In short, encoding is the process by which information travels from short–term to long–term memory and can happen through rehearsal or memorization, while chunking refers to the creation of associations among”similar pieces of information so that the information collectively becomes one slot in one’s working memory instead of many.” Id.
21. Id. at 174–75 & nn.94–99 (explaining interplay and exchange between short–term and long–term memory).
23. George, supra note 1, at 175–79 (positing that the key to successfully utilizing short–term memory is attention).
“Despite its importance to learning, focused attention is rarely if ever systematically trained or cultivated in most educational settings.”

Parents and teachers tell kids 100 times a day to pay attention . . . [b]ut we never teach them how.” Mindfulness training improves attention, and could prove instrumental in addressing the problem of distractedness.

II. MINDFULNESS MEDITATION CAN IMPROVE ATTENTION AND LEARNING

The good news for both educators and students is that “[a]ttention is a flexible, trainable skill.” A growing body of neuroscience work over the last ten years has explored how “mindfulness meditation” may improve learning. These studies show that certain forms of mindfulness training “may lead to cognitive improvements, including the enhancement of one’s attention, such as the ability to remain focused on an object and to ignore distractions . . . [and] to improve emotion regulation.” There are many other benefits to mindfulness training as well, making the teaching of mindfulness essential.

“Mindfulness meditation is a mental discipline.” It has been described as “moment–to–moment awareness of one’s experience without judgment.” “Mindfulness . . . involves paying attention to

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24. Shapiro et al., supra note 9, at 10.
27. See Konnikova, supra note 14 (“Mindfulness may have a prophylactic effect: it can strengthen the areas that are most susceptible to cognitive decline”); Levy et al., supra note 14, at 46 (postulating mindfulness training has capacity to improve focus and ability to ignore distractions).
28. Levy et al., supra note 14, at 46; see Konnikova, supra note 14 (“[M]indfulness has been shown to improve connectivity inside our brain’s attentional networks . . . changes that save us from distraction.”).
what is actually taking place in the present moment instead of becoming distracted or trying to avoid . . . reality."  Being mindful allows one to “reclaim focus and exercises the muscle of attention, which helps us to become more expert at paying attention.” Mindfulness is “like lifting weights. Just as you can build up your biceps by doing reps . . . meditation can strengthen attention.”

While mindfulness is inspired by the ancient practice of meditation, “an essential element in all of the world’s major contemplative spiritual and philosophical traditions, [i]n recent years, meditative practices have been taught in secular forms that do not require adherence to cultural and religious beliefs.” In fact, mindfulness is often “[p]racticed in the East and the West, in ancient times and in modern societies . . . [and] [f]ocusing our attention in this way is a biological process that promotes health—a form of brain hygiene—not a religion.”

“Mindfulness meditation can lead to new understandings about one’s self and others, and thus is often called ‘insight meditation’ . . . [I]t can help people feel better and perform better at virtually any activity.”

While there are many types of meditation practiced globally, most can be categorized into two main types: focused attention and

33. Id.; see Leonard Riskin, The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients, 7 HARV. NEGOT. L. REV. 1, 26 (2002). Riskin analogizes mindfulness training to athletic drills: “Just as practice drills help basketball players hone their jump–shots . . . mindfulness meditation can help people develop an ability to pay attention, calmly, in each moment, which they can apply in everyday life. It enables us to see how our minds work, to experience our lives more fully.” Id.
34. Parry, supra note 2; see also Jan L. Jacobwitz, The Benefits of Mindfulness for Litigators, A.B.A. LITIG. J., Spring 2013, at 27–28 (“Doing so creates a laboratory from within which you notice your mind’s tendency to wander. So, when you realize that your mind is wandering, just take note of its wandering, noticing the thought that is distracting you; then decide to let the thought go for the moment and return to a focus on the breath. Some people benefit from joining a contemplative group that sits together in silence or in a guided meditation. Others . . . close their office doors and listen to a recorded guided meditation. Still others prefer solitude and complete quiet.”).
35. Shapiro et al., supra note 9, at 6 (internal citations omitted).
36. Rhonda V. Magee, Educating Lawyers to Meditate?, 79 U. MO.–KAN. CITY L. REV. 535, 540 (2011) (quoting DANIEL J. SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION 83 (2010)); see Davis & Hayes, supra note, at 199 (discussing disciplines, practices, and religions which include mindfulness or meditative practice); Konnikova, supra note 14 (“Though the concept originates in ancient Buddhist, Hindu and Chinese traditions . . . mindfulness is less about spirituality and more about concentration: the ability to quiet your mind, focus your attention on the present, and dismiss any distractions that come your way.”).
open monitoring. In focused attention, the meditator tries to maintain focus on a particular thought and decrease thoughts that detract from that focus. This is also known as “concentrative attention.” In open monitoring, or mindfulness meditation, there is no specific thought brought to focus; rather, the mind is allowed to go where it may, but the meditator seeks to non-judgmentally acknowledge thoughts that may arise, and then bring the awareness back. “Mindfulness refers to a particular quality of attentional focus, mindful awareness, rather than to any particular practice or technique.” The benefits of mindfulness meditation in improving focus, attention, and health are now being supported and validated by scientific research in neuroscience and psychology.

While mindfulness can certainly benefit everyone, the focus of this article is on how mindfulness training can enhance legal education, the quality of lawyering, and the mental well-being of those who practice law.

A. Mindfulness Training Improves Attention

As discussed above, there has been much debate about the effect of multitasking and distraction on the cognitive abilities of students today. Not only is multitasking inefficient, research shows that it could be adversely affecting the part of the brain needed for focused

39. See Helber et al., supra note 38, at 350.
40. Jha et al., supra note 29, at 110.
42. Richard Chambers et al., The Impact of Intensive Mindfulness Training on Attentional Control, Cognitive Style, and Affect, 32 COGNITIVE THERAPY & RES. 303, 304 (2008).
43. See SUSAN L. SMALLEY & DIANA WINSTON, FULLY PRESENT: THE SCIENCE, ART, AND PRACTICE OF MINDFULNESS 1, 57–64 (2010) (underscoring positive effects of mindfulness on eating disorders, body issues, immunity, physical and sensory performance); Hamblin, supra note 13 (correlating mindfulness training with improved working memory capacity and increased academic performance); Konnikova, supra note 14 (highlighting mindfulness training resulted in improved task-specific focus and concentration).
44. See Jacobwitz, supra note 34, at 27–28; Magee, supra note 36, at 540–41; Riskin, supra note 33, at 9–10; Rogers, supra note 32, at 3.
attention.\textsuperscript{46} Studies in cognitive psychology and neuroscience reveal that “human attention is a limited resource, and that multitasking requires rapid task switching, which is costly in speed and accuracy.”\textsuperscript{47} Research has confirmed that mindfulness meditation strengthens the very same areas of the brain affected by multitasking, as it is believed that meditation shares the same neural pathways needed to complete complex cognitive tasks.\textsuperscript{48}

Attention is central to learning.\textsuperscript{49} Attentional training is the basis of all mindfulness exercises.\textsuperscript{50} Mindfulness training can “enhance attentional skills, permitting people both to concentrate more deeply and to switch between objects of attention more fluidly.”\textsuperscript{51} There are different types of attention, and researchers have been studying them all. For example, in one hallmark study, three attentional subsystems were evaluated: alerting, orienting, and conflict monitoring.\textsuperscript{52} “Alerting involves achieving and maintaining a state of preparedness, orienting directs and limits attention to a subset of possible stimulus inputs, and conflict monitoring prioritizes among competing tasks and responses.”\textsuperscript{53} All three subsystems are related to attention and learning.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{46} Nicholas Carr, The Shallows: What the Internet Is Doing to Our Brains 120 (2010).
\item \textsuperscript{47} Levy et al., supra note 14, at 45; see Konnikova, supra note 14. Konnikova explains why “[m]ultitasking is a persistent myth. What we really do is shift our attention from task to task . . . . We don’t devote as much attention to any one thing, and we sacrifice the quality of our attention. When we are mindful, some of that attentional flightiness disappears as if of its own accord.” \textit{Id.}
\item \textsuperscript{48} See Helber et al., supra note 38, at 352–53; Konnikova, supra note 14 (reporting study demonstrating mindfulness meditation associated with enhanced connectivity between part of brain involved in attention monitoring and working memory, and area of brain associated with self–monitoring of feelings and thoughts); Schatz, supra note 30 (reporting MRI scans of volunteers who completed eight–week mindfulness training showed stronger connections in brain regions associated with attention, auditory and visual processing).
\item \textsuperscript{49} See George, supra note 1; Shapiro et al., supra note 9, at 9 (“Attention is critically important to the mental processing central to learning.”).
\item \textsuperscript{50} See Shapiro et al., supra note 9, at 10.
\item \textsuperscript{51} Levy et al., supra note 14, at 45.
\item \textsuperscript{52} See Jha et al., supra note 29, at 109–111; Shapiro et al., supra note 9, at 10–11 (discussing Jha et al.’s study and results).
\item \textsuperscript{53} See Shapiro et al., supra note 14, at 7–8 (citing study by Jha et al.).
\item \textsuperscript{54} See Jha et al., supra note 29, at 110.
\end{itemize}
Attention Network Test (ANT)\textsuperscript{55} to assess the effects of meditation on these three subsystems.\textsuperscript{56}

The study involved three groups of participants and assessed each group’s response time and accuracy in performing the ANT.\textsuperscript{57} One group of novice meditators participated in an eight-week meditation based stress reduction (MBSR) course that met weekly for three hours, focusing primarily on concentrative attention.\textsuperscript{58} Another group of experienced meditators participated in a full-time one-month meditation retreat.\textsuperscript{59} The ANT was performed before and after the meditation program, and compared with a control group who had no meditation training.\textsuperscript{60} Pre-test, the retreat group had better conflict monitoring than the other two groups.\textsuperscript{61} Post-test, the MBSR group had significantly better ability to orient attention, while the retreat group had better alerting skills than the other two.\textsuperscript{62} “These results suggest that mindfulness training may improve attention–related behavioral responses by enhancing functioning of specific subcomponents of attention.”\textsuperscript{63}

Intensive meditation training “can alter the way in which the brain allocates attentional resources to important stimuli.”\textsuperscript{64} Another study involved “attentional blink,” a phenomenon where the brain is so busy processing initial inputs that it cannot “see” or process subsequent input.\textsuperscript{65} Participants were asked to identify two stimuli—in this case, numbers mixed with letters—and their ability to spot all the targets accurately was assessed.\textsuperscript{66} “[T]his task

\textsuperscript{55} Id. An Attention Network Test (ANT) is a brief, computerized battery of tests often used to measure different behavioral aspects of attention, and it is based on the Attention Network theory. See Shapiro et al., supra note 9, at 7–8 (citing studies discussing ANT). Scientists typically use the test to measure the tester’s ability to overcome stimuli while doing tasks as well as how well the tester responds to valid and conflicting cues to complete those given tasks. See J. Fan et al., Testing the Efficiency and Independence of Attentional Networks, 14 J. COGNITIVE NEUROSCIENCE 340 (2002). The Attention Network theory divides the neural systems of the brain into three categories: the orientation and selection network, the executive and conflict network, and the vigilance network. Id. at 340. Using reaction time (RT) and conflict tasks, scientists devised the ANT to measure the response times of these networks as well as the ability of the aforementioned networks to handle conflict. Id.

\textsuperscript{56} Jha et al., supra note 29, at 110.

\textsuperscript{57} Id. at 111.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 114 fig.2, 116.

\textsuperscript{62} Id. at 114–16 & figs.3–4.

\textsuperscript{63} Id. at 109.

\textsuperscript{64} Rachel Jones, Learning to Pay Attention, 5 PUB. LIBR. SCI. BIOLOGY 1188, 1188 (2007).

\textsuperscript{65} Id.

\textsuperscript{66} Id.
gauges the ability of subjects to allocate cognitive resources efficiently when multiple stimuli compete for attention.”

Performance by seasoned meditators was compared before training and after training, as well as to a control group of novice meditators. There was no meditation performed during the tests. Each one of the seasoned meditators showed improved ability to detect the second target while only sixteen out of twenty–three of the novice meditators showed such improvement. The authors found “this reduction in the effect of the attentional blink is consistent with the idea that after training, practitioners were allocating a smaller proportion of their brains’ resources to the first target.”

The researchers also measured the electrical changes associated with neural responses to sensory stimuli or cognitive tasks, which is believed to reflect the allocation of resources to the target. The authors concluded that intensive meditation training “can produce lasting and significant improvements in the efficient distribution of attentional resources among competing stimuli, even when individuals are not actively using the techniques they have learned.”

Even short–term mindfulness training can improve attentional skills. In another study, participants received five days of meditation or relaxation training, and were tested before and after training. The meditation group showed significantly greater improvement than the relaxation group in various tests, including the ANT. Additionally, they showed “lower anxiety, depression, anger, fatigue, and higher vigor on the Profile of Mood States scale, a signif-

67. Id.
68. Id. Jones explains that seasoned meditators attended an intensive three–month, ten–to–twelve hour training course while the novice meditators received only one hour of training. Id.
69. Id. at 1189.
70. Id. at 1188.
71. Id.
72. Id.
73. Id. at 1189; see also Antoine Lutz et al., Mental Training Enhances Attentional Stability: Neural and Behavioral Evidence, 29 J. NEUROSCIENCE 13418, 13418 (2009) (finding three months of intensive mindfulness training enhanced attentional stability and promoted more efficient processing); Heleen A. Slagter et al., Mental Training Affects Distribution of Limited Brain Resources, 5 PUB. LIBRARY SCI. BIOLOGY 1228 (2007), http://www.plosbiology.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pbio.0050138&representation=PDF (“Three months intensive mental training resulted in a smaller attentional blink and reduced brain–resource allocation to the first target.”).
75. Id. at 17152–53 (detailing structure of study).
ificant decrease in stress–related cortisol, and an increase in immu-
noreactivity.”76 Thus, not surprisingly, attention and learning can
benefit from even a short amount of mindfulness training.

B. Mindfulness Training Can Improve Working Memory

The more information that can be held in working memory, the
greater the potential for learning.77 Thus, improving working
memory capacity improves learning. Mindfulness training can aid
in the brain’s ability to take information held in working memory
and convert it to long–term memory, which is key to learning.78

Mindfulness training can help increase working memory capacity
because it helps strengthen the area of the brain responsible for
higher cognitive functioning, the prefrontal cortex.79 The hippo-
campus, which helps convert working memory into long–term
memory, is found in the frontal cortex.80 Thus, the effective use of
the hippocampus is central to learning.81 The functioning of the
hippocampus can be negatively affected by emotions and stress.82
The limbic system, which includes the amygdala, is associated with
emotions.83 Daily hassles can fire up the amygdala, a region of the
brain associated with fear, anxiety, and stress.84 The pre–frontal
cortex and hippocampus can be:

76. Id. at 17152; see also Amanda Enayati, Seeking Serenity: When Lawyers Go Zen, CNN
Enayati discussed a Harvard study showing that “as little as 30 minutes a day for eight weeks re-
sulted in measurable changes in the brain regions involved in learning, memory, emotion
regulation and stress.” Id. The Profile of Mood States scale, commonly abbreviated as
POMS, is a commonly used clinical instrument to assess mood and feeling states, and measure
levels of psychological distress. See Shelly L. Curran et al., Short Form of the Profile of
Mood States (POMS–SP): Psychometric Information, 7 Psychol. Assessment 80, 80–83

77. See supra notes 19–23 and accompanying text (linking working, short, and long–term
memory to learning capacity).

78. See supra notes 19–20 and accompanying text.

79. Scott Rogers, The Six Minute Solution: A Mindfulness Primer For Lawyers

80. Id. at 22; Carr, supra note 46, at 188–90 (equating hippocampus to “orchestra con-
ductor in directing . . . symphony of . . . conscious memory” to form long–term memories).

81. See Carr, supra note 46, at 188–90 (teaching that the hippocampus fixes and merges
various contemporaneous memories, forming single recollection, and links new memories to
old); Daniel Goleman, Social Intelligence: The New Science of Human Relationships
1, 273 (2006) (“The hippocampus, near the amygdala in the midbrain, is our central organ for
learning.”).

82. See Goleman, supra note 81, at 273; Rogers, supra note 79, at 23.

83. See Rogers, supra note 79, at 23; Daniel J. Siegel, The Mindful Brain 1, 33 & fig.

84. Schatz, supra note 30; see Rogers, supra note 79, at 22–23; see also In the Journals:
Mindfulness Meditation Practice Changes the Brain, Harv. Women’s Health Watch, at 6–
7 (Apr. 2011) [hereinafter Harvard Health Watch].
Hijacked by the more primitive amygdala . . . as too much stress hormone cortisol is released. As a result, attentional focus drops, along with the smooth functioning of the hippocampus and [the] capacity to learn. Working memory is diminished, mental creativity and flexibility are compromised, and there are fewer resources available to plan and organize.\^85

This interplay, known as the “frazzle effect” negatively affects learning.\^86 Mindfulness exercises can improve the functioning of the prefrontal cortex and the hippocampus, and tone down the amygdala, helping us to perform better in high-stress situations.\^87

In one study, participants attended an eight-week mindfulness-based stress-reduction class, which met once a week for two-and-one-half hours.\^88 They practiced mindfulness meditation in class and were given audio recordings to guide them in daily practice at home.\^89 Magnetic Resonance Imaging tests (MRIs) were taken before and after the training, and showed that, as compared to the control group of non-meditators who showed no changes, the meditators had “increased concentrations of gray matter (the ‘computing’ or processing neurons) in several brain areas, including the hippocampus . . . and other regions associated with remembering the past and imagining the future . . . [such as] introspection, empathy, and the ability to acknowledge the viewpoints of others.”\^90

In answer to questions, the meditators also indicated that they felt more capable of “acting with awareness, observing, and remaining non-judgmental.”\^91 In an earlier study of the same participants, MRIs revealed that the meditators had reduced gray matter in the amygdala and that this reduction was associated with lower stress.\^92

\^85. See ROGERS, supra note 79, at 22

\^86. See id. at 22–23; GOLEMAN, supra note 81, at 267–69 (defining “frazzle” as a “neural state in which emotional upsurges hamper . . . workings of . . . executive center.”).

\^87. See ROGERS, supra note 79, at 22; see also HARVARD HEALTH WATCH, supra note 84, at 6–7; Lisa A. Kilpatrick et al., Impact of Mindfulness-Based Stress Reduction Training on Intrinsic Brain Connectivity, 56 NEUROIMAGE 290, 295 (2011) (“Our results demonstrate that MBSR–trained subjects during mindful awareness of sounds have greater synergy/positive coherence between a region involved in fine-grained perceptual processing of auditory information and other auditory–related regions as well as salience/control regions.”); Schatz, supra note 30.

\^88. Kilpatrick, supra note 87, at 290–91; HARVARD HEALTH WATCH, supra note 84.

\^89. Kilpatrick, supra note 87, at 290–91; HARVARD HEALTH WATCH, supra note 84.

\^90. HARVARD HEALTH WATCH, supra note 84, at 7.

\^91. Id.

\^92. Id.
Other studies have shown that working–memory capacity is increased in proportion to the actual amount of meditation practice. For example, inexperienced meditators who attended an intensive ten–day mindfulness meditation class were compared with a control group who had no mindfulness training. The mindfulness–training group’s working capacity increased significantly, demonstrating a statistically significant improved capacity for sustained attention during tasks. Thus, short or long–term mindfulness training can improve working memory capacity and learning.

C. Mindfulness Training Can Improve Academic Achievement

Mindfulness has even been shown to improve academic achievement, including grades and standardized test scores. For example, researchers at the University of Southern California randomly assigned forty–eight undergraduate students to either a mindfulness class or a nutrition class. The classes met for forty–five minutes four times per week for two weeks. Experts taught the classes, and the mindfulness class provided a conceptual introduction and practical instruction on how to practice mindfulness in targeted exercises and daily life. The nutrition class taught ways for healthier eating and required students to log their daily food intake. The students in both classes took a verbal–reasoning section from the Graduate Record Examination (GRE) and a working memory capacity test before and after the two weeks of classes. The scores of the mindfulness–trained group improved, but not the nutrition–trained group. The mindfulness students improved

93. See, e.g., Chambers et al., supra note 42, at 303 (finding meditation group had significantly better working–memory capacity, attention capabilities during performance task than control group); Helber et al., supra note 38, at 349–58; Amishi P. Jha et al. Examining the Protective Effects of Mindfulness Training on Working Memory Capacity and Affective Experience, 10 EMOTION 54 (2010); Marieke K. van Vugt & Amishi P. Jha, Investigating the Impact of Mindfulness Meditation Training on Working Memory: A Mathematical Modeling Approach, 11 COGNITIVE, AFFECTIVE, & BEHAV. NEUROSCIENCE 344 (2011).

94. See Chambers et al., supra note 42, at 304–15 (suggesting mindfulness training has benefits for psychological functioning).

95. Id. at 315–16 (noting statistically significant increase in working–memory capacity helps treat Attention Deficit Hyperactivity Disorder, post–traumatic–stress disorder, schizophrenia).


97. Id. at 777.

98. Id.

99. Id.

100. Id.

101. Id.

102. Id. at 778.
both their verbal GRE score by an average of sixteen percentile points, as well as their scores on the working memory capacity test. The study serves as convincing evidence that mindfulness can improve working memory and reading, and reduce mind wandering.

In another study involving college students, two groups were studied: one group attended a one–hour concentration–based meditation class twice a week and the other group met once a week as a study group, but they were not introduced to meditation. This meditation class included attentional focusing and relaxation exercises, and students meditated during the first and last ten minutes of class, as well as outside of class and before exams. The other group met only as a study group with no particular exercises. Both groups had similar cumulative Grade Point Averages (GPAs) at the end of the fall semester, but at the end of the spring semester, the meditation group not only had higher GPAs for the spring semester, but also had significantly higher cumulative GPAs than the control group. This study lends substantial support to the proposition directly linking mindfulness training to increased academic achievement, and suggests mindfulness training should be encouraged in academic environments.

103. Id.
104. Id. at 780.
106. Pamela D. Hall, The Effect of Meditation on the Academic Performance of African American College Students, 29 J. BLACK STUD. 408, 410 (1999); see Shapiro et al., supra note 9, at 9 (summarizing results of Hall study).
108. Id.
109. Id. at 411–13. The meditation and non–meditation groups began the study with cumulative GPAs of 2.77 and 2.64, respectively. After undergoing meditation training, the meditation and non–meditation groups had spring semester GPAs of 2.85 and 2.55, respectively, and cumulative GPAs of 2.93 and 2.48, respectively.
110. See id. at 414–15; Hamblin, supra note 13 (linking mindfulness training to improved academic performance).
D. Mindfulness Training Can Improve Other Sources of Stress, Which Interfere with Focus and Learning

Mindfulness training may benefit people suffering from a variety of ailments, including chronic pain, fibromyalgia, cancer, heart disease, anxiety, binge eating disorder, psoriasis, borderline personality disorder, major depressive disorder, and stress.\textsuperscript{111} It has also been shown to reduce anxiety and increase positive emotions.\textsuperscript{112} Mindfulness has even been shown to improve immune function.\textsuperscript{113} Stated more generally, mindfulness can improve and enhance health and quality of life, which in turn can improve academic and cognitive performance.\textsuperscript{114}

1. Mindfulness Can Reduce Stress, Anxiety, and Negative Emotions

"Since the early 1980s, mindfulness meditation has increasingly found a place in mainstream health care and medicine because of evidence that it's good for emotional and physical health."\textsuperscript{115} Mindfulness Based Stress Reduction (MBSR) is well studied and documented as a useful tool in medicine and has been widely taught and practiced over the last three decades.\textsuperscript{116} Numerous studies have


\textsuperscript{112} See Richard J. Davidson et al., Alterations in Brain and Immune Function Produced by Mindfulness Meditation, 65 Psychosomatic Med. 564–570 (2003); Tang et al., supra note 74, at 17152 (reporting even short-term mindfulness meditation training reduced anxiety and improved overall mood). Positive moods such as enjoyment, joy, interest, and excitement are typically referred to as being positive affects, while feelings such as anger, disgust, dismal, distress, fear, and shame are referred to as negative affects.

\textsuperscript{113} See Blakeslee, supra note 26 (linking meditation practice with increased immunity); Davidson et al., supra note 112 (demonstrating mindfulness meditation produced significantly improved immune function); Ortner et al., supra note 29 (noting improved immune function with mindfulness training).

\textsuperscript{114} See Hall, supra note 106, at 414–15 (reporting increased GPAs as result of meditation); Hamblin, supra note 13 (reporting mindfulness training improves academic achievement); Jha et al., supra note 29, at 109, 116–17 (noting meditation training improved concentration and attention); Shapiro et al., supra note 9, at 8–9 (highlighting Hall and Slagter findings).

\textsuperscript{115} Harvard Health Watch, supra note 84, at 6.

\textsuperscript{116} See Jha et al., supra note 93, at 54 (asserting mindfulness training is now "widely available, with more than 250 medical centers around the United States offering mindfulness based stress reduction programs.").
confirmed that an eight–week MBSR program can significantly reduce stress, negative moods and rumination, and increase positive moods.\textsuperscript{117}

Reducing stress and anxiety has clear implications for improving learning.\textsuperscript{118} Stress “handicaps our abilities for learning, for holding information in working memory, for reacting flexibly and crea-

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\textsuperscript{117} See Harvard Health Watch, supra note 84; Kilpatrick, supra note 87, at 290–91; Schatz, supra note 30 (reporting MRI scans of volunteers who completed eight–week mindfulness training); Maia Szalavitz, Q&A: Jon Kabat–Zinn Talks About Bringing Mindfulness Meditation to Medicine, TIME (Jan. 11, 2012), http://healthland.time.com/2012/01/11/mind-reading-jon-kabat-zinn-talks-about-bringing-mindfulness-meditation-to-medicine/#ixzz2smGlCmzd (discussing eight–week MBSR training “can actually produce thickening in particular regions of the brain important for learning, memory, executive decision–making and perspective–taking”); Shapiro et al., supra note 9, at 10 (highlighting archetypal MBSR studies); Shauna L. Shapiro et al., The Effects of Mindfulness–Based Stress Reduction on Medical and Premedical Students, 21 J. BEHAV. MED. 581, 592–94 (1998) (discussing results of eight–week MBSR included reductions in self–reported depression and anxiety, and increased empathy).

In 2012, researcher Jon Kabat–Zinn discussed that eight weeks of MBSR training showed a significant shift in MBSR–trained individuals’ brains: the MBSR–trained group switched from exhibiting a right–side brain activation in their pre–frontal cortex (PFC) to a more left–sided activation. Szalavitz, supra. The shift from right–side to left–side brain activation was a groundbreaking discovery:

[T]he right PFC is more associated with anxiety and discomfort and experiential avoidance and the left is more associated with, well, the catchword is happiness: wellbeing, calm and emotional intelligence.

Until we did that study, it was thought that the ratio of right/left activity in the PFC was pretty much a fixed trait once you reached adulthood—that you were the way the you were; if you were a nervous nelly, you were pretty much going to stay that way, and if you happened to be Ms. Relaxation, you stayed that way, too.

\textit{Id.}

\textsuperscript{118} See J. D. Bremner & M. Narayan, The Effects of Stress on Memory and the Hippocampus Throughout the Life Cycle: Implications for Childhood Development and Aging, 10 DEV. & PSYCHOPATHOLOGY 871 (1998); Chambers et al., supra note 42, at 303 (noting meditation increases working–memory capacity); Kilpatrick, supra note 87, at 290–91 (finding mindfulness–trained group’s MRIs showed increased concentrations of gray matter in PFC and hippocampus); Roberts & Danoff–Burg, supra note 111 (demonstrating stress reduction as result of mindfulness training); Maria Konnikova, An Antidote for Mindlessness, The NEW YORKER (Jan. 29, 2014), http://www.newyorker.com/online/blogs/elements/2014/01/an-antidote—for-mindlessness.html?utm_source=tny (explaining studies by Jha, effects of mindfulness training on combating stress); supra notes 79–86 and accompanying text (explaining brain’s structure, positive mindfulness–training effects on PFC performance, working memory, and high–stress performance). “Mindfulness training . . . may work as a protective factor against the typical stresses of student life—or any stress, for that matter, since it improves emotional equilibrium and enables people to better handle distractions.” Konnikova, supra.
tively, for focusing attention at will, and for planning and organizing effectively.”

In addition to reducing stress and anxiety, mindfulness supports better regulation of emotional affect. This appears to extend beyond mere relaxation. As discussed above, “[w]hen an individual is able to successfully self-regulate . . . they experience a release of physical tension that acts to oppose the stress response and creates a calm state of mind and body.” In one study involving college students, functional MRIs revealed that those with higher dispositional mindfulness reacted less to threatening visual stimuli, as evidenced by lower activation of the amygdala and stronger prefrontal cortex activation, indicative of better executive control. Other studies reveal that mindfulness allows for a quicker turnaround from negative emotions, as compared to the other common strategies of distraction and rumination.

119. GOLEMAN, supra note 81, at 268; see Shapiro et al., supra note 9, at 9–10 (presenting studies supporting proposition that mindfulness training decreases stress); Konnikova, supra note 118 (correlating mindfulness training with improved handling of stress).

120. SIEGEL, supra note 83, at 225, 337 app. III; Shapiro et al., supra note 9, at 11–12; see ROGERS, supra note 79, at 22–23; Kirkpatrick, supra note 87, at 295; Kirk Warren Brown et al., Mindfulness: Theoretical Foundations and Evidence for its Salutary Effects, 18 PSYCHOL. INQUIRY 211, 220 (2007) (correlating cognitive and affective mental–health and well–being indicators with specific trait measures of mindfulness); J.D. Creswell et al., Neural Correlates of Dispositional Mindfulness During Affect Labeling, 69 PSYCHOSOMATIC MED. 560 (2007) (measuring amygdala activation after threatening emotional visual stimuli); supra notes 85–87 and accompanying text (highlighting “frazzle effect” and its impact). Brown et al., explain that “[t]he trait MAAS has been associated with lower levels of emotional disturbance (e.g., depressive symptoms, anxiety, and stress), higher levels of subjective well–being (lower negative affect, higher positive affect, and satisfaction with life) and higher levels of eudaimonic well–being (e.g., vitality, self–actualization).” Brown et al., supra, at 220. In their study measuring amygdala activity in response to threatening emotional visual stimuli, Creswell et al. found that those with higher MAAS–assessed mindfulness levels exhibited less reactivity to emotionally threatening stimuli than those with lower MAAS levels. See Creswell et al., supra.

121. See Shapiro et al., supra note 9, at 11; S. Jain et al., A Randomized Controlled Trial of Mindfulness Meditation Versus Relaxation Training: Effects on Distress, Positive States of Mind, Rumination, and Distraction, 33 ANNALS OF BEHAV. MED. 11 (2007) (reporting that month–long mindfulness–meditation and somatic–relaxation programs produced similar effects on “distress reduction and enhancement of positive mood relative to no–treatment control students”). While mindfulness training and somatic relaxation both reduced stress and increased overall emotional well–being, Jain et al. indicates that “mindfulness meditation may be specific in its ability to reduce distractive and ruminative thoughts and behaviors, and this ability may provide a unique mechanism by which mindfulness meditation reduces distress.” Jain et al., supra.

122. Shapiro et al., supra note 9, at 11.

123. See Creswell et al., supra note 120.

124. See Patricia C. Broderick, Mindfulness and Coping with Dysphonic Mood: Contrasts with Rumination and Distraction, 29 COGNITIVE THERAPY & RES. 501 (2005) (reporting that mindfulness best reduced negative moods and increased relaxation, compared with distraction and rumination).
Law school and lawyering are high-stress situations. Law school can be a very demanding environment as students wrestle with complex material and time pressures they likely have not seen before. Likewise, “it is common knowledge . . . the practice of law is stressful.” Research reveals that lawyers are more prone to depression than members of any other profession, and that as many as twenty percent of lawyers abuse alcohol or other substances. Because mindfulness training is linked with helping many conditions that negatively affect law students and lawyers, law schools should include it as part of their academic requirements, giving students and practicing lawyers tools they can use to combat these conditions.

125. See Riskin, supra note 33, at 1, 4 (discussing high levels of unhappiness, stress, and depression among law students and lawyers); see also More on Lawyer Stress, FUTUREVISIONS.ORG, http://www.futurevisions.org/law_crr_stress_more.htm (last visited Feb. 23, 2014) (describing environmental and occupational stressors of lawyers). Among the primary complaints that lawyers cite as contributing to their stress are time pressures, work overload, and inadequate time for themselves and their families. Simple statistics as well as descriptive accounts suggest that many legal workplaces are like working class (or blue collar) sweatshops. The typical City/Wall Street lawyer is expected to log a minimum of 1800 billable hours per year; many lawyers are expected to far exceed this figure. An 1800 hour minimum translates into almost seven hours per day, five days per week, fifty-two weeks a year. Since this does not include eating, socializing, going to meetings, reading mail, seeking new clients, etc., it has been estimated that to bill seven hours one must work nine to twelve hours. Thus, it is common for lawyers to take work home, to work on weekends, and to not take their allotted vacation or holiday time. More on Lawyer Stress, supra.

126. See Riskin, supra note 33, at 10. Riskin reasons that pervasive rates of depression and mental illness are common among lawyers because “law schools tend to over-emphasize analytical reasoning at the expense of developing interpersonal skills, and they incline students to seek satisfaction from external sources—such as ‘winning’ in general, and especially through grades, awards, and prestigious jobs—rather than from internal sources, such as a secure sense of self.” Id.

127. J. Patton Hyman, The Mindful Lawyer: Mindfulness Meditation and Law Practice, 33 Vt. B.J. 40 (2007) (referencing studies confirming depression, substance abuse, domestic difficulties more common among lawyers than general public); Riskin, supra note 33, at 10–11 (“[L]awyers have higher rates of depression and anxiety, divorce, and substance abuse than the general population and members of other professions.”).

2. Mindfulness Can Enhance Creativity

Creativity is essential to learning. Creativity traits and capacities include perceptual skill, ideational fluency, openness to experience, and emotional flexibility. While essential to learning, unfortunately creativity has been on the decline, with some blaming technology and the devaluation of creativity in education.

Research and experts point to mindfulness meditation as being able to increase creativity, and thus, improve learning. One study compared two groups of undergraduate students: one received meditation training and the other received relaxation training. The meditating group exhibited improvements in creativity, specifically, by showing greater consciousness of problems, invention, sensory experience, expression of emotion, feeling, humor, and fantasy. Mindfulness training ultimately has the potential to address the decline in creativity and improve learning.

3. Mindfulness Can Enhance Empathy, Compassion and Counseling Skills

Mindfulness can enhance other skills such as empathy, compassion, and counseling, skills that are valued and needed to practice
good lawyering. Many critics have cited the lack of these skills as indicative of a problem with the current state of legal education.

Mindfulness training has been shown to improve empathy in therapists. Two studies of medical students and graduate psychology students showed that those who received eight or ten weeks of mindfulness training experienced increased levels of self-reported empathy. The studies showed that therapists were able to “develop their ability to experience and communicate a felt sense of clients’ inner experiences, be more present to client’s suffering; and help clients express . . . their feelings.”

Mindfulness training also increases self-compassion, and may help deal with negative life events. Self-compassion has been defined as “being kind and understanding toward oneself in instances of pain or failure; perceiving one’s experiences as part of the larger human experience; and holding painful thoughts and feelings in balanced awareness rather than over-identifying with them.”

135. See Davis & Hayes, supra note 31, at 202 (highlighting empathy, compassion, counseling skills, and decreased stress and anxiety as benefits); Charles Halpern, The Mindful Lawyer: Why Contemporary Lawyers are Practicing Meditation, 61 J. LEGAL EDUC. 641, 641 (2012) (“A growing body of scientific evidence suggests that meditation affects brain structure and function and that it improves concentration, empathy and listening skills—all important to the effective practice of law.”); Magee, supra note 36, at 29 (“Mindfulness has been shown to increase feelings of empathy and compassion”); Rogers, supra note 31, at 3 (“By practicing mindfulness you will become a more effective attorney able to better cope with stress, listen more deeply to clients, and obtain greater perspective on your work and the challenges presented in daily life.”); Shapiro et al., supra note 9, at 12–14 (supporting claims that mindfulness training enhances interpersonal relationship skills, empathy, and compassion).

136. See infra note 147 and accompanying text (noting twin concerns with current legal education system).

137. See generally Davis & Hayes, supra note 31; Shauna L. Shapiro, et al., Mindfulness-Based Stress Reduction for Health Care Professionals: Results from a Randomized Trial, 12 INT’L J. STRESS MGMT. 164 (2005).

138. See Davis & Hayes, supra note 31, at 202–03 (reporting that mindfulness training improved therapists communication and empathy with clients’ situations and helped clients express themselves); Shapiro et al., supra note 117, at 589–90, 594 (evidencing mindfulness training caused improved empathy among medical students); Shapiro et al., supra note 9, at 22 (citing multiple studies supporting proposition that mindfulness training encourages empathetic tendencies).


140. See id. (strongly correlating elements of MBSR training with developing self-compassion); Shapiro et al., supra note 9, at 23 (citing relevant studies demonstrating mindfulness cultivates self-compassion); see also M. R. Leary et al., Self-Compassion and Reactions to Unpleasant Self-Relevant Events: The Implications of Treating Oneself Kindly, 92 J. PERSONALITY & SOC. PSYCHOL. 887–904 (2007) (finding, among college students, self-compassion more beneficial than self-esteem in dealing with negative life events).

141. Shapiro et al., supra note 9, at 23 (citing K. D. Neff et al., An Examination of Self-Compassion in Relation to Positive Psychological Functioning and Personality Traits, 41 J. RES. IN PERSONALITY 908 (2007)).
It is connected to other positive psychological characteristics including “wisdom, personal initiative, curiosity, and exploration, happiness, optimism, and positive affect.”142 Two studies showed that mindfulness meditation increased self-compassion.143 In one study, self-compassion helped college students deal with negative personal and interpersonal events in a way that may be even more helpful than self-esteem.144 In a second study, health care professionals demonstrated a twenty-two percent increase in self-compassion after undergoing an eight-week MBSR intervention.145 The research suggests that mindfulness training “contributes to qualities that produce well-rounded persons, reflected in higher creativity and greater capacities for positive interpersonal behavior and social relationships.”146

III. LAW SCHOOLS SHOULD TEACH MINDFULNESS

Educating law students in mindfulness has the potential to address the twin concerns of the multitasking but shallow-thinking mindset, as well as the critique that the conventional law school curriculum does not adequately address or teach professionalism and ethics.147

142. Shapiro et al., supra note 9, at 23; see Neff et al., supra note 141; Shauna L. Shapiro, Kirk Warren Brown & Gina M. Biegel, Teaching Self-Care to Caregivers: Effects of Mindfulness-Based Stress Reduction on the Mental Health of Therapists in Training, 1 TRAINING & EDUC. IN PROF. PSYCHOL. 105 (2007).
143. See Shapiro et al., supra note 9, at 23 (noting positive effect of mindfulness training on positive interpersonal behaviors and relationships); Shapiro, et al., supra note 137, at 164 (reporting significant increases in self-compassion among health care professionals who underwent MBSR training); Shapiro et al., supra note 142, at 105 (finding enhanced rates of self-compassion among graduate students after completing mindfulness training).
144. See Leary et al., supra note 140, at 887–904; see also Shapiro et al., supra note 9, at 14.
145. See Shapiro et al., supra note 137, at 164, 170.
146. Shapiro et al., supra note 9, at 23.
147. While the focus of this article is on how mindfulness can help students, research also reveals that mindfulness can improve teaching as well. See Vicki Zakrzewski, Can Mindfulness Make Us Better Teachers?, GREATER GOOD: THE SCIENCE OF A MEANINGFUL LIFE (Oct. 2, 2013), http://greatergood.berkeley.edu/article/item/can_mindfulness_make_us_better_teachers(describing eight–week mindfulness study of teachers). Zakrzewski reports on this study of the effects of mindfulness training on teachers, which found that:
[T]hose who completed the training enjoyed a myriad of personal benefits, including elevated levels of self-compassion and a decrease in psychological ills such as anxiety, depression, and burnout. In comparison, a group of teachers placed on a wait list for the course actually increased in their stress and burnout levels, but what made this study unique is that it also looked at the participants’ classroom performance, such as their behavior management skills and their emotional and instructional support of students. What it discovered was this: The practice of mindfulness made them more effective teachers, possibly by buffering them from the impact of stressful experiences as they were happening.

Id.
Critics argue that traditional law school curriculums fail to “focus on the ethical development of students in an integrated and pervasive way.” The authors of the Carnegie Report call for education reforms, “which would assist in the ‘moral development of practitioners,’” that combine professionalism with knowledge and skills, and which provide students more opportunities for self—reflection, and allow them to develop a habit of self—assessment. Critics also argue that law schools suppress creativity. Mindfulness training would enable law students and lawyers to address these shortcomings, while simultaneously addressing the issue of the decline in attention and concentration that is affecting learning. While some may think mindfulness training is too “new age” for law school, its acceptance and use in many other situations show that law schools are behind in the trend toward teaching mindfulness.

A. Mindfulness Training Is Widely Used In Medicine, Industry, and Other Educational Settings

Mindfulness training is “common in hospitals, corporations, professional sports and even prisons, [but] is relatively new in . . . education.” As discussed above, it is offered in more than 250 medical centers and has been used in the medical setting for over thirty years. In the corporate sector, mindfulness meditation has experienced a “great surge of interest.” “Major corporations like Google . . . have . . . instituted mindfulness programs for their employees.” The Chicago Bulls and L.A. Lakers basketball teams use mindfulness to improve focus and work on the team aspect of
the game. Environmental organizations, philanthropists, journalists, and prisoners have all found a use for some form of mindfulness training.

Relatively recently, secondary, undergraduate, graduate, and professional schools have added components of mindfulness training to their curriculums. Educational experts recognize that mindfulness has the potential to improve the ability to easily transfer skills, to think creatively and independently, and, perhaps most importantly, to help students become more self-directed learners. For example, about 3000 students in Britain have been taught mindfulness techniques through the Mindfulness in Schools program as a way to improve students' concentration, test taking, and focus. In Piedmont, California, one school experimented with a five-week mindfulness-training class for its elementary students, while in Lancaster, Pennsylvania, one district taught mindfulness in twenty-five classes each week at eight schools. At the Middlesex School in Concord, Massachusetts, incoming freshman students are required to take a mindfulness course, which meets for forty

155. Riskin, supra note 33, at 4 & n.9.
156. Id. at 5–6 & nn.11–16 (discussing numerous mindfulness programs used by environmental sector, leaders, philanthropists, journalists, prisoners, and green berets).
157. Id. at 5 & nn.17–18 (calling attention to programs used in medical schools, graduate, undergraduate, and professional schools); see also Brown, supra note 25 (highlighting fifth graders at Piedmont Elementary School in Oakland, California); Parry, supra note 2 (discussing mindfulness elements used at University of Washington).
159. See Oenone Crossley–Holland, Could Meditation Be the Answer to Exam Nerves?, THE GUARDIAN, (Mar. 4, 2013 2:30 PM), http://www.theguardian.com/education/2013/mar/04/mindfulness-based-stress-reduction-meditation (revealing mindfulness techniques taught to British secondary students). For example, “beditation,” the practice of meditation while lying down, is one technique incorporated in the “Stop, Breathe, and Be” curriculum of the Mindfulness in Schools program developed by two UK teachers that is now taught in twelve countries. See id.
160. Brown, supra note 25 (describing effect of mindfulness on elementary students).
minutes per week for nine weeks.\textsuperscript{161} At the University of Washington, one professor starts every class with a few minutes of meditation.\textsuperscript{162} These are just a few examples of the growing trend.\textsuperscript{163}

B. Mindfulness Training is Essential to the Law School Curriculum

Given that law students are operating with a multitasking mindset, and the criticism that law schools are not teaching students the skills of self-reflection and self-assessment, any activity that can foster better attention, learning, empathy, creativity, self-compassion, stress reduction, and general overall well-being should be taught.\textsuperscript{164} In fact, “[m]indfulness meditation has [already] entered the legal community.”\textsuperscript{165} Programs introducing mindfulness to the legal community articulate a myriad of goals, such as:

[S]piritual enlightenment to just lightening up, and include feeling and performing better as a law student or lawyer or other conflict resolver (e.g., judge, mediator, negotiator); developing a deeper understanding of ourselves, each other, and the

\textsuperscript{161} See Mindfulness, MIDDLESEX SCHOOL, https://www.mxschool.edu/mindfulness (last visited Dec. 28, 2014) (presenting students’ reports that mindfulness course helped their schoolwork and sports focus, reduced stress, improved relationships). The Middlesex school uses the Mindfulness in Schools program highlighted in Crossley–Holland, \textit{supra} note 159.

\textsuperscript{162} See Parry, \textit{supra} note 2 (describing Professor Levy’s beginning-of-class mindfulness ritual at University of Washington).

\textsuperscript{163} See Penny Cunningham, \textit{Mindfulness in the Classroom: A Growing Trend}, NAT’L INST. FOR STUDENT–CENTERED EDUC. (Oct. 3, 2013), http://nisce.org/blog/features/mindfulness-in-the-classroom-a-growing-trend/. Cunningham describes how “more and more teachers are introducing contemplative or mindful based practices into their classrooms” and how “using these approaches . . . [sets] a routine that supports self-regulation and creates a positive emotional climate.” \textit{Id.} Not surprisingly, school curriculums have started incorporating mindfulness programs, “teaching kids as young as five years old how to use body scans, mindful breathing and attention to their thoughts and emotions to become more focused.” \textit{Id.} (citing Carolyn Gegoire, \textit{Mindfulness Programs in Schools Reduce Symptoms of Depression Among Adolescents: Study}, HUFFINGTON POST (Mar. 13, 2013), http://www.huffingtonpost.com/2013/03/15/mindfulness-in-schools-re_n_2884436.html).


\textsuperscript{165} Riskin, \textit{supra} note 33, at 33, 33–45 (tracing the legal community’s incorporation of mindfulness training since 1989); \textit{Law Schools Involved in Mindfulness and the Law}, MINDFULNESS IN LAW, http://mindfulnessinlaw.org/Law%20Schools/index.html (last visited Jan. 8, 2015) (listing law schools that offer mindfulness courses or integrate it into their curricula).
nature of reality; enhancing one’s ability to cope with stress; developing emotional intelligence competencies [like self-regulation, motivation, empathy, and social skills]; and promoting ethical behavior.166

Mindfulness programs began to take off in the late 1980s and early 1990s.167 In 1989, Jon Kabat-Zinn, the director of the Center for Mindfulness in Medicine, Health Care and Society at UMass Hospital offered a session on mindfulness based stress reduction (MBSR) training to trial court judges.168 Mediators for the United States Court of Appeals for the Ninth Circuit attended meditation training in the mid–1990s.169 In 1998 and 1999, Boston’s Hale and Dorr (now Wilmer Cutler Pickering Hale and Dorr LLP) and Nutter, McClennan & Fish, LLP offered their lawyers MBSR training that included before and after program interviews, eight weekly two–hour classes, homework assignments, and a daylong retreat teaching both formal and informal meditation practices, among other features.170 “In fact, growing numbers of attorneys are embracing some form of practice to achieve mindfulness”171 to help them cope with stress management and improve their mental and physical well being.172
The American Bar Association (ABA) has been promoting mindfulness for the past five years. The ABA sponsored a book, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*, by Steven Keeva, which includes discussions of mindfulness practices for lawyers. The ABA also sponsors discussions and Continuing Legal Education (CLE) seminars based on the book and its principals. Various other bar associations and organizations have organized events centered on mindfulness and meditation around the country, including in Boston, Massachusetts; Silver Spring, Maryland; New York City, New York; Kansas City, Missouri; and in various cities in Northern California. Leonard Riskin, a leading advocate and proponent of mindfulness training has taught workshops on mindfulness and negotiation, mediation or lawyering at events in Wisconsin, Michigan, Iowa, Austria, Denmark, Southern Methodist University, Missouri, California, and Alabama. In 2002, which “legal historians will likely mark as the seminal year” for the discipline of mindfulness in the law, the *Harvard Negotiations Law Review* hosted a first of its kind forum to discuss mindfulness and the work of Professor Riskin.

The University of California’s Berkeley School of Law first hosted a conference called *The Mindful Lawyer* in October of 2010 to explore the development of meditation as it relates to lawyering. Over 180 “lawyers, judges, professors and law students from twenty-three states and two other countries . . . convened to explore the development of meditation as it has grown over the last decade in law schools and law practice.” Sponsored by Berkeley Law, and law schools at the University of Buffalo, The University of California, Hastings, the City University of New York, the University of Florida, and the University of San Francisco, the conference turnout reflected the attention mindfulness and meditation has received

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175. See Jacobwitz, supra note 34, at 2; Riskin, supra note 33, at 36.
176. See Riskin, supra note 33, at 36–37 (describing programs organized by ABA section on Dispute Resolution, Shambala Meditation Center, City University of New York School of Law, Kansas City Holistic Lawyers group); Riskin, supra note 37, at 638.
177. Riskin, supra note 33, at 34–38 & nn.143–163 (chronicling mindfulness training seminars and events throughout the U.S.).
178. Magee, supra note 36, at 549.
180. Id.
over the past years. The conference “looked at the ways that lawyers and judges have brought a meditative perspective to their work, enhancing their empathy, effectiveness, and creativity. It has made them happier in their work and less stressed.” It was so successful that it became an annual event, and inspired the Dean of Berkeley Law, Christopher Edley, to establish the Berkeley Initiative for Mindfulness in the Law in the fall of 2011 while “expand[ing] course offerings grounded in mindfulness, to explore the relevance of mindfulness to law practice and legal education, [and] to make mindfulness a more substantial presence in the Berkeley law community.”

Mindfulness meditation has begun appearing on law school curricula as well, sometimes as a course on its own or often as part of another course. Yale, Columbia, and U.C. Berkeley were the first to offer mindfulness programs as meditation retreats for law students. These programs began to be offered at more law school campuses, including for-credit classes primarily teaching some form of mindfulness as well as clinics and other classes that integrate aspects of mindfulness into their curriculum. Law school offerings that include a mindfulness component include courses on emotional intelligence at the University of Miami and the University of Missouri, professional responsibility courses at the University of Miami, and dispute resolution courses at the University of Florida and Northwestern. The University of Buffalo Law School offers a class titled “Mindfulness and Professional Identity: Becoming a Lawyer While Keeping Your Values Intact.” Other law

181. Id. Riskin, supra note 37, at 631.
182. Halpern, supra note 135, at 646.
183. Id. at 642. Materials from this conference, including links to guided meditations, books and articles on meditation and mindfulness training, course materials, syllabi, and YouTube clips of speakers and lectures are available online at http://www.mindfullawyerconference.org/resources.htm.
185. Riskin, supra note 37, at 636.
186. Id. at 637; see also Baker & Brown, supra note 164, at 45 & app. at 51–55 (introducing controlled concentration training exercises in law classes to improve students’ attention).
187. Riskin, supra note 37, at 637.

The curriculum includes readings from the vast literatures on lawyering and the legal profession, and visits from lawyers and judges who take holistic approaches to resolution of legal disputes. These, in conjunction with training in “mindfulness” techniques, will help future lawyers understand and empathize with their clients, along with developing skills that can reduce stress, manage the emotional ups and downs that lawyers consistently face, and stay connected to their ‘sense of humor and deepest ethical
schools offer mindfulness training in not–for–credit classes. Examples include the Lawyer in Balance Program at Georgetown, Vanderbilt’s Supportive Practices Group, and Mindfulness–Based Stress Reduction Programs and weekly meditation sessions at several law schools.” Law students and lawyers of all experience levels are likely to benefit from learning mindfulness tools alongside a refresher course on legal ethics.

A few law schools offer more than just a course or two incorporating mindfulness. At the University of Miami, for example, Professor Scott Rogers directs the Mindfulness in Law Program, which integrates mindfulness through courses and workshops based on “Jurisight,” a system that Rogers “developed to teach mindfulness to law students and lawyers, using legal terms of art to explain mindfulness–related concepts.” This program has gained some support since its inception, and undoubtedly inspired the City University of New York’s Contemplative Urban Lawyering Program, the University of California at Berkeley’s Berkeley Initiative for Mindfulness and the Law, and the University of Florida’s Initiative on Mindfulness in Law and Dispute Resolution.

Given this growing trend, and the clear evidence that mindfulness training improves attention, learning, working memory capacity, academic achievement, empathy, self–compassion, and creativity, and that it can reduce stress and anxiety, more law schools should be developing and offering courses or instruction on mindfulness.

and professional ideals; according to the course syllabus . . . Teaching young lawyers the skills to be compassionate and self–reflective in their professional lives will serve their personal lives as well. Through mindfulness practices, law students, attorneys and judges develop equanimity, along with the ability to pay attention to the actual person or situation presented . . . without allowing prejudices or preconceptions to distort the process.

Id. 189. See Riskin, supra note 33, at 39 (citing meditation seminar and retreats at CUNY, Yale, and Columbia did not provide academic credit).

190. Riskin, supra note 37, at 637; see Magee, supra note 36, at 549–52 & n.78.

191. See Alan Lerner, Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices, 23 QUINNIPAC L. REV. 623 (2004). Lerner suggests that experiential learning activities would be useful learning tools because “[i]nevitably, we look for solutions to problems we face by first scanning our memories for similar situations, and applying the principles and methods that we used in those situations. In the case of lawyers, particularly newer lawyers, our memories for solving legal problems were created in law school.” Id. at 652.


193. See Magee, supra note 36, at 550–51 & n.83; Riskin, supra note 37, at 637–38.
CONCLUSION

Mindfulness training can address the twin concerns of distracted students and the call for law school reform. Lawyers and law students are beginning to discover the benefits of mindfulness. By making mindfulness training a core concept in the law school curriculum, law schools will enable and empower their students to better handle the pressures of working in a distracted society where complex situations are the norm.

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Ian takes a deep breath after the supervising attorney leaves his office before he begins to work on the answers to interrogatories. He notes the time and contemplates what he was asked to do. As he breathes, he reminds himself that this attorney can be brusque but that this attitude is not directed at Ian. Ian must only do what he was asked to the best of his ability. He begins reviewing the file in order to draft the answers. He hears his phone: ding! But he does not take it out of his desk or look at it. He knows it can wait the half an hour it will take him to work on this discovery. Ian is not sure what the attorney wants him to say is accurate, so he does his best to work with what the client said and what he knows the attorney wants. In half an hour, the attorney calls to ask if the answer is done, and Ian is happy to respond that it is. While he knows the attorney may not be completely pleased with the answer, Ian is satisfied that he did the best he could. He hands the work off to the attorney, and checks his phone. Time to work on his resume before anyone asks for him! Ian is thankful that he learned to focus his attention in a law school class that prepared him for such situations.
Drawing Inspiration from the Flipped Classroom Model: 
An Integrated Approach to Academic Support for the Academically Underprepared Law Student

Susan D. Landrum*

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I. INTRODUCTION

As the call for paper proposals for this conference\(^1\) and recent legal education scholarship indicate, there is growing concern that the current generation of law students is less prepared for the challenges of legal education than ever before.\(^2\) This concern about in-

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coming law students’ level of preparation puts ever increasing pressure on law school faculty and academic support professionals to find efficient and cost–effective ways of teaching students the skills that they need to be successful in law school, on the bar exam, and in the legal profession. At the same time, this challenge has also had positive side effects: increased dialogue and collaboration among law school administrators, faculty, and academic support professionals; an increased willingness of legal educators to embrace best practices from not only legal education but higher education in general; and thoughtful, creative approaches to pedagogy and assessment. The instant conference is one such example of the positive direction of legal education that is beginning to emerge.

Law school academic support programs, with their common mission

3. The need to be efficient and cost–effective is further emphasized by the fact that, at many law schools, there is only one administrator or professor involved in academic support efforts, as well as limited financial resources. See Louis N. Schulze, Jr., Alternative Justifications for Law School Academic Support Programs: Self–Determination Theory, Autonomy Support, and Humanizing The Law School, 5 CHARLESTON L. REV. 269, 271 (2011) [hereinafter Alternative Justifications I] (stating that some law “schools find it crucial to advertise academic support but fail to fund it adequately”); see also Flanagan, supra note 2, at 28 (“[T]he majority of [academic support programs] are understaffed, underfunded, and unprepared to help students at a systemic level”).

4. See, for example, some of the recent conferences hosted by the Institute for Law Teaching and Learning, such as What the Best Law Teachers Do (held June 25–27, 2014), and Assessment Across the Curriculum (held Apr. 5, 2014), details available at: http://law-teaching.org/conferences/ (last accessed on Nov. 25, 2014), as well as Duquesne University School of Law’s, The Fourth “Colonial Frontier” Legal Writing Conference.


of empowering law students to be more effective learners, have an important role to play in this “new normal” of legal education.

The concept of law school academic support programs is not new. Although there has been an increase in the number of schools employing full-time academic support professionals in recent years, some schools have had established programs for decades. Often, law schools have established academic success initiatives that function separately and independently from the law school curriculum in the form of workshops, seminars, and individual tutoring sessions. These initiatives are important components of a law school academic support program, but they have their limitations. First, students commonly have difficulty connecting academic skills that they learn in the abstract to the course material in specific doctrinal classes. Second, there are often few consequences for failing to attend workshops or pay attention to workshop presenters, and therefore some students do not realize the value of those presentations. Third, in many schools law students do not access targeted academic support programming until they have already completed a semester or even a full year of coursework, and, even with intervention at that point, the remainder of law school may be an uphill climb. Finally, although tutoring sessions can have a significant effect on an individual student’s performance in coursework and on exams, an academic support program’s limited resources may make that approach an inefficient way of working with large numbers of students.

8. For a brief overview of the history of law school academic support programs, see Schulze, Alternative Justifications I, supra note 3, at 274–78; Flanagan, supra note 2, at 26–28.
9. See Schulze, Alternative Justifications I, supra note 3, at 275 & n.12; DeGroff, supra note 2, at 203.
10. For an explanation of the main types of law school academic support initiatives, see Schulze, Alternative Justifications I, supra note 3, at 278–88; Richard Cabrera & Stephanie Zeman, Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century, 26 WM. MITCHEL L. REV. 205 (2000); see also Section III, infra.
11. Schulze, Alternative Justifications I, supra note 3, at 284 (“Empirical evidence suggests that academic support is more effective the closer an [academic support program] works with the actual cases and rules covered in doctrinal classes.”); see also Kristine S. Knaplun & Richard H. Sander, The Art and Science of Academic Support, 45 J. LEGAL EDUC. 157, 177 (1995) (noting that one academic support program experienced noticed improvement when academic support was tied more closely to what students were covering in other classes).
12. For example, individualized tutoring may not be available to students until after they have received their final grades at the end of the first semester or even not until the end of the first year, especially if grades are based solely on final exams. Until grades are final, there may not be a formal mechanism in place to identify which students need specialized academic support. By this point, a student’s grade may have already put her on academic probation, requiring even higher grades to remove the student from probationary status.
Thus, although law school academic support programs have much to offer, they, like other areas of legal education, need to consider what more can be done to ensure that law students have the academic skills needed for success in law school. In some ways this is a daunting task, as the need for academic support professionals’ services and expertise is increasing at the very time that law school budgets are often being squeezed. But there are important resources that we can draw from, both within the legal academy and in higher education more generally, in terms of learning theory, pedagogy, and assessment practices.¹³

Building upon the author’s own experiences, this article examines how a law school academic support program can draw inspiration from the “flipped classroom” pedagogical model to teach foundational academic legal skills in a way that integrates directly with first-year students’ required courses. In Section II, the article explores the characteristics of the current generation of law students. Section III addresses the range of current approaches to academic support, as well as the benefits and drawbacks of those approaches. In Section IV, the article investigates some important trends in law school pedagogy and learning theory, including the use of cognitive science in education theory, new approaches to pedagogy such as the flipped classroom and blending learning, and the increased use of formative assessment. Section V describes the first-year academic support program at Savannah Law School and explains how it draws from both current trends in law school academic support and these innovative approaches to pedagogy and learning theory to enhance new law students’ academic success. Finally, Section VI further explores the benefits and limitations of this new program and how it could be further tweaked and expanded in the future.

II. CHARACTERISTICS OF TODAY’S LAW STUDENTS

As a preliminary matter, it is important to have a basic understanding of some of the common characteristics of the current generation of law students, many of whom are identified as Millennials. By its nature, these descriptions include generalizations that may not be true of all law students. Still, even with its limitations, identifying student qualities can help law schools set educational objectives and develop strategies for meeting those objectives.¹⁴ Some

¹³ See Section IV, infra.
¹⁴ As Professor Cassandra Hill has noted, “[m]any law students, as adult learners, bring wide-ranging experiences and skills with them to law school, and, for law professors, ‘understanding what experiences, biases, habits, and learning preferences each person brings’ is the first step in developing students’ metacognitive skills.” Cassandra L. Hill, The Elephant
student characteristics create potential obstacles for academic success in law school and therefore are a matter of concern. Not all of these characteristics are problematic, however. Law schools may capitalize on their students’ positive qualities to maximize academic success.

A. The Effect of the Current “Crisis” in Legal Education on Law Student Characteristics

One only has to take a cursory glance at many of the blogs on the Internet to know that there is a growing consensus that law schools in the United States are in the midst of a “crisis.”15 While the reasons for that crisis and its possible solutions are hotly debated,16 some of its consequences are not. The numbers unequivocally show that law school enrollment has been on the decline for the past few years and is currently at the lowest it has been in decades.17 Moreover, declining enrollment has been accompanied by another trend:


16. See id.

declining academic indicators such as undergraduate grades and Law School Admission Test (LSAT) scores. Although there is some debate about the extent to which the LSAT is an accurate predictor of academic performance in law school, based upon that data, there has been a perception that at least some law schools are enrolling less qualified students in an attempt to boost their enrollment figures.

B. The “Underprepared” Law Student

Beyond any debate about the effect of declining enrollment and declining LSAT scores on law student qualifications, there is a growing belief that this generation of law students is different than preceding generations. In recent years, legal educators have noted that many students come to law school less prepared for its

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19. See, e.g., Marjorie M. Shultz & Sheldon Zedeck, Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions, 36 LAW & SOC. INQUIRY 620, 621 (2011) (noting that law students’ undergraduate grade point averages and LSAT scores “have proven to be valuable predictors of first–year law school grades [but] do not account for success in the legal profession or for law school outcomes other than first–year grades”); Christensen, supra note 2, at 87 (“The relatively weak correlation between the LSAT score and class rank (0.23), as compared to the stronger correlation between lawyering skills, grades, and class rank (0.57), suggests that the LSAT may not be a reliable predictor of success in law school.”).

20. See Taylor, Why today’s law students are not less qualified, supra note 18. Taylor disputes this perception, however, and asserts that the decline in LSAT scores and other academic indicators is minimal and that law school admissions programs have acted in “good faith.” See id.; see also Aaron N. Taylor, As Law Schools Struggle, Diversity Offers Opportunities, CHRON. OF HIGHER EDUC. (Feb. 10, 2014), http://chronicle.com/article/As-Law-Schools-Struggle/144631/ (arguing that LSAT scores and undergraduate grades “have some value in predicting student success, the value is focused on the first year of law school,” and they “have little to no value in predicting longer–term outcomes, like subsequent grades, bar passage, or professional success”).

21. See, e.g., Flanagan, supra note 2, at 1 (“Criticism of lackadaisical, underprepared, or unmotivated students has a long history, but recent research suggests that incoming law students are less prepared than previous generations of law students.”); DeGroff, supra note 2, at 202–03 (noting that the today’s law students are “less accustomed than their predecessors to thinking sequentially and logically and are ill–prepared for the rigorous questioning, sorting, cataloguing, and synthesizing of conceptual frameworks that are essential for legal analysis”); Nancy B. Rapoport, Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools, 116 PENN. ST. L. REV. 119, 122–23 (2012); Judith Wegner, Reframing Legal Education’s “Wicked Problems”, 61 RUTGERS L. REV. 867, 887 (2009).
academic demands than in the past. Legal educators sometimes describe these law students as “underprepared,” and it is undisputed that these students face significant challenges in law school.

Underprepared law students can be successful in law school, on the bar examination, and in the legal profession, but they usually require additional support as they develop academic skills. A toolbox makes for a useful analogy. A successful law student will have a range of tools in his or her toolbox—including advanced critical thinking skills, problem-solving skills, verbal communication skills, and writing skills, among others. Underprepared students lack some of the tools required for academic success when they first begin law school. In order to complete law school, pass the bar, and become productive members of the legal profession, these students will have to collect any tools that were missing at the start.

The deficits that legal educators have identified are not directly related to the current crisis in legal education; according to many legal educators, they are part of a larger trend in higher education in recent years. Noting that current law students received much of their K-12 training after passage of the No Child Left Behind Act.

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22. Flanagan, supra note 2, at 1 (“Many of today’s college graduates do not have the fundamental thinking and reasoning skills necessary to master the law school curriculum.”); DeGroff, supra note 2, at 202–03.
23. See generally Stuart & Vance, supra note 2; Flanagan, supra note 2.
24. See, e.g., Flanagan, supra note 2, at 6 (“L]earning to ‘think like a lawyer’ is associated with higher–order thinking familiar to students with strong academic preparation, but foreign to students from non–traditional backgrounds.”).
26. Id. (“W]ith under–prepared students, the concern is not necessarily about the amount of effort the students put forth in doing the work (they attend class and listen, take notes, stay up late, and read assignments), but rather about their legal reasoning and synthesis skills.”); see also id. (quoting Zalesne & Nadvorney, supra note 2, at 267) (“Although under–prepared students do the work, their performance on exams ‘indicate[s] that in some profound way . . . [they] cannot put the material together to understand what the law is and how it works.”).
27. In recent years, a number of critiques have explored weaknesses in undergraduate education in the United States. See, e.g., RICHARD ARUM & JOSIPA ROKSA, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES (2011); DEREK BOK, OUR UNDERACHIEVING COLLEGES (2006); ANDREW HACKER & CLAUDIA DREIFUS, HIGHER EDUCATION?: HOW COLLEGES ARE WASTING OUR MONEY AND FAILING OUR KIDS—AND WHAT WE CAN DO ABOUT IT (2010); and MARK C. TAYLOR, CRISIS ON CAMPUS: A BOLD PLAN FOR REFORMING OUR COLLEGES AND UNIVERSITIES (2010). But cf. Alexander W. Astin, In ‘Academically Adrift, ’ Data Don’t Back Up Sweeping Claim, CHRON. OF HIGHER EDUC. (Feb. 14, 2011), http://chronicle.com/article/Academically-Adrift-a/126371/ (arguing that the statistical analysis in Academically Adrift was flawed and therefore did not support its authors broad conclusions regarding student learning). In a recent article, Rebecca Flanagan explored the empirical basis of Arum and Roksa’s analysis of undergraduate student learning. See Flanagan, supra note 2, at 3–5.
in 2001, Professors Susan Stuart and Ruth Vance present a scathing indictment of that statute’s educational limits. More importantly, regardless of the quality of K–12 education prior to the time that students enter colleges and universities, undergraduate institutions are not graduating students with the same level of critical thinking and problem–solving skills as in the 1970s and 1980s. Legal educators criticize today’s undergraduate education as less rigorous than it has been in the past. Furthermore, college students today are accustomed to only spending approximately half the number of hours studying each week than they were accustomed to only fifty years ago, a trend that does not set students up for law school’s academic demands.

So what specific challenges do our students face as they come into law school? What “tools” do they still need to acquire in order to build academic success? As mentioned before, many incoming law students lack critical thinking skills and analytical skills. Their

28. Stuart & Vance, supra note 2, at 44–45; see generally Goodwin, supra note 2.
29. Stuart & Vance, supra note 2, at 41, 44–45, 56; see also id. at 44 (“Today, more students enter the legal academy without even rudimentary problem–solving skills”; id. at 59 (arguing that “higher education itself has become a major factor in the degradation of basic critical thinking skills for many of our students”); Cooper, supra note 2, at 1 (“Law schools are inheriting students less prepared for law study than ever before.”); Flanagan, supra note 2, at 5; DeGroff, supra note 2, at 202–03.
30. Stuart & Vance, supra note 2, at 60 (citing ARUM & ROKSA, supra note 27, at 70 (“[U]ndergraduate education is simply no longer as rigorous, which unfortunately fits the consumer–student who wants the best educational credentials with the least amount of effort.”). These criticisms do not just come from legal educators, as Stuart and Vance note. Richard Arum and Josipa Roksa have also criticized undergraduate higher education for failing to teach higher thinking and reasoning skills. See Stuart & Vance, supra note 2, at 58 (quoting ARUM & ROKSA, supra note 27, at 21) (“Arum and Roksa’s conclusions are a devastating indictment of higher education’s failure to deliver on ‘core outcomes espoused by all higher education—critical thinking, analytical reasoning, problem solving and writing.’”); Joan Catherine Bohl, Generations X and Y in Law School: Practical Strategies for Teaching the “Mtv/google” Generation, 54 LOY. L. REV. 775, 786 (2008) (“The American school system imposed fewer academic requirements on the Gen X Y student than it had imposed on any previous generation in modern times, and this difference left an indelible mark on the students who sit in law school classes today.”).
31. Stuart & Vance, supra note 2, at 59–60 (citing ARUM & ROKSA, supra note 27, at 3 (“Average study time . . . was twenty–five hours per week in the 1960s, twenty hours per week in the 1980s, and thirteen hours per week in 2003”); see also Cooper, supra note 2, at 3 (“Undergraduate students spend an average of 15 hours per week studying, down from an average of 24 hours a week in the 1960’s and only 1 in 4 college students devote more than 20 hours a week to studying, which is relatively consistent across demographics.”); Flanagan, supra note 2, at 12–13.
32. Stuart & Vance, supra note 2, at 43 (“[E]merging empirical evidence reveals that fewer students possess the basic higher–order cognitive processes that the academic has assumed are the threshold educational achievement for success in law school.”); George, supra note 2, at 164 (“[S]cholars agree that these students are entering law school with weaker reading and reasoning skills than prior generations, due in large part to the way students multitask through life’); Flanagan, supra note 2, at 5–7; Cooper, supra note 2, at 1–2.
problem–solving skills are often deficient. 33 Furthermore, these students may have difficulty effectively communicating their arguments and analysis in both written and oral form. 34 In short, students often do not know how to employ higher–level cognitive processes. 35 Moreover, according to some legal educators, the problem is not just that many students are entering law school without skills that are required for academic success; that initial problem is compounded by the fact that many law professors assume that students have already learned those skills in their undergraduate institutions. 36 Based on assumptions that the quality of undergraduate education has remained unchanged over time, “law professors expect entering law students to be equipped with the basic linguistic and analytical skills needed to rapidly grasp the techniques of case and statutory analysis.” 37

These problems are not uniform; instead, some students face more academic challenges in law school than others. Students from liberal arts colleges tend to have more developed critical thinking and writing skills than students from other types of colleges. 38 Students from privileged backgrounds tend to experience significant improvement in their critical thinking skills during their years as an undergraduate, in contrast to students whose parents are less educated and those who come from more diverse socioeconomic backgrounds. 39 The end result is that “[l]aw schools that admit a

33. Professor Nancy Rapoport has explained the need to transition law students from legal analysis to problem solving. See Rapoport, supra note 21, at 1152; see also Larry O. Natt Gantt, II, The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving, 45 CREIGHTON L. REV. 699 (2012) (discussing the need for law students to become legal problem solvers and suggesting how students can be taught that skill).

34. See generally James Etienne Viator, Legal Education’s Perfect Storm: Law Students’ Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First–Year Curriculum, 61 CATH. U. L. REV. 735 (2011–2012).


36. Stuart & Vance, supra note 2, at 54 (“[D]eveloping and honing critical thinking skills have long been considered, theoretically, one of the primary missions of higher education. As a consequence, the legal academy presumed their students’ familiarity with these processes—application, analysis, synthesis, evaluation, creation—as a function of their undergraduate training and a foundation for the new discipline of law.”); see also id. at 43. According to Professors Deborah Zalesne and David Nadvorney, the Carnegie and MacCrate reports also rely on these kinds of faulty assumptions. See Zalesne & Nadvorney, supra note 2, at 272 (stating that “Carnegie and MacCrate both overlook a critical component of legal education, assuming a standard level of academic preparation and an equal starting point for all entering law students, which diserves the students who enter law school with less than an optimum level of academic intelligence”).

37. Viator, supra note 34, at 753.

38. Flanagan, supra note 2, at 5–6.

39. Id.
more diverse population of students, from across the socioeconomic spectrum and from a variety of undergraduate schools, have students with widely differing levels of academic preparation” for law school.40

Legal educators also point to the effects of modern technology and social media on their students’ ability to analyze difficult legal problems and communicate information.41 Studies demonstrate that the ability to rapidly type notes on a computer has resulted in students not fully processing what is going on in the classroom.42 Students’ use of texting and social media platforms like Twitter has created a new abbreviated language that makes for quick and efficient communication of social information but may not translate to competent academic and professional writing. The end result is that students do not always understand what is required of formal writing and may lack fluency in grammar and other writing conventions that are required in law school and the legal profession.43

C. Other Characteristics of Millennials That Have the Potential to Create Challenges in Law School

Millennials often have other traits that may act as obstacles to academic success in law school. Teachers who work with Millennials report that their students “are more concerned with getting good grades than with learning.”44 Students’ focus on grades has often

40. Id. at 6.
41. See, e.g., Stuart & Vance, supra note 2, at 64 (“Employers blame colleges, and colleges blame K–12, but some of the blame lies with Millennials using technological modes of communicating via texts, instant messages, and email. Social networking has contributed to Millennials’ poor writing skills, not only in terms of spelling, punctuation, and grammar, but also when it comes to writing clear, organized prose and arguing persuasively.”); see also George, supra note 2, at 164 (“Today’s law student enters law school as a digital native, constantly ‘plugged in’ and accessing information at a moment’s notice, often during class time itself,” but students’ multitasking has contributed to their weaker reading and analytical skills); Peter Sankoff, Taking the Instruction of Law Outside the Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (For Professors and Students), 51 U. ALBERTA L. REV. 891 (2014) (noting that today’s student is often disengaged and distracted by social media).
42. See generally Pam A. Mueller & Daniel M. Oppenheimer, The Pen is Mightier than the Keyboard: Advantages of Longhand over Laptop Note Taking, 25 PSYCHOL. SCI. 1159 (2014).
43. Stuart & Vance, supra note 2, at 64 (citing RON ALSOP. THE TROPHY KIDS GROW UP: HOW THE MILLENNIAL GENERATION IS SHAKING UP THE WORKPLACE 155 (2008)) (“Employers complain that Millennials can’t compose a ‘coherent, and well–written memo and that their writing lacks clarity and logical organization.’ They also complain that Millennials can’t make persuasive arguments to support their assertions.”).
44. Stuart & Vance, supra note 2, at 63 (citing ALSOP, supra note 43, at 14, 104); see also Joshua Silverstein, A Case for Grade Inflation in Legal Education, 47 U.S.F. L. REV. 487, 525 (2013) (“Grades are critically important in the lives of our students”).
been reinforced by their experiences in primary and secondary education, as well as undergraduate education. For many years, there has been a concern about grade inflation in education. Regardless of whether one fully agrees with the numerous indictments against current grading trends, the grades that most students have earned prior to law school are higher than they were in the past.

New law students' past experiences with grades do not adequately prepare them for the reality of law school grading systems. In most law schools, fewer students earn As in their classes than is the case in most undergraduate classes. Even students with higher GPAs do not always make As in their classes. Some of these differences may be reinforced by grade distribution requirements, where only so many students earn As, so many earn Bs, and

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45. Concerns that students are focused on grades rather than learning are not new; they have been voiced by educators in many fields and at numerous education levels. See, e.g., Steve Byrd, In grade-obsessed society, learning gets left behind, CHRISTIAN SCI. MONITOR (May 24, 2004), http://www.csmonitor.com/2004/0525/p14s01-legn.html; Brad Kuntz, Focus on Learning, Not Grades, 54 ASSOC. FOR SUPERVISION & CURRICULUM DEV. EDUC. UPDATE (May 2012), http://www.ascd.org/publications/newsletters/education-update/may12/vol54/num05/Focus-on-Learning,-Not-Grades.aspx; Alfie Kohn, The Case Against Grades, 69 EDUC. LEADERSHIP (Nov. 2011), http://www.alfiekohn.org/teaching/tcag.htm.


47. See generally Rampell, supra note 46.

48. Silverstein, supra note 44, at 526 ("C grades are common in legal education. They are generally awarded to students whose performance is satisfactory. In other words, C marks indicate that one has achieved basic proficiency and should continue in the program. But that is not how many—and perhaps most—law students see such grades. Large numbers of students (and often their families) perceive C’s as a sign of poor performance or even failure. And this is so despite regular explanations from faculty that C marks are acceptable."). "The reaction of [law] students at my school to C grades is consistent with national trends in higher education. Today’s college students regard grades in the C range as ‘loathsome and a sign of failure,’ a ‘devastating insult,’ and an indication that the student ‘has disappointed the teacher.’ . . . Accordingly, students today expect A and B grades for average work." Id. at 527; see also John O. Sonsteng, Donna Ward, Colleen Bruce & Michael Petersen, A Legal Education Renaissance: A Practical Approach for the Twenty-First Century, 34 WM. MITCHELL L. REV. 303, 338 & nn.170–73 (2007) ("Prior to law school, many students had outstanding scholastic records and developed a belief system that equates self–worth with achievement. Students arrive at law school with control issues because they have become accustomed to, and expect to continue, a record of outperforming other students. Law school may be frustrating and damaging to those whose self–esteem depends on repeated demonstrations of success. A significant number of law students lose self-confidence and their motivation to learn.").

49. Songteng et al., supra note 48, at 338.
so forth.\textsuperscript{50} Many law schools mandate that faculty apply these types of grade distributions to their classes, while other law schools use grade distributions as recommended guidelines.\textsuperscript{51} But even schools that do not utilize grade distributions to determine grades usually have results that are much different from students’ expectations coming into law school.\textsuperscript{52}

Moreover, research has found that people motivated by intrinsic factors, such as the desire to be a good attorney, have a much greater rate of long–term success than students who are motivated by extrinsic factors, such as grades, fame, or money.\textsuperscript{53} The reasons for these results are not entirely clear, but one reason could be that students who focus on internal motivations are more resilient in the face of adversity or potential obstacles.\textsuperscript{54} Law students who focus primarily on grades hit a roadblock when they do not receive the grades they expected at the end of the semester.\textsuperscript{55} They often argue about “points” on an exam rather than focusing on learning from past exams and assignments to improve their academic skills going forward.

Some first–year law students lack important social skills, including interpersonal and listening skills.\textsuperscript{56} The informalities that accompany social media participation, texting, and even many emails are much different from the professional expectations of law school and legal practice. Students may have to learn for the first time in law school how to communicate orally and in writing in a tone and manner that meet those professional expectations. Students may also need to develop effective listening skills.\textsuperscript{57} Regardless of the


\textsuperscript{51} See id.

\textsuperscript{52} See Sonstreng et al., supra note 48, at 338.

\textsuperscript{53} See generally Amy Wrezniweski et al., Multiple Types of Motives Don’t Multiple the Motivation of West Point Cadets, 111 PROCEEDINGS NAT’L ACADEMY SCI. U.S. 10990 (2014).

\textsuperscript{54} For an analysis of how resilience may correlate to academic success, see Martina Kotzé & Rita Niemann, Psychological Resources as Predictors of Academic Performance of First–Year Students in Higher Education, 45 ACTA ACADEMICA 25 (2013).

\textsuperscript{55} See Sonstreng et al., supra note 48, at 338.

\textsuperscript{56} See Stuart & Vance, supra note 2, at 65.

\textsuperscript{57} For a discussion of some of the important listening skills required of both law students and lawyers, see Jennifer Romig, LISTEN LIKE A LAWYER, http://listenlikealawyer.com/ (last updated Jan. 27, 2015); see also Neil Hamilton, Effectiveness Requires Listening: How
cause of these deficiencies, law school educators are tasked with helping their students develop those social skills as well, so that students are successful in law school and as attorneys in the future.

Scholars have also observed that the current generation of undergraduate students “would like the fruits of a college degree but are either unaware of required rigors or do not make an intentional decision to commit to the necessary rigors of study.” Those qualities are not limited to undergraduate students; many students enter law school without an understanding of what a legal education requires of them academically, in terms of time, amount of reading and other work, and complexity of course content. They approach law school passively rather than engaged in its challenges. As Professors Stuart and Vance have observed, “[w]hereas the academy still maintains vestiges of a cognitive apprenticeship model [in line with the Carnegie Report conceptualization of legal education], many of its students come to the academy indifferent to the cognitive process, believing they are already journeymen and all they have to do is wait out the three years, pass the bar, and get a job.”

D. Potentially Beneficial Characteristics of This Generation of Law Students

There is a tendency to view all educational characteristics of Millennials as negative, but those negative trends observed by educators are not universal. Students coming from certain undergraduate disciplines tend to have fared better than others in obtaining the skills required for success in law school. Specifically, students who major in liberal arts subjects, such as English or history, often have stronger problem-solving skills than graduates from other disciplines. Moreover, although non-traditional students may...

to Assess and Improve Listening Skills, 13 FLA. COASTAL L. REV. 145, 145 (2011–2012) (“Listening skills are critically important for effectiveness in both law school and the practice of law . . . .”).


59. See Bohl, supra note 30, at 780 (“Since internet information appears on one’s computer screen with little investment of time or effort, Gen X Y students have developed a predominantly passive relationship to information and an expectation of instant gratification.”).

60. See id.

61. Stuart & Vance, supra note 2, at 81.

62. Id. at 44.

63. See id. Rebecca Flanagan has noted that students from liberal arts colleges performed differently on learning assessments than students from other types of institutions. See Flanagan, supra note 2, at 5–6.
face other challenges in law school, particularly if they have been away from school for an extended period of time, their educational background—or even their life experiences—may have helped them to develop some relevant problem-solving skills.64

In general, Millennials often have positive traits that contribute to success in law school and the profession, if educators recognize those traits and maximize them. For example, having grown up in an age when working in groups in a classroom environment is common, the current generation of law students brings more collaborative skills to law school.65 Although it may be necessary to clarify and reinforce students’ understanding of appropriate collaborative behavior to avoid plagiarism and other forms of misconduct, collaborative skills are in high demand in the work place. Enhancing those skills through collaborative learning in law school will allow law school graduates to work collaboratively with their colleagues in the profession.66

Furthermore, today’s law students are more technologically proficient than earlier generations.67 Although students’ dependence on technology can sometimes be an obstacle to academic success,68 there is also a value to their interest in technology. If approached thoughtfully, with an attention to learning objectives and pedagogical value and not just for the sake of using technology, legal educators can tap students’ enthusiasm for technology, potentially engaging them in new, innovative ways.69 There is also a growing dialogue regarding the importance of technological competence once

64. Stuart & Vance, supra note 2, at 44.
66. Sophie M. Sparrow, Can They Work Well on a Team? Assessing Students’ Collaborative Skills, 38 WM. MITCHELL L. REV. 1162, 1162–63 (2012) (“Working with others is an important legal skill; and as law practice increasingly relies on collaboration among lawyers, legal staff, clients, and other individuals, so have legal employers raised the demand for effective collaborative skills among law students and recent graduates.”).
67. Sonsteng et al., supra note 48, at 356; DeGroff, supra note 2, at 201–02.
68. DeGroff, supra note 2, at 202.
69. Peter Sankoff discusses this phenomenon in his article—he notes that today’s students (Generation Y) “were born and raised on technology [and] regard devices like the laptop, tablet and mobile phone as the preferred platforms for learning, communication and entertainment.” Sankoff, supra note 41, at 4. Several Australian legal educators have recently started a blog project, Social Media in Legal Education, which focuses on ways that law professors can incorporate social media into their teaching by linking it to sound pedagogy. See SMILE, http://socialmediainlegaleducation.com/ (last updated July 15, 2014); see also Kristen B. Gerdy et al., Expanding Our Classroom Walls: Enhancing Teaching and Learning through Technology, 11 J. LEGAL WRITING INST. 263 (2005) (describing some of the benefits of incorporating technology into law school courses).
law students graduate and enter the profession.\textsuperscript{70} The use of technology as a pedagogical tool can reinforce and expand those students' technological proficiency. It can also introduce current technology and strengthen technological competency of students who may have entered law school without as much technological experience.

## III. CURRENT APPROACHES TO LAW SCHOOL ACADEMIC SUPPORT

As Professor Sheilah Vance has explained, a law school academic support program (commonly referred to as ASP) is “a comprehensive program designed to help law students succeed academically through a combination of substantive legal instruction, study skills, legal analysis, legal writing, and attention to learning styles.”\textsuperscript{71} Today, most law schools in the United States have some kind of academic support program, although those programs may vary significantly.\textsuperscript{72} It has long been recognized that academic support programs are not one–size–fits–all; instead, what works best for one law school and its students may not work as well for another.\textsuperscript{73} The following factors are important to the development of a law school academic support program: (1) the unique characteristics of that particular law school’s students; (2) the characteristics of faculty and administration; (3) institutional characteristics (including not just the characteristics of the law school but, if the law school is part of a larger university, the characteristics of that university as well); and (4) the resources available to the program (including financial resources, but also human resources, library resources, etc.).\textsuperscript{74}

\textsuperscript{70} The American Bar Association’s eLawyering Task Force, with the assistance of the Standing Committee on the Delivery of Legal Services, completed a survey in 2013 of ABA–accredited law school’s efforts to teach legal technology. See Richard Granat & Marc Lauritsen, \textit{Teaching the Technology of Practice: The 10 Top Schools}, 40 LAW PRAC. (2014), http://www.americanbar.org/publications/law_practice_magazine/2014/julyaugust/teaching-the-technology-of-practice-the-10-top-schools.html. As a result of that survey, the Task Force “identified 10 law schools that presently offer significant attention to the technology of practice, by which we mean they offer multiple courses or have dedicated centers.” \textit{Id.}; see also Sonsteng et al., supra note 48, at 356 (“Students who use technology during law school will be more prepared to work with technology as it applies to practice”).


\textsuperscript{72} Schulze, \textit{Alternative Justifications I}, supra note 3, at 271.

\textsuperscript{73} Id. at 278; see also Louis N. Schulze, Jr., \textit{Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices}, 40 CAP. U.L. REV. 1, 22 (2012) [hereinafter \textit{Alternative Justifications II}].

\textsuperscript{74} Paula Lustbader, \textit{From Dreams to Reality: The Emerging Role of Law School Academic Support Programs}, 31 U.S.F. L. REV. 839, 842 n.13 (1997); see also Schulze, \textit{Alternative Justifications I}, supra note 3, at 278.
There are multiple ways to articulate law schools’ approaches to academic support, as demonstrated below.

A. Relating Academic Support to the Law School Time Continuum

One way that law school academic support programs can be categorized is along a time continuum. Using this approach, academic support programs correspond with four major stages of law student development. The first stage is that of the pre-law student. A number of law school academic support programs begin working with admitted or conditionally admitted students during the summer prior to the first year of law school, with the goal of introducing those students to the expectations of law school while simultaneously improving academic skills. Some of these summer programs only last one or two weeks, but others span much of the summer. Summer programs may be open to all students or only target non-traditional, minority, or other students who have been identified as “at risk” of not successfully completing law school.

The second stage takes place during the first year of law school. The focus of the second stage is to further develop the universal academic skills that are required for success in law school. The scope of academic support activities may vary in this stage. Some

75. See Schulze, Alternative Justifications I, supra note 3, at 278–88; Schulze, Alternative Justifications II, supra note 73, at 22.
76. Schulze, Alternative Justifications II, supra note 73, at 22.
77. Id.
80. Schulze, Alternative Justifications II, supra note 73, at 23.
schools may offer only limited general support to first–year law students, in the form of occasional academic skills workshops, library print resources, or web–based resources.\textsuperscript{81} Other law schools may require all first–year students to take an academic–support related course.\textsuperscript{82} It is in this second stage that some students begin receiving individualized support.\textsuperscript{83} Once again, first–year academic support programming may target all students or only “at risk” students.\textsuperscript{84}

The third stage targets upper–level students. Some upper–level programs still reach out to all law students, but the majority focus their attention on students whose first–year grades put them at risk of not completing law school or passing the bar examination.\textsuperscript{85} Much of the academic support programming that takes place is individualized, although more schools now offer for–credit academic skills courses as well.\textsuperscript{86}

The fourth and final stage of law school academic support focuses on preparation for the bar exam.\textsuperscript{87} This programming begins prior to law school graduation and extends from graduation until the bar examination;\textsuperscript{88} in some cases, law schools continue to offer academic support resources to graduates who fail the bar examination and are preparing to take it again.\textsuperscript{89} Schools that offer bar support often have an academic support program which functions as a one–stop shop, including both academic support for law school and bar support upon graduation.\textsuperscript{90}

Having programming for each of these four stages of law student development requires significant resources, and academic support programs that do not have as many resources may focus on only one or two stages instead. Most commonly, law schools have some type of program for 1Ls and then more limited programming, focusing on “at risk” students, after that first year of law school.

\begin{itemize}
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Flanagan, \textit{supra} note 2, at 27–28; Schulze, \textit{Alternative Justifications II, supra} note 73, at 5, 24.
\item \textsuperscript{86} Schulze, \textit{Alternative Justifications II, supra} note 73, at 24.
\item \textsuperscript{87} See Flanagan, \textit{supra} note 2, at 27; Schulze, \textit{Alternative Justifications II, supra} note 73, at 24–25.
\item \textsuperscript{88} Schulze, \textit{Alternative Justifications II, supra} note 73 at 24–25.
\item \textsuperscript{89} Id. at 25.
\item \textsuperscript{90} Flanagan, \textit{supra} note 2, at 27.
\end{itemize}
B. Considering Alternative Forms of Law School Academic Support

Another way to think about law school academic support is as a range of different program forms. The most common form is focused on the individual law student. It usually includes individualized guidance in developing academic and study skills, and, in some cases, tutoring in substantive law. Academic support programs do not have the resources to tailor their offerings to every law student. Instead, individualized academic support targets students who have been identified as “at risk” because of their academic indicators coming into law school, such as undergraduate grades and LSAT scores, or because of their academic performance in law school. This type of programming can be very resource-intensive.

Another common form is the workshop. Workshops can be an efficient way to communicate information to large numbers of students. Workshops, which may be optional or mandatory, address topics of interest to new law students during their first semester, such as briefing cases, outlining, and writing essay exams. One challenge with workshops is that academic skills are often taught in a vacuum. Students may have difficulty applying abstract lessons about study and exam skills to specific courses that they are taking.

Academic support offices may also offer other resources, such as resource centers or libraries with study materials that students can

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91. See id. (noting that academic support programs “are time and labor intensive, because students often require one-on-one counseling to determine the source of their academic challenge, and frequently require additional meetings to ameliorate academic deficiencies”).
92. See id.
93. See id. at 27–28.
94. Id. at 27.
95. Id. at 27–28.
96. Schulze, Alternative Justifications II, supra note 73, at 23.
97. Id.
98. For example, the academic support program may offer a workshop on outlining. The person teaching the workshop may provide general descriptions of how students should outline course materials and even provide an example or two of what an outline might look like, but the workshop will usually not use specific examples from a course that the students are actually taking or require students to apply these general outlining concepts to create their own outline of course material.
99. See Tonya Kowalski, True North: Navigating for the Transfer of Learning in Legal Education, 34 SEATTLE U. L. REV. 51, 55 (2010) (“When law students are asked to carry discrete, locally-bound knowledge and skills into uncharted waters, they can feel lost at sea.”). Professor Eric DeGroff has observed that many first-year law students may have difficulty with abstract thinking, creating obstacles for success in law school. See DeGroff, supra note 2, at 268.
borrow or websites with handouts about study tips, stress management, and time management. A resource center requires a commitment from the law school in terms of a dedicated space and budget for study aids and manpower. In contrast, a website requires fewer financial resources to develop but can be time-consuming to create.

Finally, some law schools are beginning to offer a range of academic support–related courses for credit. Two types of courses are most common. First, there are the courses for “at risk” and probationary students, offered either in the second or third semester of law school and focused on building academic skills. Law schools often require “at risk” students to take these courses. Secondly, after the American Bar Association began allowing law schools to offer for–credit bar–related courses, some law schools have developed bar skills courses, primarily for students in their final year of studies. These for–credit courses have the benefit of targeting larger numbers of students more efficiently than individualized programming, but they still require significant resources and thoughtful attention to pedagogy and course design to be fully effective.

C. Varying Targets of Law School Academic Support

A third way of thinking about law school academic support programs is to focus on their target audiences. There are really two different types of target audiences, which may be further sub–categorized based upon their stage of development in law school: “at risk” students and all students. The earliest law school academic support programs usually focused solely on “at risk,” minority, or nontraditional students, but, as academic support programs have evolved, more and more programming is offered to all students in law school. This trend is particularly true for first–year law students. As discussed supra, some forms of programming are more

100. See Schulze, Alternative Justifications II, supra note 73, at 23.
101. See id. at 24–25.
102. See id. at 24.
103. See id. at 24–25.
104. See, e.g., Lustbader, supra note 74, at 317 (“When I began teaching, my mission was to develop an Academic Assistance Program to increase retention and enhance academic performance of students who are admitted into the law school via our alternative admissions program.”); Flanagan, supra note 2, at 25 (“[L]aw schools have a long history providing extra support to students who are underprepared for law school”).
105. See Schulze, Alternative Justifications II, supra note 73, at 23. Schulze argues that academic support should be integrated across the curriculum and include all students. See id. at 65.
106. See id. at 66.
conducive to individualized support, while others handily lend themselves to larger groups.\textsuperscript{107}

D. Competing Objectives of Law School Academic Support Programs

The final consideration for law school academic support programs is their larger objectives. Most objectives really fall into one of two camps: retention or bar passage. Retention objectives are focused on keeping students in law school,\textsuperscript{108} while bar passage objectives are focused solely on strengthening skills needed for passing the bar examination. Although the two types of objectives can sometimes overlap—for example, the skills required for success in law school examination essays are often the same ones required for success in bar examination essays—the objectives are not entirely synonymous. In some cases, retention objectives may actually contradict bar passage objectives, as students in the bottom portion of the class are statistically less likely to pass the bar examination.\textsuperscript{109}

IV. CURRENT TRENDS IN LAW SCHOOL PEDAGOGY AND LEARNING THEORY

For a number of years, there has been increasing interest among law school faculty and academic support professionals in incorporating best practices from educational theory and pedagogy into law school courses.\textsuperscript{110} Because the academic support program described in Section V draws from some of these theories, the following subsections provide a brief overview of what some of these theories encompass and why they are relevant to law school curriculum design.

\textsuperscript{107} See \textit{id.} at 23.
\textsuperscript{108} See Lustbader, \textit{supra} note 74, at 317; Flanagan, \textit{supra} note 2, at 26.
\textsuperscript{109} See Ellen Yankiver Suni, \textit{Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?}, 73 UMKC L. REV. 497, 507–08 (2004) (“Teaching students how to pass the bar, which is exclusively directed and focused on one test, is very different from preparing students for a lifetime of learning. Moreover, focusing on passing the bar does little to empower students to maximize their potential as lawyers, to have an impact on the profession, and to serve as vehicles for social change. As academic support professionals focus their efforts on bar passage, they will become more important to the institution, but they may be in less of a position to affect the overall academic program, since preparation for the bar exam is even further removed from the mainstream of legal education than assisting students in maximizing their ability to learn in the law school itself.”).
\textsuperscript{110} See Section IV and accompanying footnotes, \textit{infra}, for a representative sample of scholarly articles demonstrating that interest.
A. Cognitive Science and Education Theory

Since the 1870s, the Socratic Method has been the mainstay of the law school classroom in the United States. In most law schools, little thought was given to pedagogy or learning theory. In recent years, however, that has changed. There has been an increased interest in how learning theory can be applied to legal education, with a focus particularly on the relationship between cognitive theory and learning. According to cognitive theory, people learn best “when data is selected, processed, transformed into meaningful information, and stored in memory.” Educational psychologists use cognitive theory to better understand adult education.

Cognitive and educational psychologists believe that students should be taught metacognitive skills—in other words, students should be active learners who are taught to think about and manage their own thinking and learning. In order to create a “scaffold” for student learning, Professor Christine Venter has argued that legal educators can use a taxonomy like Bloom’s Taxonomy in

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111. See Sonsteng et al., supra note 48, at 321–37 (describing the history of legal education in the United States and the dominance of the Socratic Method).

112. In fact, Professor Paula Lustbader has critiqued the traditional approach to pedagogy in legal education, arguing that it “creates barriers to learning because it is not responsive to law students’ learning processes.” Lustbader, supra note 74, at 319; see also id. at 319–20 (“Learning theories suggest that law school pedagogy may be a major reason for the lack of correlation between student effort and performance because it does not explicitly provide a context for understanding, analyzing, and applying legal concepts.”). But cf., Hillary Burgess, Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning, 29 QUINNIPIAC L. REV. 1, 2–3 (2011) (“Although many traditional law school teaching methods are pedagogically sound teaching tools, it seems increasingly necessary to complement traditional teaching methods with methods that improve and expand learning while not increasing the burden for either students or professors.”).


114. Venter, supra note 113, at 635.

115. See Burgess, supra note 112, at 2.

course design and instruction.117 Outside of legal education, *Bloom’s Taxonomy* “has been widely documented as supporting student mastery of learning and as an assessment tool to measure student competency and knowledge acquisition.”118 The designer of *Bloom’s Taxonomy*, psychologist Benjamin Bloom, divided cognitive thinking skills into six levels ranked according to their level of complexity: Knowledge and Comprehension, which he ranked as least complex; Application, which fell in the middle; and Analysis, Synthesis, and Evaluation, which indicate high–complexity thinking.119 Legal educators have increasingly used *Bloom’s Taxonomy* in course development and assessment.120

B. The Value of Formative Assessment

As part of the foregoing focus on pedagogy and learning theory in the design of law school courses and other types of educational programming, some legal educators have also realized the importance of assessing student learning and recognizing the connections between learning and assessment.121 One criticism of the traditional approach to law school education is that, by only providing one assessment at the end of the semester in the form of a single graded exam, instructors provide no positive reinforcement of what students have learned.122 By the time the student receives his or her

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117. See Venter, supra note 113, at 635. Other law professors have also advocated using Bloom’s taxonomy to teach law students metacognitive skills. See Stuart & Vance, supra note 2, at 50–53; Burgess, supra note 112, at 6–7; Lysaght & Lockwood, supra note 113, at 79–81; Gibson, supra note 113, at 6–12; Jones, supra note 113, at 98–99.

118. Venter, supra note 113, at 637.

119. See id. For a more detailed discussion of Bloom’s taxonomy, see Stuart & Vance, supra note 2, at 50–53.


122. See Sonsteng et al., supra note 48, at 337, 408; see also George, supra note 2, at 188 (“[M]any law school classes have only a midterm and final, or even just a final exam which constitutes the entire grade, yielding an assessment system which directly conflicts with learning theory”); STUCKEY ET AL., supra note 5, at 236 (“In the traditional law school course, especially in the all important first year, the only evaluation of how well a student is learning, and the entire basis for the student’s grade for the course, is a three hour end–of–the–semester essay exam that requires students to apply memorized legal principles to hypothetical fact patterns.”); Robert C. Downs & Nancy Levit, *If It Can’t Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822–23 (1997) (noting that the end–of–the–term essay examination is still the primary
grade from the course, it is too late to do anything to improve. Legal educators are increasingly implementing more assessment into law school courses, connecting assessment to course goals and learning objectives. Good assessment is not just about testing students. A comprehensive approach to student assessment, coupling graded summative assessments with formative assessments that provide both students and professors with information about student learning and the effectiveness of instruction, more adequately addresses what learning theory has shown to be important in the learning process.

Formative assessment is particularly important because it provides feedback to both students and educators. One purpose of feedback is to motivate students. “Frequent feedback provides an opportunity to help students understand how well they are solving a problem or performing a particular task, and how to make their problem-solving or learning process more effective.” Legal educators can provide this type of feedback to students by using grading rubrics. Professor Herbert Ramy has defined a grading rubric as “a systematic scoring guideline used to evaluate student performance.” Rubrics and other forms of feedback help students to develop their own metacognitive skills.

As beneficial as assessment can be for law students, if not done thoughtfully, it can also have negative consequences. Overuse of assessment can create more stress for students by taking up valuable time that otherwise is needed to study for their classes. Faculty members should coordinate their assessment efforts to ensure that students are not overwhelmed with assignments within a short form of student assessment in law school, but it is among the least recommended by professional educators).

123. Sonsteng et al., supra note 48, at 408.
124. See generally Ramy, supra note 7; Michael Hunter Schwartz et al., Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam (2009).
125. Sonsteng et al., supra note 48, at 407.
126. See George, supra note 2, at 188–89; Ramy, supra note 7, at 843–45.
127. Ramy, supra note 7, at 844 (“Unlike summative assessments, where grading plays a central role, formative assessments emphasize feedback to both teacher and student”).
128. Sonsteng et al., supra note 48, at 407 (“Learning theorists agree that adult students need specific feedback in order to stay motivated.”).
129. Id. at 408.
131. Ramy, supra note 7, at 857.
132. See George, supra note 2, at 188–89.
time period. Furthermore, it is important that these assessments actually assess what we need to know about our students, particularly those underprepared students, such as the status of their legal analytical skills.

C. The Introduction of the Flipped Classroom and Blended Learning

New pedagogical models have been introduced to education in recent years, including blended learning and the flipped classroom. Blended learning has been defined as “instruction that has between 30 and 80 percent of the course content delivered online.” [A] blended course may be viewed as either a face-to-face course with online enhancement or an online course with face-to-face enhancement.” A “flipped” classroom “is a pedagogical model which reverses what typically occurs in class and out of class.” By requiring students to watch video lectures before coming to class, the professor can reserve class time for active learning activities.

134. Hill, supra note 14, at 485; Zimmerman, supra note 133, at 67 (“It is one thing to have multiple assignments in a single course; it is quite another thing to have multiple assignments in a number of courses simultaneously.”).

135. See, e.g., Hill, supra note 14, at 486 (“Thus, with under-prepared students, the concern is not necessarily about the amount of effort the students put forth in doing the work . . . but rather about their legal reasoning and synthesis skills.”).

136. See MARY BART, FACULTY FOCUS SPECIAL REPORT, BLENDED AND FLIPPED: EXPLORING NEW MODELS FOR EFFECTIVE TEACHING AND LEARNING (July 2014), at 2; see also Mary Bart, Survey Confirms Growth of the Flipped Classroom, in FACULTY FOCUS SPECIAL REPORT, BLENDED AND FLIPPED: EXPLORING NEW MODELS FOR EFFECTIVE TEACHING AND LEARNING (July 2014), at 18. For a more detailed discussion of what blended learning is and what its potential benefits are see generally D. Randy Garrison & Heather Kanuka, Blended Learning: Uncovering Its Transformative Potential in Higher Education, 7 THE INTERNET IN HIGHER EDUC. 95 (2004).


139. Bart, supra note 136, at 2; see also Barbi Honeycutt & Jennifer Garrett, Expanding the Definition of a Flipped Learning Environment, in FACULTY FOCUS SPECIAL REPORT, BLENDED AND FLIPPED: EXPLORING NEW MODELS FOR EFFECTIVE TEACHING AND LEARNING (July 2014), at 12.

The most widely used description of the flipped class is a learning environment in which the activities traditionally completed outside of class as homework are now completed in class during instruction time. And, the activities traditionally completed in class are now completed on students’ own time before class. In many definitions and models, this means students watch a video of prerecorded lectures before class. Then, when they arrive to class, they work through assignments or activities with their peers and the instructor.

Id. For a more detailed discussion of approaches to flipped classroom design see JONATHAN BERGMANN & AARON SAMS, FLIP YOUR CLASSROOM (2012).

Flipped classrooms are also known as inverted classrooms. Many educators categorize the flipped classroom model as a form of blended learning.

Some law professors have started integrating the flipped classroom concept into their courses. For example, Professor Peter Sankoff of the University of Alberta began utilizing a flipped classroom approach to his Evidence class in 2012, creating short video “capsules” for students to watch prior to class and reserving class time primarily for problem-solving exercises. Professor Sankoff has noted that his video capsules “preserve[d] class time for where [it was] needed most—whether for problem solving or other means of engaging students.”

Librarian Catherine A. Lemmer has also utilized an inverted classroom approach to teaching legal research to students in an international L.L.M. program.

Educators have identified a variety of benefits of a flipped classroom approach to learning:

- Videos engage visual and audio learners.
- The flexibility of video access allows students to “choose exactly when they wish to learn.”
- Students can watch the videos repeatedly if they are having a hard time understanding concepts or wish to review material.
- Professors can use the videos to present basic information or review concepts already explored in class.

141. Id.
142. Id.
144. See generally Sankoff, supra note 41.
145. Id. at 11.
146. See generally Lemmer, supra note 143.
147. Sankoff, supra note 41, at 11–12; see also id. at 12 (“By combining audio description from the professor with visual imagery, capsules allow students with different learning styles to interact with the information in a multi–sensory fashion.”).
148. Id. at 12.
149. Id.; see also Barbi Honeycutt, Looking for “Flippable” Moments in Your Class, in FACULTY FOCUS SPECIAL REPORT, BLENDED AND FLIPPED: EXPLORING NEW MODELS FOR EFFECTIVE TEACHING AND LEARNING (July 2014), at 15 (“Maybe [students] need a video to watch and re–watch several times before and after class to reinforce the main points.”).
• Using video to present course content allows more class time for practicing what students are learning.\textsuperscript{151}
• Materials created for a flipped classroom can be used over and over.\textsuperscript{152}

Although there can be some significant benefits to using a flipped classroom approach to a course, there are also some drawbacks. First, a flipped classroom requires a major time investment on the front end of the process, when the professor must identify the topic of each module, plan how the module integrates with what will happen during class, draft a script or develop other materials for the module, develop competency in using the technology needed to create the video, and creating and editing the video.\textsuperscript{153} Second, students who are less technologically proficient or lacking access to high speed Internet may have difficulty using video modules.\textsuperscript{154} A video’s length is also an important consideration. If the video is too long, its demands on law students’ limited time may be too onerous.\textsuperscript{155} Finally, it may be challenging to make sure that students are actually watching the video before coming to class, an essential requirement to achieve academic objectives.

V. A New Approach to Academic Support for First-Year Law Students

As the first full–time Director of the Office of Academic Achievement at Savannah Law School, I was tasked with developing the law school’s academic success initiatives. One of my primary efforts was to create a comprehensive first–year academic success program that: (1) takes into account the unique characteristics of today’s incoming law students;\textsuperscript{156} (2) builds upon the benefits of traditional

\textsuperscript{151} See Maryellen Weimer, \textit{Blended Learning: A Way for Dealing with Content, in Faculty Focus Special Report, Blended and Flipped: Exploring New Models for Effective Teaching and Learning} (July 2014), at 5.
\textsuperscript{152} Id.
\textsuperscript{153} As Peter Sankoff noted, “the most significant challenge in transitioning to a flipped classroom environment lies in the fact that capsules or similar initiatives are time–consuming to create and require a large investment from any professor who wishes to use them. The expenditure of effort lies in two places: the planning and the execution stages.” Sankoff, \textit{supra} note 41, at 14; see also Weimer, \textit{supra} note 151, at 5; Bart, \textit{supra} note 136, at 18.
\textsuperscript{154} Sankoff, \textit{supra} note 41, at 14. However, Sankoff noted that, when he began using video “capsules” as part of his Evidence class, he received no complaints about students’ ability to access the videos. \textit{Id}.
\textsuperscript{155} \textit{Id} at 15.
\textsuperscript{156} See Section II, \textit{supra}. 
approaches to academic support;\textsuperscript{157} (3) draws inspiration from recent pedagogical innovations in education, such as flipped classrooms and use of assessment as a teaching/learning tool;\textsuperscript{158} (4) increases collaboration between academic support professionals and law school faculty,\textsuperscript{159} and (5) integrates academic support into the first–year curriculum in a direct, nuanced way. In short, my goal was to develop an academic support program which responded to recent critiques and recommendations regarding best practices in legal education.\textsuperscript{160} The following subsections describe the institutional and pedagogical foundations for this new first–year program and explain how the program was implemented.

A. Foundations of the First–Year Academic Support Program

The initial step in developing Savannah’s first–year academic success program, known as the Professional and Academic Success Seminar, or PASS, was obtaining buy–in from first–year faculty members and law school administration. It would be impossible to succeed in efforts to integrate academic support with the first–year curriculum without administrative approval and faculty support. Fortunately, I had significant support from both quarters in developing the PASS program. In the first year, we primarily integrated PASS with two first–year courses for each student: Legal Writing and Property for the 1L day students, and Legal Writing and Torts for the 1L night students.

Second, I developed the concept for the PASS program’s structure and content. Based upon my research, past experiences with the academic support program, and discussions with faculty and administrators, I identified a set of core academic skills that contribute to law students’ success in law school and on the bar examination: critical reading and case briefing; classroom note–taking; the

\textsuperscript{157} See Section III, supra, for a discussion of traditional approaches to law school academic support.

\textsuperscript{158} See Section IV, supra.

\textsuperscript{159} The idea of academic support professionals collaborating with faculty is not a new idea. See, e.g., Adam G. Todd, Academic Support Programs: Effective Support Through a Systemic Approach, 38 GONZ. L. REV. 187 (2003).

\textsuperscript{160} See Section V, supra; see also, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (also known as the Carnegie Report); STUCKEY ET AL., supra note 5. The idea that Academic Support Programs can and should support best practices is not a new idea. Louis N. Schulze, Jr., has written substantially on that topic. See generally Louis N. Schulze, Jr. & A. Adam Ding, Alternative Justifications for Academic Support III: An Empirical Analysis of the Impact of Academic Support on Perceived Autonomy Support and Humanizing Law Schools, 38 OHIO N.U. L. REV. 999 (2012); Schulze, Alternative Justifications II, supra note 73.
ability to analyze and critique arguments based upon logic; synthesis (also known as outlining); issue spotting; exam skills (both multiple choice and essay writing); and critical self-assessment. The program’s objectives focus on developing students’ competencies in each of these important skills.

In its completed form, PASS consists of a series of eight modules and five workshops. The first workshop takes place during Orientation.161 From the beginning of first-year students’ introduction to law school, academic skills training is linked directly to the content of the students’ courses; the Orientation workshop uses the first reading assignment from Property or Torts, depending on the students’ status as a day or night student. After Orientation, students complete a series of eight learning modules and four more workshops during their first semester. Each module is based upon a skill that students need for academic success and, once again, those modules are integrated with first-year courses. Various formative assessment tools are used to evaluate students’ skills competencies, improve their self-assessment abilities, and provide a starting point for remediation when necessary.162 After students master the skill(s) within one module, they are permitted to move on to the next. The supplemental workshops complement the modules, providing opportunities for students to practice the skills they are learning in the modules and obtain additional guidance on specific challenges they may be facing in learning those necessary academic skills.

The final version of the PASS program draws from the various approaches to academic support described supra in Section III. First, it is focused specifically on one of the stages of law student development: the first year. Second, the program is basically a hybrid of the traditional approach to academic support for law students, the workshop, and a more traditional academic skills course. Because the program targets first-year students during their first semester of law school, it includes all students, not just those who have been identified as “at risk.” As such, it lends itself to addressing the challenges faced by underprepared law students who may have earned high grades in undergraduate institutions or relatively high LSAT scores, as well as students who traditionally have been labeled “at risk.” Finally, as a first-semester program offering, the PASS program’s key objective is student retention, although it may

161. There are separate Orientations for day and night students.
162. The approach to module design and assessment drew from such resources as Ramy, supra note 7; Sparrow, supra note 130; and Schwartz, supra note 113.
also promote development of test-taking and study skills that are applicable to the bar examination.

B. Using the Flipped Classroom Approach to Integrate Academic Support and First-Year Courses

In designing the PASS learning modules, I drew inspiration from recent approaches to pedagogy both inside and outside of the law school environment—in particular, the flipped or inverted classroom approach and the concept of blended learning. Flipped classroom pedagogy was intriguing for several reasons. First, a primary objective of PASS was to have students integrate what they were learning about law school academic skills with what they were doing in their first-year courses. When the students went into their Torts, Property, or Legal Writing classes, they were going to see that professor—not me—in the classroom. Using short videos to communicate how students should approach academic skills was a way of signaling to students that what they were learning in PASS was not meant to be separate from what they were doing in their other classes. This message was reinforced by the PASS assignments, which linked directly to the content they were learning in those other classes. Each module was designed to improve students’ cognitive skills, focusing especially on the higher-level learning processes identified in Bloom’s Taxonomy.

The flipped classroom approach also allowed the PASS workshops to be more productive. Rather than me standing in front of the 1Ls talking for extended periods of time without students engaging in the workshop content, students watched the videos prior to each workshop. Depending on the module(s) that the workshop corresponded to, students might even have started applying what they learned from the video to an assigned module task. When students then came into the workshop, they were primed to ask questions and participate actively in a dialogue about that skill. Depending on the workshop, there could even be opportunities for further practice of the skills they were learning, such as practice multiple-choice questions or even a practice essay exam.

Specifically, each module starts with a short video teaching the basic approach to that module’s skill(s). Students can watch the video at their convenience and can go back and view it again as many times as they like. Students then practice the skill by applying it to the relevant class materials. During the practice phase,
students have the opportunity to ask questions and seek additional help by: (a) raising questions in an online discussion forum; (b) attending a related skills workshop; and (c) seeking help during office hours. Having practiced the skill(s) related to that module, students complete a formative assessment. Afterwards, they receive feedback based upon the assessment. If students have demonstrated competence in the skill(s) at issue, they then move on to the next module; if not, a remediation plan is implemented.

C. Maximizing Formative Assessment

Formative assessment is a key component of each PASS module. These assessments complement the feedback that students may be getting in other classes. Because many law school courses base grades on a single final exam, the PASS assessments are particularly helpful to students. At the same time, the assessments provide valuable information for the Office of Academic Achievement, allowing me to identify, much earlier, students who may need additional academic support in their first semester of law school.

Another educational tool that I make use of in the PASS modules is the rubric. The PASS program utilizes rubrics in three different ways. First, many of the PASS modules use rubrics to communicate the expectations for that module’s assessment task. Second, rubrics provide an efficient way for the PASS instructor to give students timely and helpful feedback on the status of their skills mastery. Finally, rubrics provide the opportunity to teach students self-guided learning. That process begins as they interact with the rubrics both before and after completing each module task. In the eighth and final module, however, that process is taken even further. Basically, in the final module students learn how to create their own rubrics to evaluate their learning. There is also a side benefit to the use of rubrics: giving students guidance regarding what is expected of them for each assignment, as well as providing formative feedback of their understanding of the material in other courses, helps to reduce students’ stress.

VI. CONCLUSION

The approach to first–year academic support described in Section V has both benefits and limitations. First, because PASS is designed to be integrated with first–year courses, it is essential to obtain faculty buy-in and cooperation for the program to be successful. If faculty members are supportive, the program has the potential to increase dialogue about pedagogy and learning theory and further inspire innovation in teaching. If faculty members are not interested in collaborating with academic support professionals on the program, it is much more difficult to make it work. Importantly, PASS does not need to be integrated with all first–year courses; it can work successfully with only one or two.

Second, the program makes no assumptions regarding what academic skills students have upon entering law school. In many ways this is a positive attribute of the program. PASS provides numerous opportunities to identify underprepared students and provide the training and academic support they need to be successful in law school, either through their own voluntary efforts (watching videos multiple times, utilizing supplemental resources, or asking questions by email or during office hours), or because the PASS instructor identifies skills deficits and creates plans for how those skills will be improved. If not done carefully, however, the program has the potential to make students who enter law school with advanced academic skills believe that they are wasting their time. By tying each PASS module’s task to their other courses and things that good students should be doing anyhow, like briefing cases, outlining, and taking practice exams, this potential downside can be avoided. Furthermore, by creating a comprehensive academic support program for all incoming 1Ls, a law school can address the needs of underprepared law students without creating the types of marginalization and stigmatization associated with some earlier academic support efforts.¹⁶⁶

The PASS program has an added benefit for students with disabilities. For example, it has been argued that courses presented in the form of modules make learning more accessible for students who have Attention Deficit Hyperactivity Disorder by “breaking a course into manageable units.”¹⁶⁷ The videos that correspond with each module are compliant with the Americans with Disabilities

¹⁶⁶. See Flanagan, supra note 2, at 26–27.
Act, having both an audio and text component (including both PowerPoint slides and closed-captioning of all spoken components). The videos may also be helpful to students with learning disorders because of the multiple forms of information transmission and students’ ability to review the material multiple times.

One of the greatest challenges for creating and maintaining the PASS program is limited resources—especially time. The initial design and implementation of PASS has taken a significant time investment, as is the case for any blended learning or flipped classroom project. Although each video lasts only ten to twenty minutes, depending on topic, they each require the creation of a script and corresponding PowerPoint presentation and the time it takes to record and edit the video and closed captioning text. Even if the instructor has experience with whatever video program he or she is using, several hours to a few days will be needed to create each video. There are also other materials that must be created for each module, including instruction sheets, tasks (such as logic exercises, issue spotting exercises, and practice exams), and feedback rubrics. The first time that the course is taught, the start-up costs in terms of time are therefore substantial. Assuming that the instructor has thought the course through before beginning, many of these costs will be one-time investments. Once resources have been created, they can be used over and over again with little to no modification.

The other major time component for PASS is the time that it takes to provide feedback for each module task. Obviously, the more first-year students there are participating in such a program, the more time this feedback will require. Well-designed rubrics made it easier provide quicker, effective feedback to each student. There are also other ways to approach this aspect of the program. For example, a faculty member who seeks to incorporate more formative assessment into his or her class may be willing to share the feedback duties with the academic support professional, or it may be possible to train student teaching assistants to provide feedback. Some modules may also lend themselves to peer assessment that could be done within the PASS workshops.

168. I used Adobe Presenter 10 to create the videos for PASS, as its recording and editing functions were fairly intuitive, and it also had the capability to import the scripts into the closed captioning program so that limited text editing was necessary. It also is compatible with PowerPoint and could easily split the screen between a view of the speaker and the PowerPoint slides at the same time.

169. Herbert Ramy has provided numerous suggestions of how formative assessments can be designed to reduce the amount of time that professors must spend on giving individual feedback while ensuring that the underlying purpose of the assessment is still maintained. See generally Ramy, supra note 7.
Ultimately, I hope that this article contributes to the dialogue about how academic support professionals and law school faculty can think “outside the box” to create effective, efficient, and innovative ways to improve our students’ chances for long-term academic and professional success. Rather than viewing law school academic support programs as peripheral, focused only on a limited number of “at risk” students, it is time to explore how these programs, such as the PASS program described supra, can be fully integrated into the law school curriculum.
Bankruptcy and Health Insurance Proceeds: Why Health Care Providers Should Not Be Subject to the Automatic Stay Provision

Kenneth N. Schott III*

I. INTRODUCTION

In America today, experts estimate that more than 60% of individuals who file for bankruptcy do so because of unpaid medical

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This statistic demonstrates the significant impact that healthcare expenses have on the individuals who file for bankruptcy, but it also alludes to the financial impact that bankrupt patients can have on provider–creditors, whose businesses must tolerate the risk of suffering significant financial losses, as the debts stemming from healthcare services, which were provided to the patient–debtor prior to filing a petition for bankruptcy, are often discharged under either Chapter 7 or Chapter 13 of the federal Bankruptcy Code. Potentially worse than the financial impact that exorbitant medical bills can have on patients and providers alike is that the provider–patient relationship can become strained to the point that the provider might consider ending the relationship, which in some cases may mean poorer health outcomes for the patient.

The potential silver lining for providers and patients going through the bankruptcy process is that recent studies show over three-quarters of the individuals with a medically related bankruptcy had health insurance. However, as a result of the automatic stay provision, provider–creditors are unable to collect on the uncovered portions of medical bills directly from the patient–debtors, and their ability to collect the insurance proceeds directly from insurance companies is questionable at best because the issue of whether or not health insurance proceeds are property of the bankruptcy estate has not been answered universally. For this reason, Congress should amend the federal Bankruptcy Code to expressly exclude health insurance proceeds from the definition of property of the bankruptcy estate, thereby permitting provider–creditors to collect health insurance proceeds directly from the debtor–patient’s health insurance company in order to: (1) help mitigate the financial risk of running a medical practice; (2) alleviate the need for healthcare providers to pass the costs of unpaid medical bills to other patients; and (3) ensure that the provider–patient relationship continues.

5. Tamkins, supra note 1.
7. Id. § 541(a)(1).
Currently, there is a split of authority among the United States Circuit Courts of Appeal between the First Circuit on one side and the Third and Fifth Circuits on the other side, regarding whether or not liability insurance proceeds are considered property of the bankruptcy estate\(^8\) such that third-party involuntary creditors are prevented by the automatic stay provision\(^9\) from trying to collect insurance proceeds directly from insurance companies. While the analyses from these decisions do not apply directly to health insurance proceeds, this article discusses how the courts’ opinions could influence the way health insurance proceeds will be treated going forward within the bankruptcy context. In addition, this article provides an overview of the bankruptcy problem nationwide, along with a parallel analysis on how the common law, existing state statutory law, and basic contract theory might differ from the approach taken by the First, Third, and Fifth Circuits in how insurance proceeds should be treated.

I. BACKGROUND AND HISTORY

A. The Scope of the Bankruptcy Problem in America

A custom data search conducted using the Bankruptcy Data Project at Harvard University revealed that the total number of individual Chapter 7\(^10\) and Chapter 13\(^11\) bankruptcy case filings has increased dramatically since 2006.\(^12\) From January of 2006 through December of 2012, the number of individual Chapter 7 bankruptcy case filings has increased by 144%.\(^13\) During this timeframe, the number of individual Chapter 13 bankruptcy case filings increased

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8. Compare First Fidelity Bank v. McAteer, 985 F.2d 114, 117 (3d Cir. 1993) (“[I]f the owner of a life insurance policy did not have an interest in its proceeds, the filing of the petition in bankruptcy cannot create one.”), and Houston v. Edgeworth, 993 F.2d 51, 55–56 (5th Cir. 1993) (“When a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate . . . those proceeds are not property of the estate.”), with Tringali v. Hathaway Mach. Co., Inc., 796 F.2d 553, 560 (1st Cir. 1986) (holding that “language, authority, and reason all indicate that proceeds of a liability insurance policy are property of the estate.”).


10. “A bankruptcy trustee liquidates the [Chapter 7] debtor’s nonexempt assets and distributes the proceeds to creditors. State law often determines whether a property is exempt from liquidation. The debtor has no liability for discharged debts.” Caffarini, supra note 2.

11. “Called a ‘wage earner’s plan,’ [Chapter 13] individuals with regular incomes develop a plan to repay all or part of their debt over 3 to 5 years. Unlike Chapter 7, it allows filers to keep their house and reschedule secured debts over the life of the chapter’s plan. It acts like a consolidation loan under which the debtor makes payments to a Chapter 13 trustee, who then distributes payments to creditors.” Id.


13. Id.
by 44%.\textsuperscript{14} Admittedly, since 2010 the total number of individual bankruptcy case filings has declined\textsuperscript{15} (a 27% decline in cases filed under Chapter 7 and an 18% decline in cases filed under Chapter 13). Bankruptcy, however, still poses a significant financial threat to creditors, including healthcare providers who may not be reimbursed for services already provided to bankrupt patients.\textsuperscript{16} While, individuals may file bankruptcy petitions under Chapter 11, the number of individual bankruptcy cases filed under this chapter is too small to have a substantial impact on healthcare providers in a manner pertinent to the analysis of this article—only 2726 individual cases were filed under Chapter 11 during the 2012 calendar year.\textsuperscript{17}

**Figure 1: Individual Bankruptcy Cases Filed in the United States**\textsuperscript{18}

![Graph showing Individual Bankruptcy Cases Filed in the United States](image)

Not insignificantly, a 2009 report estimates that more than 60% of people who declare bankruptcy do so because of exorbitant medical bills.\textsuperscript{19} According to the same report, published in the August issue of the *American Journal of Medicine*, the number of bankrupt-

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Caffarini, supra note 2.
\textsuperscript{17} BANKR. DATA PROJECT AT HARV. UNIV., supra note 12.
\textsuperscript{18} Id.
\textsuperscript{19} Tamkins, supra note 1.
cies due to medical bills rapidly increased during the six–year period between 2001 and 2007, by almost 50%. Surprisingly, low–income families do not comprise the majority of bankruptcy cases; rather, the majority of bankruptcy cases due to medical bills are comprised of well–educated middle–class homeowners. Many medical bankruptcy cases are the result of gaps in health insurance coverage, which leave the typical medically–bankrupt family with an average out–of–pocket expense of $17,943.

Healthcare providers are not only at risk of losing revenue for unpaid medical expenses, which are not covered by the patient–debtor’s health insurance policy, but they are also in danger of losing revenue in the form of health insurance proceeds from medical expenses which were covered by the patient–debtor’s insurance policy. This is because health insurance proceeds may be protected by the automatic stay provision of the United States Bankruptcy Code, which automatically goes into effect once a patient–debtor files for bankruptcy under either Chapter 7 or Chapter 13 and prevents creditors from collecting against property of the debtor’s bankruptcy estate or directly from the debtor. Under Section 362(a) of the Bankruptcy Code, the automatic stay provision provides:

Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of—

[A]ny act to obtain possession or property of the estate or of property from the estate or to exercise control over property of the estate;


20. Id.
21. Id.
22. Id.
Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.\textsuperscript{25}

As a result of the automatic stay provision, the determinative factor for healthcare providers in regard to their ability to collect health insurance proceeds directly from an insurance company as compensation for covered medical services, despite a patient–debtor filing for bankruptcy, is whether or not the insurance proceeds are considered property of the bankruptcy estate.\textsuperscript{26} Property of the estate is defined as “all legal or equitable interests of the debtor in property as of the commencement of the case.”\textsuperscript{27} If the insurance proceeds are property of the estate, then the automatic stay provision applies and the healthcare provider may not collect the insurance proceeds directly from the insurance company.\textsuperscript{28} On the other hand, if the insurance proceeds are not property of the estate, then there is nothing to prevent the healthcare provider from collecting the insurance proceeds directly from the insurance company.\textsuperscript{29} The latter scenario, at the very least, limits healthcare providers’ exposure to the financial risk that bankrupt patients represent to only those medical expenses that are not covered by the debtor–patient’s health insurance policy because the insurance proceeds would not be subject to the automatic stay provision; therefore, healthcare providers can collect the proceeds directly from the insurance company.\textsuperscript{30}

The financial risk that bankruptcy presents to healthcare providers adds to an already heavy financial burden imposed upon healthcare providers by state and federal regulations, as well as the mounting costs of medical education.\textsuperscript{31} For example, medical malpractice insurance premiums are very high, even in an average cost

\textsuperscript{25} Id.
\textsuperscript{26} Id. § 541.
\textsuperscript{27} Id.
\textsuperscript{28} Id. § 362(a)(3).
\textsuperscript{29} Id.
\textsuperscript{30} Id.
state such as Pennsylvania;\textsuperscript{32} declining reimbursement from Medicare programs\textsuperscript{33} is creating slimmer margins for physician practices; and, according to the Association of American Medical Colleges (AAMC), the median tuition at a medical school in the United States during the 2012–2013 school year was $28,719 for a resident and $49,821 for a non–resident.\textsuperscript{34} These increasing education costs are part of the reason why the AAMC is projecting a physician shortage of 124,000 physicians by 2020.\textsuperscript{35} Thirty–seven percent of this shortage is estimated to be attributable to primary care physicians as students, seeking more lucrative careers as specialists to offset the cost of their medical education, avoiding careers in primary care.\textsuperscript{36} Therefore, it is bad policy to add to this already heavy financial burden by classifying health insurance proceeds as property of the estate, thereby effectively removing from the province of healthcare providers the practical capability to collect health insurance proceeds for services performed because a patient–debtor has filed for bankruptcy. Simply put, healthcare providers do not need to assume any more financial risk than they already have, especially when the potential impact of the Affordable Care Act on bankruptcy and healthcare providers is, at the very least, an unknown variable and, at best, a wild guess.\textsuperscript{37}

B. Chapter 7 Versus Chapter 13: How Do They Affect Healthcare Providers?

Patient–debtors who file under Chapter 7 present a greater risk to healthcare providers’ bottom lines than patients who file under

\textsuperscript{32} A recent article on the costs associated with medical malpractice insurance states: Pennsylvania malpractice insurance falls in the middle with respect to average cost. Rates differ between the major insurers due to demographic and claims differences. In 2009, base rates for general surgery could be as low as $28,000 annually or as high as $50,000. Internal medicine malpractice insurance costs varied between around $6,000 to $11,000. Obstetricians/gynecologists could find themselves paying up to $64,000 or more for coverage. Writing, supra note 31.

\textsuperscript{33} “Medicare payments to health care providers, health care plans and drug plans will be reduced by 2% starting April 1, [2013] according to the Centers for Medicare & Medicaid Services . . . . Over the last 12 years, Medicare payments to physicians have increased by only 4%, while the cost of providing care has jumped 20%.” Kavilanz, supra note 31.

\textsuperscript{34} \textit{ASS’N OF AM. MED. COLL.}, supra note 31.


\textsuperscript{36} Id.

\textsuperscript{37} 42 U.S.C. §§ 18001–18121 (2012) (The Affordable Care Act (“ACA”) is an unknown quantity at this point in time relative to its potential impact on the costs of providing healthcare services. Moreover, the author is not referencing any specific provision of the ACA and cannot speak specifically to how the ACA will impact healthcare costs from the perspective of healthcare providers.)
Chapter 13. Under Chapter 7, the patient–debtor undergoes a liquidation process in which an interim or an elected trustee liquidates the patient–debtor’s nonexempt assets which comprise the property of the estate. The trustee then distributes the patient–debtor’s nonexempt assets according to the provisions of 11 U.S.C. §§ 724–726—provisions which provide for a hierarchy of creditors that ensures that certain claims are given priority over others. Secured claims are given top priority over all other types of claims. Next in line are unsecured claims which have statutory priority; these include but are not limited to claims for domestic support obligations, claims for administrative expenses, and unsecured claims of governmental units. Finally, “any allowed unsecured claim[s]” filed on time are given priority ahead of unsecured and secured claims that are not filed on time.

Healthcare providers are part of the second tier of creditors with statutory priority because they have “allowed unsecured claims . . . arising from . . . the purchase of services.” This places healthcare providers in an unenviable position, because not only do they have a lower priority than the debtor’s secured creditors, but they also fall in line behind six other kinds of unsecured creditors who have statutory priority before the healthcare provider’s claim is entitled to compensation. Under these circumstances, healthcare providers bear tremendous risk because once all of the financial resources from the liquidated nonexempt assets are distributed to creditors with a higher level of priority, any outstanding lower level priority claims are discharged and the debtor is no longer liable to pay back any portion of any outstanding debt. Assuming arguendo, that health insurance proceeds are considered property of the bankruptcy estate, it is very unlikely that an impacted healthcare provider will ever see a penny of what was owed to him or her under the terms of the insurance policy. While it is possible to seek a

38. “With Chapter 7 liquidation, most unsecured debt, including medical bills, usually are discharged. With Chapter 13 reorganization, you might get a portion of what is owed, but it could take years.” Caffarini, supra note 2.
40. Id. § 702.
41. Id. § 726.
42. Id. § 725.
43. Id. § 507.
44. Id. § 726(a)(2).
45. Id. § 507(a)(7).
46. Id. § 507.
47. Id. § 727.
48. E.LIZABETH W. ARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 2013 CASEBOOK SUPPLEMENT 167 (Vicki Been et al. eds., 6th ed. 2013) (‘Although secured creditors have priority only in their collateral, their security interests often swallow virtually all the value
reaffirmation agreement from a patient–debtor once the bankruptcy process is complete, it is highly unlikely that medical bills would be included in such agreements.49

Alternatively, patient–debtors who file under Chapter 13 make it possible for healthcare providers to be reimbursed for their health insurance claims through a reorganization payment plan.50 The payment plan is designed for individuals with regular incomes to repay their debt over a three–to–five year period, with a focus on repaying secured debts first.51

C. The United States Courts of Appeal for the First, Third, and Fifth Circuits’ Analysis of Liability Insurance Proceeds May Provide a Guide on How Health Insurance Proceeds Should be Viewed

The concept of how insurance proceeds should be treated for purposes of bankruptcy proceedings has been subject to analysis since 1989, but early on, the concept was generally analyzed within the context of liability insurance proceeds and not health insurance proceeds.52 At that time, the argument was that liability insurance proceeds should be considered property of the estate for purposes of bankruptcy proceedings to give effect to the overriding policy which governs bankruptcy: “equitably distributing a debtor’s assets among creditors.”53 Over time, however, a new line of cases emerged out of the Third and Fifth Circuits, indicating that some jurisdictions are leaning toward viewing liability insurance proceeds as not being part of the property of the bankruptcy estate because the debtor is not directly entitled to payment of the insurance

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49. Caffarini, supra note 2.
50. Healthcare providers with Chapter 13 bankruptcy patients should file a claim immediately because the plain language of the statute requires “full payment” of “all claims entitled to priority.” The plain language of the statute provides:
   (a) The plan—
   (1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
   (2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim . . .

53. Id. at 374.
proceeds.\textsuperscript{54} Rather, the typical insurance company makes payment directly to the injured third party and, therefore, even though there is no privity between the insurer and the injured third party, an equitable interest in the insurance proceeds is created on behalf of the injured third party at the time the injury occurs.\textsuperscript{55}

While there are some notable similarities between the two types of insurance, each has distinct characteristics such that cases involving health insurance proceeds should be analyzed separately from, but compared with, the case trends involving liability insurance. Most notably, a liability policy, such as an automobile insurance policy, is designed to be used infrequently in order to cover damages incurred by a third party in an unanticipated accident. On the other hand, with a health insurance policy, it is anticipated that the insurer will reimburse healthcare providers fairly frequently for everyday kinds of healthcare services, while also providing coverage for rare but significant healthcare emergencies.\textsuperscript{56} Ultimately, this separate analysis leads to the conclusion that health insurance proceeds should not be treated as property of the bankruptcy estate.

II. Analysis

Before looking more extensively at how the United States Courts of Appeal for the First, Third, and Fifth Circuits have treated the issue of liability insurance proceeds for purposes of the bankruptcy estate, this article looks at a few state law and common law doctrines, which may provide some alternative solutions, or perhaps guidance, for solving the issue of whether healthcare insurance proceeds should be considered property of the bankruptcy estate.\textsuperscript{57}

A. Doctrine of Necessaries

The Doctrine of Necessaries is a common law rule that has been codified in a number of states, including Pennsylvania and Virginia.\textsuperscript{58} It provides:

\textsuperscript{54} See First Fidelity Bank v. McAteer, 985 F.2d 114 (3d Cir. 1993); Houston v. Edgeworth, 983 F.2d 51 (5th Cir. 1993).
\textsuperscript{55} See First Fidelity Bank v. McAteer, 985 F.2d 114 (3d Cir. 1993); Houston v. Edgeworth, 983 F.2d 51 (5th Cir. 1993).
\textsuperscript{57} 40 PA. CONS. STAT. ANN. § 117 (West 2012); 23 PA. CONS. STAT. ANN. § 4102 (West 2012).
\textsuperscript{58} See 23 PA. CONS. STAT. ANN. § 4102 (West 2012); VA. CODE ANN. § 55–37 (West 2012); Connor v. Sw. Fla. Reg’l Med. Ctr., Inc., 668 So. 2d 175 (Fla. 1995).
At common law, a married woman’s legal identity merged with that of her husband, a condition known as coverture. She was unable to own property, enter into contracts, or receive credit. A married woman was therefore dependent upon her husband for maintenance and support, and he was under a corresponding legal duty to provide his wife with food, clothing, shelter, and medical services. The common law doctrine of necessaries mitigated the possible effects of coverture in the event a woman’s husband failed to fulfill his support obligation. Under the doctrine, a husband was liable to a third party for any necessaries that the third party provided for his wife. Because the duty of support was uniquely the husband’s obligation, and because coverture restricted the wife’s access to the economic realm, the doctrine did not impose a similar liability upon married women.59

As society has evolved, a number of states, including Pennsylvania, amended their state constitutions to include equal rights amendments to prevent “future enactments of discriminatory state legislation” and to “erase the many instances of sex–based classification in existing state laws.”60 As a result of changing cultural norms, Pennsylvania’s Doctrine of Necessaries today is gender–neutral and reads:

In all cases where debts are contracted for necessaries by either spouse for the support and maintenance of the family, it shall be lawful for the creditor in this case to institute suit against the husband and wife for the price of such necessaries and, after obtaining a judgment, have an execution against the spouse contracting the debt alone; and, if no property of that spouse is found, execution may be levied upon and satisfied out of the separate property of the other spouse.61

In Pennsylvania, therefore, the property assets of a spouse who individually files for bankruptcy under Chapter 7 or Chapter 13 would still be protected by the automatic stay provision of the federal bankruptcy code,62 because the Pennsylvania Doctrine of Necessaries requires the creditor to obtain a judgment against the

59. Connor, 668 So. 2d at 175–76 (emphasis added).
61. 23 PA. CONS. STAT. ANN. § 4102 (West 2012).
debtor and the spouse before the debt may be satisfied by the 
spouse’s separate property which is not property of the bankruptcy 
estate. The federal Bankruptcy Code demands this result because 
attaching such a judgment against the debtor, notwithstanding the 
fact that the claim is also against the debtor’s spouse, is a violation 
of the automatic stay provision.

Virginia takes a statutory approach similar to Pennsylvania by 
making the Doctrine of Necessaries gender-neutral: “[t]he [D]oc-
trine of [N]ecessaries as it existed at common law shall apply 
equally to both spouses, except where they are permanently living 
separate and apart[.]” However, Virginia’s Doctrine of Neces-
saries statute differs from the Pennsylvania statute in its effect on 
the bankruptcy estate because there is no requirement to obtain a 
judgment against the debtor first. In the absence of a judgment 
against the debtor requirement, an unsecured creditor or 
healthcare provider could assert a claim against the debtor’s 
spouse’s separate property for unpaid medical expenses without vi-
olating the automatic stay provision of the federal Bankruptcy 
Code. In other states there has been a trend within the judicial 
branch of the government to abrogate the Doctrine of Necessaries 
eliminating the opportunity for creditors to seek reimbursement 
from the debtor’s spouse altogether.

The Doctrine of Necessaries is one potential solution for 
healthcare providers who have insured patients with unpaid medi-
cal bills that have filed for bankruptcy. However, this common law 
doctrine has some obvious weaknesses as a method to get around 
the automatic stay provision of the federal Bankruptcy Code. First, 
the inconsistent application of the common law rule from 
state to state and the fact that it has been abrogated in other states

63. 23 PA. CONS. STAT. ANN. § 4102 (West 2012).
64. The federal Bankruptcy Code provides: 
(a) Except as provided in subsection (b) of this section, a petition filed . . . operates as 
a stay, applicable to all entities of—  
(1) the commencement or continuation, including the issuance or employment of pro-
cess, of a judicial, administrative, or other action or proceeding against the debtor 
that was or could have been commenced before the commencement of the case under 
this title, or to recover a claim against the debtor that arose before the commencement 
of the case under this title; 
66. Id.
(listing Alabama and Maryland as two states which have abrogated the common law Doctrine 
of Necessaries).
limits its applicability nationally.\textsuperscript{70} Second, the Doctrine of Necessaries only applies to the spouses of debtors, and therefore does not capture single persons with health insurance who file for bankruptcy and have unpaid medical bills.\textsuperscript{71} To be sure, the Doctrine of Necessaries will work in narrow instances where the bankrupt debtor is married, lives in a state that still honors this common law doctrine, and does not have a judgment against the debtor requirement.\textsuperscript{72} However, because of its limited scope and reach, and the trend towards abrogation, the Doctrine of Necessaries does not provide an adequate solution for creditors seeking to consistently collect insurance proceeds from debtors who have filed for bankruptcy.

B. Taking Direct Action in Pennsylvania

In Pennsylvania, an insurer is not permitted to issue a liability insurance policy unless there is a provision in the insurance contract requiring the insurer to pay for damages for injury or loss to a third party even in the event that the insured becomes insolvent or bankrupt.\textsuperscript{73} The plain language of the statute reads as follows:

No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by animals or by any vehicle drawn, propelled or operated by any motive power and for which loss or damage the person insured is liable, shall hereafter be issued or delivered in this State by any corporation, or other insurer, authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation, under the

\begin{footnotesize}
\textsuperscript{70} See 23 PA. CONS. STAT. ANN. § 4102 (West 2012); VA. CODE ANN. § 55–37 (West 2012); Connor, 668 So. 2d at 176 (listing Alabama and Maryland as two states which have abrogated the common law Doctrine of Necessaries).

\textsuperscript{71} 23 PA. CONS. STAT. ANN. § 4102 (West 2012); VA. CODE ANN. § 55–37 (West 2012).

\textsuperscript{72} VA. CODE ANN. § 55–37 (West 2012).

\textsuperscript{73} 40 PA. CONS. STAT. ANN. § 117 (West 2012).
\end{footnotesize}
terms of the policy, for the amount of the judgment in the said action, not exceeding the amount of the policy.\textsuperscript{74}

The key to the direct action statute is that the injured third party must obtain a judgment against the debtor before the injured third party can maintain an action against the insurer.\textsuperscript{75}

In \textit{Gubbiotti v. Santey}, Appellee Michael Santey was involved in an automobile accident with the Appellants, Frank Gubbiotti, Linda Gubiotti, Dean W. Pavinski, and Sheryl Pavinski, who subsequently filed complaints against Santey alleging personal injuries resulting from the accident.\textsuperscript{76} Santey filed a Chapter 7 bankruptcy petition in which the Appellants’ personal injury claims were listed as creditors holding unsecured non–priority claims.\textsuperscript{77} The Appellants were provided with notice of the Suggestions of Bankruptcy as well as notice of Bankruptcy filing regarding their claims against Santey by February 9, 2010.\textsuperscript{78} On May 14, 2010, Santey was granted a discharge\textsuperscript{79} of all debts accumulated prior to the order date. Thereafter, Santey filed a motion seeking to amend his answer to the personal injury actions filed against him to include the affirmative defense of discharge from bankruptcy and to obtain summary judgment on that basis.\textsuperscript{80} The trial court granted the motion and the Appellants’ claims were dismissed.\textsuperscript{81}

On appeal, the Appellants argued that the trial court erred in granting Santey’s motion for summary judgment “because they [were] seeking recovery for their injuries from Santey’s insurance carrier, and not Santey individually.”\textsuperscript{82} The Appellants based their

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id. at 274}.
\end{itemize}
claim on the plain language of the Pennsylvania Direct Action Statute. However, their argument failed in the eyes of the Pennsylvania Superior Court because Appellants failed to obtain a judgment against Santey to determine his liability under his auto insurance policy. Moreover, Santey properly provided notice to the Appellants of the Bankruptcy proceedings giving the Appellants until April 27, 2010 to file a Complaint Objecting to Discharge of Debtor or to Determine Dischargeability of Certain Debts.

The Pennsylvania Direct Action statute is another potential solution for creditors seeking to collect insurance proceeds owed to them by insurers of bankrupt debtors. If each state creates similar legislation to Pennsylvania’s Direct Action statute, which accounts for health insurance proceeds as well as liability insurance proceeds for injured third parties, then healthcare providers would have reasonable means to collect unpaid medical bills covered by the debtor’s insurance policy. This type of legislation would certainly be a step in the right direction for healthcare providers seeking to collect insurance proceeds owed to them from insurers of bankrupt patients.

However, Gubiotti demonstrates that not all third parties who have a cause of action under Pennsylvania’s Direct Action statute fully understand the nature of the bankruptcy process, nor the necessary steps they need to take to intervene in the bankruptcy proceedings to enforce their direct action claim against the insurer. To fully understand these details and properly enforce a direct action claim, a third party or healthcare provider would most likely need to obtain the services of and incur the expenses of hiring legal counsel to help file the necessary paperwork on time and to obtain an appropriate judgment against the debtor. As a result, many healthcare providers would miss out on their opportunity to file a

83. 40 PA. CONS. STAT. ANN. § 117 (West 2012).
84. The court in Gubiotti held:
   The plain language of 40 PA.STAT. § 117 permits the garnishment of an insurance company for a judgment entered against an insolvent or bankrupt insured. This provision does not permit an action against the insured, which would clearly violate the discharge order, but rather permits an action directly against the insurer where a judgment has been entered, in case of insolvency or bankruptcy. In this case, Santey’s liability under any applicable automobile insurance policy has not been determined, and accordingly, no judgment against Santey has been entered. Therefore, 40 PA.STAT. § 117 is inapplicable and provides Appellants with no relief.
Gubiotti, 52 A.3d at 274.
85. Id.
86. Id.
87. Id.
88. Id.
89. Gubiotti, 52 A.3d at 274.
direct action claim against the insurer, or would incur needless attorney's fees if they were able to successfully file their claim. In conclusion, a modified form of the Pennsylvania Direct Action statute, which would provide a cause of action for healthcare providers to file a claim directly against insurers of bankrupt patients, is potentially a step in the right direction, but it is still not “direct” enough. The law needs to provide healthcare provider–creditors with an easier way to collect insurance proceeds “directly” from insurers without the hassle of going through the legal process.

C. Following the Lead of the Third and Fifth Circuits: Why the Debtor May Not Have a Legal or Equitable Interest in Healthcare Insurance Proceeds

Alternatively, the easiest and most effective solution for healthcare provider–creditors to be able to collect unpaid health insurance proceeds on medical services already provided is to not include insurance proceeds from a debtor’s health insurance policy in the definition of property of the bankruptcy estate. Under this definition, the healthcare provider would be able to collect insurance proceeds directly from the insurance company without triggering the automatic stay provision of the federal bankruptcy code. This potential solution clearly presents a better alternative for provider–creditors to consistently and effectively collect insurance proceeds owed to them than the Doctrine of Necessaries, which only applies in limited circumstances, and the Pennsylvania Direct Action statute, which entails a great deal of time and expense, along with a working knowledge of the judicial process.

Currently, there is a split of authority among the United States Circuit Courts of Appeals over whether liability insurance proceeds should be considered property of the bankruptcy estate. While liability insurance proceeds are distinguishable from health insurance proceeds, this split of authority sheds light on how health insurance proceeds may be analyzed with regard to the concept of property of the bankruptcy estate.

91. Property of the estate is defined as “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541 (2012).
92. Id. § 362(a)(3).
95. See supra text accompanying note 8.
In analyzing the definition of property of the bankruptcy estate, the United States Court of Appeals for the First Circuit noted in *Tringali v. Hathaway Mach. Co., Inc.*, that:

The Supreme Court has said, interpreting this section, that "the House and Senate Reports on the Bankruptcy Code indicate that § 541(a)(1)’s scope is broad," and it quoted the following from the legislative history: The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act.97

Despite this broad definition, some courts have determined that what is property of the bankruptcy estate depends upon the type of insurance policy under consideration.98 For example, the Fifth Circuit Court of Appeals concluded in *In re Louisiana World Exposition Inc.*, that the insurance proceeds from a Directors and Officers insurance policy were not property of the bankruptcy estate.99 In coming to this conclusion, the Fifth Circuit Court of Appeals:

[D]istinguished titular ownership of a policy from total ownership of the proceeds of that policy, holding that the proceeds of Directors and Officers (D&O) liability insurance policies were not part of a corporation’s bankruptcy estate even though the policies were purchased and owned by the corporation. The policies at issue in that case provided liability coverage only for the corporate debtor’s directors and officers and for the obligation of the corporation to indemnify those directors and officers. Thus, under the D&O policies, the insurance companies’ obligations flowed only to the corporate debtor’s directors and officers, who were the only insureds under the policies. The policies did not afford the debtor corporation any direct coverage

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98.  A recent article summarized this viewpoint by stating: [A]s a general rule: [e]xamples of insurance policies whose proceeds are property of the estate include casualty, collision, life, and fire insurance policies in which the debtor is a beneficiary. Proceeds of such insurance policies, if made payable to the debtor rather than a third party such as a creditor, are property of the estate and may inure to all bankruptcy creditors. But under the typical liability policy, the debtor will not have a cognizable interest in the proceeds of the policy. Those proceeds will normally be payable only for the benefit of those harmed by the debtor under the terms of the insurance contract. Epling, *supra* note 23, at 104.
99.  *In re Louisiana World Exposition Inc.*, 832 F.2d 1391, 1401 (5th Cir. 1987) ("[L]iability proceeds which belong only to directors and officers, are not part of the estate . . . .").
for liability to third-party claimants. In that narrow factual context, we concluded that the debtor corporation’s ownership of the policies was not enough to render the proceeds of those policies property of the corporation’s bankruptcy estate. Consequently, despite the debtor’s legal ownership of the policies, this court determined that the directors and officers were the equitable owners of all of the proceeds of those policies, precluding inclusion of the proceeds in the estate of the debtor.¹⁰⁰

Following the line of thinking from the Court of Appeals for the Third and Fifth Circuits, it stands to reason that the owner of a health insurance policy has legal title due to privity of contract with the insurer, but the healthcare providers who supply medical services to the policy owner become the owners of equitable title to the insurance proceeds. While the analysis of liability insurance proceeds conducted by the Court of Appeals for the Third and Fifth Circuits¹⁰¹ is helpful, health insurance proceeds are different from liability insurance proceeds because in most cases the right to health insurance proceeds is assigned by the patient–debtor to the provider–creditor prior to the provision for and consumption of healthcare services, whereas the independent third–party who is injured by a debtor covered by a liability insurance policy does not receive an assignment of the debtor’s contract rights. While the arguments put forth by the Court of Appeals for the Third and Fifth Circuits are highly persuasive, the striking difference between the two types of insurance proceeds means that the courts’ collective analysis does not provide a justifiable basis for concluding that health insurance proceeds are not property of the bankruptcy estate nor free from the automatic stay provision, such that providers can collect insurance proceeds directly from insurers where a patient–debtor files for bankruptcy.

D. The First Circuit’s Alternative Analysis and Application of Basic Contract Theory

Property of the bankruptcy estate is defined as “all legal or equitable interests of the debtor in property as of the commencement of the case.”¹⁰² As the First Circuit Court of Appeals pointed out in Tringali, “[t]he scope of this paragraph [§ 541(a)(1)] is broad . . . [i]t

¹⁰¹. See First Fidelity Bank v. McAteer, 985 F.2d 114 (3d Cir. 1993); Houston v. Edgeworth, 993 F.2d 51 (5th Cir. 1993).
includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property[.]” 103 “In many contexts . . . ‘contract rights’ are treated as [intangible] property.” 104 In a typical bilateral contract, there are rights and duties on both sides of the contract. 105 In the context of a health insurance contract, the insurer has the right to collect monthly insurance premiums and a corresponding duty to pay insurance proceeds to the insured, per the terms of the contract, as he or she consumes healthcare services. Conversely, the insured has a right to payment of insurance proceeds, per the terms of the contract, triggered by the consumption of healthcare services and a duty to pay monthly insurance premiums to the insurer. Because health insurance proceeds constitute a contract right, they must be viewed as a legal interest in intangible property; 106 hence, health insurance proceeds are property of the bankruptcy estate. 107

This conclusion, however, gives rise to additional inquiries. What happens to this property interest where the insured assigns his or her right to the health insurance proceeds to a healthcare provider? Does the insured–assignor relinquish all rights to the insurance proceeds to the provider–assignee such that the insured–assignor, who subsequently becomes the debtor in a bankruptcy proceeding, no longer has a “legal or equitable interest in property?” 108 According to a Texas Court of Appeals, an assignment of health insurance proceeds creates separation of legal and equitable title to the anticipated insurance proceeds wherein the insured–debtord Maintains legal title and the provider–creditor maintains equitable title. 109 As a result, the court also held that the anticipated health insurance proceeds were still property of the estate for bankruptcy purposes because the insured–debtor retained legal title. 110 Interestingly, the court imposed a constructive trust on the insured–debtor, despite the debtor having legal title to the health insurance proceeds and

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104. WARREN, supra note 46, at 108.
105. See 17 AM. JUR. 2D CONTRACTS § 8 (2014).
106. WARREN, supra note 46, at 108.
108. Id.
110. Id.
claiming them as exempt property under Section 522(d)(5) of the Bankruptcy Code,111 under the theory of unjust enrichment.112

The court in University of Texas Medical Branch at Galveston provides a creative solution to the issue; however, its analysis leaves the door open for opposing legal arguments. For example, some legal scholars would argue that instead of a separation of legal and equitable title occurring where an insured–patient assigns his right to insurance proceeds to a provider that “an effective assignment extinguishes the right [entirely] in the assignor and recreates the right in the assignee to performance by the obligor who owes the correlative duty.”113 If this is the case, then the debtor no longer has any “legal or equitable interest”114 in the insurance proceeds and is therefore, not subject to the automatic stay provision.115

Ultimately, the contract theory of assignment, with regard to how it is applied to health insurance proceeds, could lead to a split of authority similar to the existing split between the United States Courts of Appeals for the First Circuit on one side and the Third and Fifth Circuits on the other. This would create a lack of predictability for all parties involved, creating messy legal and policy arguments on both sides in the lower court systems resulting in a different legal standard from one district to the next. In order to prevent such a mess, the best solution is for Congress to amend the Bankruptcy Code to expressly exclude health insurance proceeds from the definition of property of the estate.

III. CONCLUSION

With an estimated 60% of individual bankruptcy cases in America stemming from unpaid medical bills,116 the economic impact of bankruptcy on patients and healthcare providers is significant. Today more than ever, providers are faced with an uncertain financial future due to the ever increasing cost of a medical education, the substantial expense of obtaining medical malpractice insurance, and the unknown impact of new federal laws such as the Affordable

111. “The following property may be exempted under subsection (b)(2) of this section: [t]he debtor’s aggregate interest in any property, not to exceed in value $1,225 . . . .” 11 U.S.C. § 522(d)(5) (2012).
112. Univ. of Texas Med. Branch at Galveston, 777 S.W.2d at 454–55.
115. Id. § 362.
116. Tamkins, supra note 1.
In light of the ever increasing costs of running a medical practice, it is incumbent upon Congress to help mitigate the financial risk for providers and the cost of healthcare for patients. The foregoing analysis demonstrates how existing case law, common law doctrine, state statutory law, and basic contract principles do not provide a clear and consistent basis for ensuring that this goal is achieved universally. Therefore, Congress should amend the federal Bankruptcy Code to expressly exclude health insurance proceeds from the definition of property of the bankruptcy estate, thereby permitting provider-creditors to collect health insurance proceeds directly from the debtor-patient’s health insurance company.
