

2019

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THE CONSUMMATE LEGAL EDUCATION: TEACHING ANALYSIS AS DOCTRINE

Julie Ann Interdonato *

This Article addresses the necessity and means of developing analysis and its written expression as an independent topic of study throughout students' law school tenure. "Doctrine," as it appears in the above title, is defined as the transcendent analytic concepts that underlie the common law, and the modality of their application in the law's constant evolution. The purpose of presenting analysis in this context is to enhance analytic instruction presently provided in law school, and thereby take students one step further in their education, into the realm of the practicing attorney. In this manner, educators, building on the case law method, maximize students' sophisticated, lawyerly thinking to the degree the practicing bar demands of recent graduates seated at their desks as new professionals.

Only in the scholastic environment is there the capacity to devote both time and purpose exclusively to detailed, continual, analytic training. In this context, professors assume the role of both teacher and senior partner, at once playing devil's advocate, and sharing their own thought processes as experienced professionals. Instruction necessarily runs concurrently with that of the traditional law school courses, thereby enhancing student aptitude in every area of legal study, and engendering a paradigm of legal education that raises the bar of analytic acumen for future generations.

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* Member of New York Bar, with background in civil litigation, and Adjunct Professor of Law, Lawyering and Legal Writing, Benjamin N. Cardozo School of Law. The following is dedicated to my students, past, present, and to come, who inspire me each day that they learn, and my parents, Anna and John, the spiritual authors of this work. Special thanks to my former teaching assistants, Angad S. Bhai and Edward Matzner, Esqs., who lent a careful eye to my words, and the editorial staff of Concordia Law Review for their diligent efforts.

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INTRODUCTION

Imagine that a law school finds itself uncommonly short of faculty on the eve of the fall semester. The school thus decides that it must eliminate all courses of instruction but one for the entire year. It then calls a meeting of the student body, at which it disseminates a list of all the doctrinal courses comprising the traditional law school curriculum for well over a century. A panel of administrators, including the dean, then asks the students to suggest, for its consideration, which of those courses should be chosen as the one and only. Many of the students, frustrated and angry at the turn of events, refuse to so much as contemplate the prospect. Some form factions, based upon what course they believe to be the best choice, and those factions fight amongst themselves, all to the dismay of the observing panel. Finally, one first-year student calmly and confidently raises her hand. The dean, relieved by what he perceives as a gesture of cooperation, acknowledges the student:

“Yes, what doctrinal course would you choose?”

“I choose *Analytic Doctrine*,” she replies.

A thud of silence befalls the auditorium, except for a hint of muffled laughter emanating from a location uncertain.

“I’m afraid there is no such entry on the list,” says the dean, judging his perception of the student’s intentions to have been erroneous. “Perhaps,” he suggests diplomatically, “because this is only your first year, you do not yet appreciate the significance of the time-honored curriculum.”

“But I do, Sir,” the student explains. “If, however, we may benefit from only one topic of study, should it not be the one that enables us to comprehend all the others?”

Bereft of counter-argument, the panel seeks to oblige.

In the actual world, the circumstances are quite the opposite. The traditional curriculum substantially remains, and so it should; however, what lies at its core goes largely unacknowledged through the decades. Though analysis per se underlies every subject presented in law school, and is the gateway to all lawyerly training, its individual role in the curriculum is all too often abridged, or non-existent.¹ Thus, the full significance of analysis is understated in the minds of the students, whose future employers nonetheless will expect them to enter the world with professional abilities.² Without a separate and pronounced focus on analysis in and of itself, the law school education, fine as it is, falls short of its great potential.

Absent specifically is the articulation of legal analysis as doctrine, and its rigorous, repeated instruction as a proper, independent course of study throughout a student’s law school career. Doctrine is defined herein as the transcendent analytic concepts that underlie the common law, and the modality of their application in the law’s constant evolution.³ However abstract, these concepts, because of their time-honored universality in the common law system, are nonetheless etched in stone. They are the vehicle that enables the student, and the lawyer, to understand and apply the law to

¹ See *infra* notes 22, 33 and accompanying text (addressing deficiencies in analytic training).

² See *infra* pp.6–8 (describing the analytic demands placed upon graduates).

³ See *infra* Sections I(A), I(C)–(D) (providing a rudimentary discussion of analytic methodology, a sampling of analytic concepts reflected in court decisions, and the role these concepts play in application of common law precedent).

diverse facts, in perpetuation of the role of the common law as a living, developing entity.

When Christopher Langdell introduced the case law method at Harvard in 1870,⁴ the prevailing law school instruction was based upon the Dwight Method.⁵ Under this approach, preparation for law school class entailed reading treatises, as opposed to actual court decisions.⁶ Professors conducted classes by lecture, and students were tested orally on their ability to memorize.⁷ Langdell's presentation necessarily viewed law in the context of the judicial decisions in which it appeared,⁸ and undisputedly brought to light the foundation of law school education recognized in the present day. Yet, that presentation represented something far greater, but largely unexplored: the pathway to the intrinsic case law analysis essential to the practicing attorney. How ironic, therefore, that case law analysis, and all it encompasses, is insufficiently addressed in the very system upon which it is based.

The cause of this irony originates in the historical underpinnings of formal legal education. Before Langdell's emergence at Harvard, would-be lawyers did not necessarily attend law school. Education in the law was achieved by means of: (1) self-study; (2) an apprenticeship in a law practice; (3) formal study within an independent school or a university; or

⁴ See W. Burette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 23 (1997) (providing a detailed account of emergence of the case law method in the context of development of formalized legal education).

⁵ David A. Garvin, *Making the Case: Professional Education for the World of Practice*, Harv. Mag., Sept.–Oct. 2003, at 58. This method was named after a Columbia University professor. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Carter, *supra* note 4, at 5–6. Professor Carter's paper refutes a popular opinion that Langdell was, in actuality, a formalist; meaning, despite his introduction of a legal education system based upon the study of case law, Langdell adhered to the unyielding letter of the law, to the exclusion of all else, including morality. *Id.* at 6, 8, 136. Professor Carter proposes that Langdell, instead, was likely as enlightened as he could be for his time, during which, law, as even a course of study in colleges and universities, was the subject of controversy in the United States, among practitioners and educators alike. *Id.* at 136. There is no dispute today, whatever ideology one ascribes to Langdell, that current law students must be schooled in learning law in the broader, pivotal context of court decisions, and not confine their studies to a blind search for the rule. See *infra* note 33 and accompanying text. The present concern thus is that schooling in case law analysis be *maximized* to the degree necessary to ready students for entry into the profession, as addressed herein throughout.

(4) some combination.⁹ Law school faculty generally consisted of experienced practitioners who taught part-time.¹⁰ Gradually, the case law method came into increasing prominence,¹¹ and law schools, with the formalized education they provided, played an increasingly greater role in gaining entrance into the profession.¹² As law schools achieved more footing, political power plays for authority in legal education grew between the practicing bar on the one hand, and law school institutions on the other.¹³ Law school graduates, devoted for the most part to teaching and scholarship, and schooled in the case law method, eventually became the dominant figures in legal education, with experienced practitioners playing a minority role.¹⁴ A pronounced line of demarcation, present to this day, thus formed between the practicing bar and the law school, creating two separate and distinct entities,¹⁵ despite the fact that both entities share the same profession, and *the same academic core*.

The law school's emergence into prominence was unquestionably of great benefit to the legal profession, in terms of the uniformity in quality of training it ultimately came to represent, combined with implementation of the case law method of instruction essential to study of the common law. The artificial rift created, however, between the practice of law and its inherent academics, has deprived students of the full extent of analytic training the profession demands of a beginning lawyer. To engage in a thorough analysis of case law, and, from that analysis, to assess the merits of a course of action or formulate a legal argument, is indeed the academics of law, as well as the requirement of every practitioner. *That misconceived line of demarcation, extant well over a century ago, was the product of the politics of the time and the early growing stages of formal legal education, but has no legitimate basis in the present.* In the interest of providing law students with the best fundamental education possible, that line must be lifted sufficiently to allow full training in the analytic process into the law school classroom.

⁹ Carter, *supra* note 4, at 11.

¹⁰ *Id.* at 13.

¹¹ *See id.* at 37–38.

¹² *See id.* at 36.

¹³ *Id.* at 3, 104–06.

¹⁴ *See id.* at 106–07.

¹⁵ *See id.* at 94–113.

A poignant example of the effect of history and politics upon the selection of courses provided in law school is the once treatment of constitutional law. In his 1870–1871 annual report to Harvard alumni, Dean Langdell, in enumerating the legal topics of study taught at Harvard, omitted constitutional law from the list.¹⁶ Law school, at the time, did not constitute the relatively pluralistic institution that it does today. Thus, “neither [Langdell], nor the overwhelming majority of his students, nor their potential clients, expected to have any need to look to the Constitution for the protection of their rights.”¹⁷ Yet, the United States Constitution is the “supreme Law of the Land.”¹⁸ Consequently, much of the students’ view of the law is, expressly or impliedly, through the lens of constitutional principles, and in the context of a framework of government the Constitution itself provides. By analogy, analytic doctrine governs all legal study. Students’ insight is necessarily achieved through the lens of analytic concepts, which inherently govern the continual development of judicial precedent. These concepts ever guide students’ thinking, throughout the law school experience and their entire professional lives.

To relegate, therefore, the unabridged study of analysis to the “practical” world, and omit to address it as a course of study in academia, is to send graduates on their way without as complete an education as can and must be had, in each individual area of the law school curriculum. Under such circumstance, students of all levels of aptitude walk away with insufficient exposure to the degree of analytic training potentially, and *uniquely*, available in the scholastic setting. In that setting, there is the capacity to devote both time and purpose *exclusively* to detailed, continual analytic instruction. This instruction necessarily would run *concurrently* with the case readings and class discourse taking place in the remaining courses, thereby enhancing student aptitude overall. All legal educators must be encouraged to work within that specific paradigm of education to

¹⁶ See *id.* at 26. The courses of study listed were “Real Property, Contracts, Torts, Criminal Law and Criminal Procedure, Civil Procedure at Common Law, Evidence, and Jurisdiction and Procedure in Equity.” *Id.*

¹⁷ Carter, *supra* note 4, at 127. Constitutional law was taught previously at Harvard, however. *Id.* at 127 n.413. In the list of courses provided for the subsequent school year, 1871–1872, constitutional law was included again, but only as an elective. *Id.* at 26, n.102.

¹⁸ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

raise the bar of analytic acumen for future generations of lawyers, and not remain content with maintenance of the status quo.

Moreover, graduates, who enter the profession as novices, must understand that a significant job of lawyers is to develop an academic mastery of the law substantially *beyond* what they learn within the inevitable confines of formal education. That mastery is challenged in several contexts, including the lawyer's substantive ability to: counsel a client; draft an agreement; conduct or defend a deposition; try a case; present an argument, both written and oral, before a panel of judges; and, indeed, *serve* as judge in the first instance, or *assume* the role of judge to assess the merits of both sides of a position. In every one of these instances, the professional's principal asset is analytic training.

Still further, beyond classroom, law office, and courthouse, changes of monumental consequence are taking place in internet technology, and the threat of terrorist activity looms large in the societal consciousness. These ever-increasing concerns continually challenge application of traditional legal tenets, such as those of tort,¹⁹ Fourth Amendment boundaries of government investigation,²⁰ and overall Fifth Amendment right to due

¹⁹ See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 219–35 (2001) (addressing the role of tort principles in cases of wrongs committed in the relentlessly developing, intangible world of cyberspace).

²⁰ See *United States v. Jones*, 565 U.S. 400 (2012). In *Jones*, officers attached a GPS device to the car that defendant drove, without benefit of a proper warrant. *Id.* at 403. The Supreme Court of the United States addressed whether the use of the device to track defendant's movements constituted a "search" within the meaning of the Fourth Amendment, thereby triggering the requisite constitutional safeguards. *Id.* at 402; see U.S. CONST. amend. IV. The Court, applying a traditional physical trespass analysis, held a search to have taken place. *Jones*, 565 U.S. at 404–06. The issue, however, raised further questions, in the minds of the concurring Justices, relative to the constitutionality of electronic searches regardless of the applicability of the physical trespass analysis. *Id.* at 413–31 (Sotomayor, J. & Alito, J., concurring). These Justices expressed concern that the seemingly limitless, ubiquitous nature of modern technology, as an investigatory tool, may result in violation of an individual's "reasonable expectation of privacy," and thereby constitute a search within the meaning of *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *Id.* At the same time, the concurrence also observed that the growing presence and sophistication of technological advancement would have the effect of "shaping the evolution of societal privacy expectations," *Id.* at 415 (Sotomayor, J. concurring), in a manner that limits what individuals reasonably consider private in the first instance. Justice Scalia, writing the majority opinion, articulated, in dicta, the difficulty of determining whether a search has taken place, based upon the more abstract reasonable expectation of privacy analysis. *Id.* at 412–13. Does a two-day visual surveillance, in a public place, of an individual suspected of selling stolen goods, fall within the definition of search, while a similar six-month surveillance of a suspected terrorist falls outside? In other

process of law.²¹ Society will turn to future generations of lawyers to confront these unprecedented challenges and more, as counselors, advocates, judges, and educators, imposing a heavy burden upon their shoulders. All the heavier thus is the burden upon *present* members of this profession to ensure that these future lawyers are up to the task, and the shouldering of this burden begins with educators. *Indeed, today's practicing attorneys are placing a pronounced emphasis upon a law school's ability to produce graduates better prepared for entry into the profession, in terms of critical thinking and overall analysis.*²² *It therefore behooves law schools, in furtherance of such end, to maintain, at the forefront of their curriculum, that which lies at the core of legal education, and to do so for the full tenure of the student's law school experience.*

The thinking that follows herein is from the combined perspectives of an experienced legal practitioner and educator. These perspectives are inextricably linked, based upon that common analytic core that both practitioners and educators share. To the extent both can be isolated, however, the practitioner's perspective provides an appreciation of the depth of analytic insight essential to the function of a lawyer. Accordingly, such perspective focuses on the analytic foundation that can and must be

words, can the definition of the word "search" ever be narrowed or expanded to accommodate government investigation, based upon "the nature of the crime being investigated," and what we perceive to be the level of threat to public welfare? Such, he observed, is a problem with which the Court "may have to grapple" in the future. *Id.*; see also *United States v. Carpenter*, 138 S. Ct. 2206, 2220 (2018) (holding government access to cell phone location data of robbery suspect to constitute search, but expressly reserving from consideration information gathering "involving foreign affairs and national security"). Indeed, the task of grappling with these critical issues likely awaits students presently enrolled in law school.

²¹ See generally ROGER DOUGLAS, *LAW, LIBERTY, AND THE PURSUIT OF TERRORISM* (2014) (addressing counterterrorism law and, *inter alia*, its effect on rights of accused in five democratic countries, including the United States).

²² See Catherine H. Finn & Claudia Diamond, *Are We Listening?*, WASH. LAW., Jan. 2015, at 27, <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/january-2015-taking-the-stand.cfm>. Said article is based upon a survey, consisting of practitioners and judges, which revealed "[o]verwhelmingly, the number one skill that [the] respondents believe[d] recent graduates lacked was critical thinking and analysis." *Id.* at 30. The article further articulates the necessity of such ability, in drafting a brief, to apply equally to "drafting a will or contract or advising the chief executive officer of a corporation." *Id.*; see also Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 420, 436–37 (2007) [hereinafter Gantt] (addressing findings of analytic deficiencies in the minds of second and third-year law students).

laid in law school. It is upon this foundation that the student may build after graduation, in furtherance of meeting maximum professional standards. The educator's voice, in turn, articulates what is meant herein by analytic training in the common law system, in the most fundamental sense, and its mode of instruction in formalized education, complete with examples.

The intended audience of this paper, however, is not limited to educators. Rather, it extends to the entire legal profession. So that, founded on our cumulative awareness, we *all* may work together to influence the unending betterment of law school education, to the benefit of all students who follow, and, thus, the benefit of our society.

In furtherance of such end, this paper, specifically: addresses the essence of analytic training;²³ pinpoints ways in which it is generally lacking in the present student curriculum;²⁴ illustrates its unique significance to all law school learning, in the context of academic acumen,²⁵ as well as passion for the law, maturity in judgment, and legal ethics;²⁶ and proposes tangible means by which it may be elevated to the prominence it deserves in the classic law school education, generally,²⁷ as well as in the context of specialized model instruction in the first year,²⁸ and each year thereafter.²⁹ This author respectfully submits that development of legal education in this regard shall significantly contribute to the optimal enhancement of the academic excellence that had its beginning with the introduction of the case law method.

I. THE DOCTRINE OF LEGAL ANALYSIS

A. *Instruction in the Essence of Lawyerly Thinking*

The courses we normally label “doctrinal,” such as contracts, torts, property, and civil procedure, focus on *specific* areas of the law. This category of doctrine is referred to as the “subject courses” for the purpose of this paper. Just as analytic doctrine, subject courses play an essential role in legal education. While, however, subject courses largely teach students *what* we think about the law, analytic doctrine teaches them *how* we think about the law. In other words, instruction in analytic doctrine delineates

²³ See *infra* Section I(A).

²⁴ See *infra* Section I(B).

²⁵ See *infra* Sections I(C)–(D).

²⁶ See *infra* Sections III(A)–(B).

²⁷ See *infra* Section II(A).

²⁸ See *infra* Section II(B)(1).

²⁹ See *infra* Section II(B)(2).

precisely how the lawyer gets from Point A, to Point B, to Point C, and beyond, with all shades of gray in between, by applying those unchanging analytic concepts that underlie the common law. Such is why the relevance of analytic doctrine transcends the boundaries of any one legal subject. Indeed, it is the principal vehicle by which a legal subject evolves.

In the simplest of terms, the goal of analysis in the common law system is to examine a court decision, which is necessarily founded upon specific facts, and then predict, with some degree of likelihood, how that same court would decide, based upon *diverse* facts. The lawyer accomplishes this goal by first identifying the analytic concepts reflected, expressly or impliedly, in the actual text of the court's decision. Segments of the text of a decision, to the extent they reflect analytic concepts, are hereinafter referred to as the "analytic components" of case law. A prime example of an analytic component is a court's statement of the procedural history of a case. The procedural rules may vary from jurisdiction to jurisdiction, and may change with the passage of time; however, the underlying concept of judicial authority, and the parameters of that authority in the decision-making process, remain constant in the common law, play a dominant role in its substantive significance, and thus, in analysis overall.³⁰

In furtherance of the analytic goal, the lawyer then applies the relevant analytic components to the new fact pattern to perform an extrapolation and arrive at a conclusion regarding the likely judicial disposition. The lawyer applies the same basic method in devising an argument, except from the perspective of advocate, with the court as the ultimate audience. The approach, in each case, is step by deliberate step, and within a given conceptual framework³¹ that varies based upon the subject and the problem involved. *Thus, instruction in analytic doctrine assists the student in identifying and applying each relevant analytic component in all its underlying aspects. It then guides the student in the analytic journey from one step to another, toward a conclusion, always keeping the student focused on how those steps fit within that conceptual framework.* Founded on this basic approach, students then gradually expand

³⁰ See *infra* Sections I(B)–(C) (addressing the substantive significance of the procedural component, along with that of other analytic components).

³¹ See *infra* Section I(C)(5) (discussing the meaning of "conceptual framework" and its significance to the analytic process).

their perspective to: *synthesis* of multiple court decisions, with continued sensitivity to relevant analytic components; *integration* of diverse opinion that may influence the same issue; and overall *development* of their work, to stretch the full, substantive scope of the analytic task before them, in furtherance of sophisticated, lawyerly thinking.

Inherent in instruction in the subject courses is certainly analysis, primarily through the Socratic method. Invaluable though this instruction is, it does not provide a sufficient forum for *continual* and *particularized* analysis in how a court arrives at its determination. Time constraints, and the need to focus on the details of a specific legal topic, generally preclude such instruction of analysis per se in the subject courses. Nonetheless, to understand thoroughly the significance of case precedent addressed in *any* class, students must take the same analytic journey as the court, ever mindful of the analytic components that form the basis of a court decision, and that lead them toward improved insight into the law.

Instruction in analytic doctrine embraces the same Socratic discourse; but it places the ultimate focus on the substantive significance of specific analytic components for their own sake, and the role those components play in application of the law to the facts of a given hypothetical, in *any* legal context. *Through that discourse, analytic doctrine thus takes students yet one step further in their education, into the realm of practicing attorneys.* Those attorneys must possess an acute sensitivity to what the law means, in the context of each substantive aspect, to achieve an in-depth, detailed formulation of their position, as well as a comparable command of that of their opponent.

It is thus crucial to analytic instruction that professors integrate, into the Socratic discourse, their own thought processes employed in striving to master a legal problem. In such manner, students have the full benefit of their professor's seasoned, professional experience. Indeed, Langdell himself is believed to have embraced teaching law from "the standpoint of the *learner*."³² Such philosophy should be espoused as an *all-encompassing* approach to instruction, as both student *and* professor are learners in their never-ending pursuit of understanding in the common law. A suggested teaching approach, therefore, which encompasses *both* Socratic dialogue and the express sharing of the professor's *own* analytic journey, is for the

³² Carter, *supra* note 4, at 50 (emphasis added).

professor to assume the role of senior partner and the students that of junior associate. *In this context, the senior partner/professor plays devil's advocate, and, at the same time, provides students a guiding legal hand, in furtherance of their mutual challenge to create a cogent, rich, professional analysis.* The varied contexts in which that approach is applied follow *infra* throughout.

B. *The Necessity of Repetitive, Substantive Application*

Every law student, regardless of advancement level, can enumerate at least some of the analytic components of a case. If one asks a class of aspiring lawyers to define summary judgment (a significant aspect of the procedural component), or to define dictum, many a student will rise to the occasion and recite the litany. A superficial grasp of a definition, however, is not the same as the ability to recognize the actual component in a court decision, grasp its substantive significance in the context in which it appears, and recognize the role it plays in applying the law to a new set of facts. However well-versed in definitions, when reading a case, students generally focus on one aspect of the text alone, i.e., what is broadly categorized as the “holding.” This focus is almost to the exclusion of all else. If they emerge victorious with what they believe to be the law for which the case stands, they consider themselves to have achieved a satisfactory grasp of the court’s decision.³³ But a legal education based solely upon identification of “line and rule,”³⁴ is in direct contravention to the case law method, by its very meaning. In focusing on the holding above all else, students unwittingly overlook other analytic components that underlie the law of the case and place it in its proper context. They thereby preclude themselves from full application of the law to a diverse fact

³³See Gantt, *supra* note 22, at 420. Professor Gantt’s paper pinpoints students’ learning throughout law school to focus generally on the rules, to the exclusion of emphasis upon other aspects of a lawyer’s thinking. So narrow is this focus that they “fail to develop their skills in applying those rules within an analytical framework.” *Id.*

³⁴ 1 Leigh Hunt, *Fiction and Matter of Fact*, in *MEN, WOMEN, AND BOOKS: A SELECTION OF SKETCHES, ESSAYS, AND CRITICAL MEMOIRS* 1, 4 (1847). “There are two worlds; the world that we can measure with line and rule, and the world that we can feel with our hearts and imaginations. To be sensible of the truth of only one of these, is to know truth but by halves.” *Id.* Though the author was not addressing the study of law, the distinction he draws plays a poignant role in legal education. To have a command only of rules is indeed to know law by only halves, if at all. To have, as well, a finely honed sensitivity to the underlying analytic components that govern the application of those rules, and thus an ability to think beyond rigid confines, is part and parcel of a capable attorney.

pattern. *A lack of appreciation of the full, dimensional meaning of an actual court decision situates students an insufficient distance from the olden days of readings confined to treatises.*

From that distance, students may develop additional insight beyond the holding over time, by their continued participation in the education process; however, just as we do not leave students' grasp of the basic tenets taught in the subject courses to the haphazard passage of time, or experience in the outside world, neither should we so leave their grasp of analytic doctrine. *Instruction in furtherance of said development must be express, commensurate with the level of academic advancement, and ingrained as an integral part of the students' thinking.* Schools ideally should strive to maintain mandatory courses in analytic doctrine, alongside the subject courses, each year of the students' law school tenure. This structure creates the maximum opportunity for a *synergy of learning*, based upon the subject courses, on the one hand, and analytic doctrine, on the other. The synergy is formed when faculty from both sides, working independently, though in concert, sharpen simultaneously students' analytic acumen, as the students gradually develop the keen mind of a lawyer.³⁵

Absent this synergy, students likely advance from one year to the next with, for example, insufficient sensitivity to: a court's articulation of the standard or test applied in arriving at the case holding; the reasoning utilized and how reasoning affects future interpretation and application of that holding; and how the procedural context in which an issue appears before the appellate court affects what the case truly represents in the law. Regarding this last shortcoming, if one asks a class whether a trial on the merits took place in the lower court or a motion for summary judgment, the same students, so adept at reciting definitions, all too often hesitate. Such, at least in part, is because class readings generally focus on appellate court decisions, leaving students with only a vague awareness of the fact that an entire other proceeding took place below and of the substantive nature of that proceeding. Yet, as addressed herein, the procedural history of a case dictates its very substance, because how an issue arrives before the court determines the ambit of the court's authority to decide.³⁶ Why then would all legal educators not want students to view the law in its procedural

³⁵ See *infra* Section II(A) (discussing specifics regarding analytic training in the context of the overall law school curriculum and the creation of synergy).

³⁶ See *supra* Section I(A); see also *infra* Section I(C)(2).

context. It is therefore incumbent upon legal academia to take greater strides in placing that holding, along with other pertinent components of a case, continually in its proper context, in furtherance of honing, in the minds of students, an instinctive, meaningful, and constantly progressive insight into what they are studying.

C. *Some Rudimentary Specifics*

At the heart of progressive instruction in analytic doctrine, therefore, is an intrinsic, ever-increasingly advanced delving into the role that each analytic component plays in the common law. Articulation of the full depth and breadth of study of the substantive significance of every cognizable analytic component, and legal analysis overall, is beyond the scope of this paper. So crucial is intense study of these components, however, that at least some of particular import deserve special mention herein, as modest illustration. Below thus is discussion regarding limited, rudimentary instruction in selected analytic components, as impetus toward in-class presentation and ultimate insightful class dialogue, upon which the professor may build. Though each of these components is presented in isolation, students need understand that the boundaries between and among them are generally shaded. One or more may overlap with, or encompass, others, as part of one, cohesive judicial text. The achievement of such sophisticated understanding is, after all, inherent in the goal of analytic instruction.

An effective design for crafting written assignments is to create a problem that requires students to focus on one analytic component in isolation, in addition to a generalized analytic focus. In this manner, the seed of appreciation of the substantive significance of that isolated component is better implanted in the students' memory for future development. The professor may take the same approach in the context of additional assignments, each time with particularized focus on application of yet another analytic component, and how each component necessarily connects with the whole.³⁷

1. *The Pivotal Role of Reasoning.* Where application of the law of a case is in controversy, assessment of whether a proposed resolution is in conformity with the underlying reasoning of the law, or in

³⁷ See *infra* Sections II(B)(1)–(2) (discussing assignments).

contravention thereto, is likely the deciding factor. Inculcated thus in the students' minds must be the varied, subtle, and pivotal role reasoning plays in the common law. In addition to serving as the principal conduit in application of the law to a specific set of facts, reasoning exposes the bigger picture in terms of, *inter alia*, the fairness, morality, and policy concerns potentially underlying an entire body of law, as well as the balance of those concerns. Societal interests may alter with outside forces that emerge with time, and the balance of those interests may shift more heavily on one side than the other, because of those forces, but the concept of reasoning and its role in the common law remain constant.³⁸

Reasoning also is at the core of the relationship between common law and statutory law. It assists students in better understanding how those two forms of law work together, as well as the complex dynamic that has evolved between them.³⁹ A prime illustration of the influence of reasoning upon the living law thus lies in the context of a statutory problem. The reasoning underlying a statute generally sets the parameters for judicial interpretation and application. In special cases, however, *that very reasoning* can prompt a court to decide in a manner that effectively *amends* that statutory provision, or to apply the statute in seeming *contravention* to the statutory language. In such respect, judicial decisions sometimes become a springboard for legislative revision, effectively turning an old statute on its ear.⁴⁰ Among analytic components, reasoning invariably reigns supreme.

³⁸ See *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (acknowledging role technological advancements play in “shaping the evolution of societal privacy expectations” in context of Fourth Amendment safeguards). These advancements thereby potentially alter the balance of interests between preservation of the right of the individual and public safety, based upon the individual’s lesser expectation of privacy. See generally *supra* note 20 (discussing *Jones*).

³⁹ See, e.g., *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427 (1969) (creating, in a four-to-three decision, an exception to New York’s statute of limitations and arguably overstepping judicial authority). Both majority and dissenting opinions raised informative questions regarding the respective roles the court and legislature play in the lawmaking process, and the sometimes shadowy boundaries of control between those two entities. See *id.* at 435–45 (Breitel, J., dissenting).

⁴⁰ See *id.* The New York Court of Appeals case of *Flanagan* effectively carved out a foreign object exception to New York’s statute of limitations for medical malpractice actions, where *literally* no such statutory language was present. See *id.* at 431. In 1969, the statute provided that the limitation period be measured from the time of the commission of the alleged misconduct. See *id.* at 430. It contained no provision to cover instances in which objects, such as surgical clamps, were negligently left inside the patient at the close

2. ***The Substantive Influence of Procedure.***⁴¹ The significance, and overall reach, of the law that students glean from a case must be viewed in a substantive context that is necessarily dictated by the procedural roots. The professor must direct students to be closely aware of the relevant proceeding that took place before the trial level court in reading every appellate case assigned in every course contained in the curriculum. In other words, far beyond the distilled appellate court holding, students' focus must be unremittingly on whether the ultimate appellate determination of the case is rooted, *inter alia*, in a motion to dismiss for failure to state a claim, motion for summary judgment, or in a full trial on the ultimate merits. Only repeated, uninterrupted practice in sensitivity to procedure results in a substantive command of what the law of the case is truly about.

From a subtler perspective, students must comprehend that, inherent in any decision, is the court's assessment of whether a given aspect of a case rests upon a question of law, or a question of fact, regardless of whether the court expressly so articulates. Such distinction between law and fact may have profound analytic significance in an advocacy setting, and is inextricably linked with the procedural posture of a case.

Suppose, for example, that half a class of students is asked to imagine it represents a plaintiff in tort, and the other half, the defendant. The students for defendant move for summary judgment, pre-discovery, dismissing the suit.⁴² In support of the motion, they cite, as binding authority, an appellate decision affirming a lower court judgment against a plaintiff who asserted a similar claim and alleged set of facts. That lower court judgment, however, is rendered *after trial*.

of surgery, though the patient could not have known of their wrongful presence until after the limitations period had expired. *See id.* at 431. Specifically, *Flanagan* held that, in foreign object cases, the limitations period be measured from the time the patient reasonably could have discovered the object, instead of from the time that the alleged misconduct occurred. *Id.* In so holding, the Court relied, in large part, upon *the precise reasoning underlying the statute in the first instance*, i.e., concern for loss of evidence and break in the causal chain, due to passage of time, as well as frivolous lawsuits. *Id.* at 429–31. The exception, in cases involving a foreign object, the majority reasoned, raises none of those concerns, as the very presence of the object speaks for itself. *Id.* The statute was subsequently revised to include a foreign object exception. *See* N.Y.C.P.L.R. §214-a (McKinney 2003).

⁴¹ *See also supra* Sections I(A)–(B) (addressing the significance of procedure to analytic instruction).

⁴² FED. R. CIV. P. 56.

One argument of students for plaintiff may be that the plaintiff, in the cited case, had the full benefit of his day in court: a trial of the facts, wherein the plaintiff had an opportunity to demonstrate his own credibility and defendant's lack thereof, and likely the advantage of the complete panoply of discovery pre-trial. So too, the student-plaintiffs would argue, should the plaintiff at bar. That the plaintiff in the case cited may have lost *based upon the factual lack of merit of his individual claim* has no bearing on the singular merits of the claim of the hypothetical plaintiff, no matter how similar the nature of the case. Factors, such as the admissibility and cogency of specific items of evidence, and, specifically, the overall credibility of witnesses, inherently influence the outcome at the trial stage.⁴³ In so arguing, students for plaintiff must have sufficient substantive command of the standard for summary judgment to identify expressly where *genuine disputes of material fact* lie in their case.⁴⁴ Moreover, the students' argument must incorporate the *deference* the law affords to their client as the non-moving party, with an understanding of the specific factors to which that deference applies; mere articulation of words, without specific substantive focus, is insufficient.⁴⁵

The students' total grasp of the procedural significance of their position, in the above hypothetical, thus entails: an understanding of the procedural history that governs the case at bar and the case cited by their adversary; the ability to contrast the two; the insight to use that contrast as a basis for argument in opposition to summary judgment; the depth of comprehension to support that argument with specific identification of the facts in dispute, taking into express account the deference afforded their client; and the ability to distinguish those issues of fact with those of law. Moreover, in performing the above analysis, students must be ever open to the argument that summary judgment indeed be granted in *plaintiff's* favor,

⁴³ See 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, Ch. 802.02 (Mark S. Brodin, ed., Matthew Bender 2d ed. 2018) (addressing significance of in-person appearance of witness before court and opposing party, under oath or affirmation, and subject to cross-examination).

⁴⁴ See FED. R. CIV. P. 56(c)(1).

⁴⁵ In assessing whether movant has met the burden of demonstrating no genuine dispute of material fact, the court must assume all facts alleged by the non-moving party are true, and draw every reasonable inference in non-movant's favor to determine the presence of outstanding factual issues. See, e.g., *United States v. Bosurgi*, 530 F.2d 1105 (2d Cir. 1976).

founded upon law *and* fact,⁴⁶ thereby potentially reversing the outcome by 180 degrees. This analytic grasp from start to finish constitutes the paradigm for genuine substantive command of summary judgment problems in general, and further, opens the door to comprehension of the substantive role of procedure overall.

3. *The Insight of Concurring and Dissenting Opinions: Messages in a Bottle.* Inherent in concurring and dissenting opinions is the very personification of critical thinking. These opinions oftentimes provide salient arguments and other details that the majority omits. They thereby provoke additional thought, and offer an insightful critique of the majority opinion, all of which increases the students' own insight into the law. In these respects, the dissenting and concurring judges serve as built-in law professors, raising questions in the students' minds about application of the law as if by Socratic method.

The dissenting or concurring opinion of one jurisdiction may later influence the law of another, or of the same court, thereby altering the course of precedent. So that, a poignant dissent written by Supreme Court Justice Holmes, in 1919, denouncing the majority for its failure to uphold the freedom of speech of political dissidents, now is considered to have "emphatically carried the day."⁴⁷ And the concurring opinion of Justice O'Connor, proposing a test for the constitutionality of religious displays on government property, is later embraced by Justice Blackman as a "sound analytical framework" within which to work in assessing the merits of a subsequent case.⁴⁸ Dissenting and concurring opinions are indeed akin to messages in a bottle, engraving their transcendent, independent mark in the

⁴⁶ Upon reasonable notice, a court may grant summary judgment in favor of the nonmovant. FED. R. CIV. P. 56(f)(1).

⁴⁷ *Morse v. Frederick*, 551 U.S. 393, 442 (2007) (Stevens, J., dissenting) (addressing, generally, the Supreme Court's broad interpretation of coverage of the constitutional guarantee of freedom of speech in the present day (citing *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting))); *see also* *United States v. Alvarez*, 567 U.S. 709, 728 (2012) (holding a conviction based upon a false claim of receipt of the Congressional Medal of Honor unconstitutional in violation of the free speech clause (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting))).

⁴⁸ *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

law, with the potential to influence future cases and serve as impetus for legislative change.⁴⁹

Students must understand that insight into the characteristics of dissenting and concurring opinions enables them to engage in a virtual polling of the individual judges on the panel. Students thereby can assess, based upon the content of all the judges' respective opinions, how each member of the court might decide with a diverse set of facts at bar. Such diversity potentially changes the configuration of the panel, by bringing, for example, members of the earlier dissenting or concurring opinion over to the majority, or causing members of the earlier majority opinion to join with the dissent or concurrence,⁵⁰ all based upon a previous imprimatur of thought carried through time.

4. *The Precedential Effect of Dictum.* Though not itself binding, dictum may constitute a forecast of subsequent application of the law, the very basis of analysis in a legal system founded on case precedent. A court's articulation that it might decide another way tomorrow, with facts before it diverse from the ones that it has today, has potentially decisive significance in the disposition of a future case.⁵¹ The ability to recognize and apply such dictum lies at the foundation of competent lawyering. The

⁴⁹ See *People v. Owusu*, 93 N.Y.2d 398, 414–15 (1999) (Bellacosa, J., dissenting) (indicating the dissenting opinion to be the “standard mechanism” for bringing the majority opinion to the legislature’s attention “for amendatory consideration, if that [b]ranch of lawmaking government so desires”).

⁵⁰ See, e.g., *Morse*, 551 U.S. at 433 (2007) (Stevens, J., dissenting) (addressing a school speech case in which the Supreme Court held constitutional a public school suspension of a student for drug advocacy, based upon his display of a banner, which read “BONG HITS 4 JESUS”). Justice Stevens, writing a dissenting opinion, in which Justices Souter and Ginsburg joined, based his opinion, in part, on the language in question constituting a “nonsense message, not [drug] advocacy.” *Id.* at 444. How, one might pose to a class of law students, would the configuration of justices change, if at all, based upon a change in the precise nature of the speech at issue?

⁵¹ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 581 (1975). *Goss* held a group of public high school students were entitled to minimum due process in a case involving suspensions of ten days or less. *Id.* at 580–81. In dictum, however, the Court expressly reserved opinion regarding, *inter alia*, “unusual situations,” or “[l]onger suspensions or expulsions for the remainder of the school term, or permanently . . .” *Id.* at 584. All of which, it said, “may require more formal procedures.” *Id.* A professor might ask that students, relying exclusively on *Goss*, imagine a scenario in which they represent a client afforded only minimum due process, but subjected to a ten-day suspension encompassing an end-term exam period, or the last week of classes of the student’s senior year. The application of *Goss* to such fact patterns provides a fine lesson in the necessity of application of case law beyond the holding, in furtherance of effective legal representation.

appearance of dictum, however, may be exceedingly subtler, contained, for example, in the court's choice of: a single word containing meaning broader than the facts before it; a word that itself triggers in the reader's mind the precise antonym;⁵² a group of words; or a select juxtaposition of those words. Grasp of the varied ways in which dictum is expressed in case law, and how it is utilized in the analytic process, requires specific training, beyond mere recognition of the term.

5. *The All-Encompassing Conceptual Framework: A Lawyer's Vision.* None of the above-stated analytic components, or any other, has cohesive meaning unless applied in the context of a conceptual framework dictated by the subject matter. Construction of that framework is not about form, but rather *an identification of the governing law, and substantive comprehension of its inherent structure*. Students must develop the ability to recognize the relevant conceptual framework, and understand how analysis must work within that framework and span its entirety. The framework may be the elements of a common law cause of action, or those of a statutory provision, and the common law the vehicle for interpretation and application of each element of that provision. There may be a constitutional standard that governs, and a test that determines satisfaction of that standard.⁵³ In some instances, a straightforward framework may be lacking, in which case students must look beyond the articulation of prima facie elements, standards, tests, and the like, and toward the cumulative body of relevant law to glean a coherent analytic structure. This latter

⁵² See, e.g., *People v. Vollmer*, 299 N.Y. 347, 350 (1949). In *Vollmer*, the New York Court of Appeals rejected the prosecution's argument that defendant's use of his bare fists constituted assault with a "dangerous weapon." *Id.* In reaching its conclusion, however, the court stated that, by "dangerous weapon," the law "means something quite different from the bare fist of an *ordinary* man." *Id.* (emphasis added). Such choice of adjective later prompted another judge to observe, in a similar context, that "ordinary" itself invokes the precise opposite word, "extraordinary." *Owusu*, 93 N.Y.2d at 398, 411 (Bellacosa, J., dissenting) (citing *Vollmer*, 299 N.Y. at 350). "If the *Vollmer* Court had intended to exclude the fists of *any* person," Judge Bellacosa opined, "it would not have included the telling adjective." *Owusu*, 93 N.Y.2d at 411 (emphasis by the court). Thus, Judge Bellacosa indicated, "ordinary," by virtue of its very antonym, "leaves open the possibility" that the definition of "dangerous instrument" might encompass the fists of a "boxer" or "martial arts expert." *Id.*

⁵³ See, e.g., *Scott v. Harris*, 550 U.S. 372, 383 (2007) (stating the reasonableness of a seizure, under the Fourth Amendment, is determined by a balancing test between the right of the individual, on the one hand, and the governmental need to safeguard the public, on the other).

approach necessitates aggressive, sophisticated thinking on their part, and highlights even more the need for specialized analytic training.

In an analytic writing assignment, students' mere identification of issues and accompanying case law holdings, or recitation of cases one after another, or diversion from the issues altogether, is per se symptomatic of an insufficient substantive identification and grasp of the relevant conceptual framework. Those students are thereby unable to conceive of the role that the issues and cases play in the context of the bigger picture. Without the ability to formulate a conceptual framework, students lack a genuine grasp of the law and its application. With this ability, students gradually develop the beginnings of a *lawyer's vision*, whereby the experienced lawyer creates an instinctive, mental picture of the relevant framework, and how the other essential analytic components fit therein.

6. *The Decisive Influence of Presumptions, Burdens, and Standards of Appellate Review.* The elements of a conceptual framework do not function in a vacuum. Their application is necessarily influenced by other analytic concepts reflected in the common law, such as those addressed above,⁵⁴ as well as those of presumption, burden of proof, and standard of appellate review. Individually, or in combination, these latter concepts effectively can impose *the* determining weight when applied to a given case. Their unique influence deserves isolated attention in the students' education, as, in an advocacy context, arguments are readily made or broken based upon *appreciation of where the weight lies*.

For example, imagine a case addressing claimed government prohibition of the First Amendment right to freedom of speech.⁵⁵ The core conceptual framework that structures analysis of the issue includes two elements: (1) a government interest in prohibiting the speech; and (2) a prohibition tailored to that interest.⁵⁶ The degree of legitimate interest the

⁵⁴ See *supra* Section I(c)(1) – (5).

⁵⁵ Assume, for the sake of this hypothetical, that the speech does not lie within a category unprotected by the First Amendment, as defined by law. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (placing “defamation,” “obscenity,” and “fighting words” under that category) (internal quotes and citations omitted).

⁵⁶ See generally *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45–46 (1983) (discussing varying levels of scrutiny, in terms of assessment of government interest and permissible scope of prohibition, in the context of diverse government forums).

government must demonstrate, and the tailoring required, are contingent upon the problem presented.⁵⁷

Thus, suppose the prohibition allegedly restricts speech expressed in the context of a traditional public forum, and is allegedly content-based, thereby raising the presumption of unconstitutionality.⁵⁸ This presumption imposes upon the government the “most rigorous burden of justification,”⁵⁹ if the prohibition is so much as afforded consideration at all.⁶⁰ To meet that burden, the government must demonstrate a “compelling” interest, and the prohibition must be “narrowly drawn” in furtherance of that interest.⁶¹ Students must be trained to look *beyond a superficial articulation and perfunctory application* of this presumption and concomitant burden. Specifically, imbedded in their thinking must be the recognition that the presumption, and burden it imposes upon the government, is a pivotal factor in determination of constitutionality.⁶² So that, in furtherance of meeting their burden, counsel for the government must engage in intrinsic contrast and comparison of the details of the case at bar with those of case precedent. Their goal is to establish, from the government’s perspective, where the common law would draw the line between constitutionality and unconstitutionality in the case at bar. Counsel for the speaker must be prepared to do likewise, establishing their own position of where the line is drawn.⁶³ Training limited to spotting the issue and arriving at a blanket conclusion omits to lead students toward the requisite academic mastery essential to representation of the client.

Imagine, yet again, that a criminal defendant, on trial before a federal district court, objects to the prosecution’s introduction of spousal testimony, asserting the marital communications privilege. At issue is

⁵⁷ *See id.*

⁵⁸ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (stating content-based prohibitions to be presumptively invalid).

⁵⁹ *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting).

⁶⁰ *See Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (stating an ordinance that “slip[s] from the neutrality of time, place and circumstance into a concern about content” is “never permitted”) (internal quotes and citation omitted).

⁶¹ *Perry Educ. Ass’n.*, 460 U.S. at 45.

⁶² *See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (survey indicating application of strict scrutiny “most fatal in free speech cases”).

⁶³ Rather than provide a precise definition of compelling interest, the Supreme Court has relegated determination to the courts on a factual basis. *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1070 n.9 (1998) (Beezer, J., dissenting).

whether defendant's alleged communication was confidential.⁶⁴ The prosecution claims that it was not, and thus the privilege inapplicable. Subsequent to evidentiary hearing, *the judge concludes that defendant failed to meet the burden of proving confidentiality*. The testimony is admitted. Defendant is found guilty of the crime in question.

On appeal, the sole issue is the admission of the spousal testimony. The appellate standard of review of the court's ruling is abuse of discretion.⁶⁵ Such standard has pivotal significance in favor of the prosecution, based upon the deference afforded to the lower court determination.⁶⁶ Students, standing in the shoes of the prosecution, must, of course, so recognize, and argue accordingly. If the sole strategy of students representing defendant is to argue that the evidence presented warrants a diverse conclusion, with no specific effort to overcome the hurdle of deference, they are facing a heavy, uphill battle, which they are likely to lose.

Both sides need be aware of potential arguments that lie *beneath the standard of appellate review*,⁶⁷ but nonetheless affect its application. Thus, students for defendant must not lose sight of the law that governs the lower court's hand in making its determination in the first instance. They rather must assess the lower court's application of that law *in conjunction with* the standard of appellate review. For example, the law presumes marital communications to be confidential, and the burden, at the lower court level, is upon the prosecution to rebut the presumption.⁶⁸ The present hypothetical suggests that the court may have wrongly placed the initial burden on the defendant. One potential concern then becomes: Did the lower court commit an error of law by failing to recognize the presumption, and thus placed the burden on the wrong party? Moreover, in so doing, might the court have overlooked a lack of credible proof produced by the prosecution, thereby making a "clearly erroneous assessment of the evidence?"⁶⁹ If

⁶⁴ See generally *United States v. Marashi*, 913 F.2d 724, 729–30 (9th Cir. 1990) (stating the elements comprising the conceptual framework governing determination of the privilege).

⁶⁵ *Id.* at 729; *United States v. Singleton*, 260 F.3d 1295, 1301 (11th Cir. 2001).

⁶⁶ Under an abuse of discretion standard, the district court determination is afforded "large latitude." See *Moran v. Vermeer Mfg. Co.*, 742 F.2d 456, 458 (8th Cir. 1984).

⁶⁷ See *infra* Section II(B)(1)(b) (addressing the need to develop a dimensional understanding of an appellate court decision).

⁶⁸ *Marashi*, 913 F.2d at 730.

⁶⁹ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (stating that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law

defense counsel successfully so argues, that deference, otherwise readily afforded the lower court, is negated in its entirety, and the weight shifted in defendant's favor.

D. *Analysis and the Distillation Process: A Lawyer's Poetry*

The ultimate objective in analytic training is gradual focus on students' ability to assimilate law into their own thinking, and apply that law in a manner that, though substantively inclusive, is seemingly simple in expression. True mastery of legal analysis is evidenced by text that is pure in both thought and presentation. Yet, by very reason of its unadulterated state, that text is, at the same time, densely potent. This distilled product is a lawyer's poetry.

In the literary world, arguably the greatest poetry ever composed, instilling in our minds, hearts, and souls the most poignant and complex of ideas, itself often consists of the simplest expression of language and thought. This poetry is at once pure in its expression, yet potent in its content, undoubtedly owing to the relentless effort of the author in constant re-thinking and re-drafting.⁷⁰

The road to a law student's ability to achieve distillation in thought and expression is thus long. Students, at the onset of legal studies, are likely not even aware of such an intangible objective. This objective is made more formidable by the necessary technicalities, and overall difficulties, of legal study in the first instance. Students only can recognize and accomplish such objective over time, with experienced guidance throughout the process, consisting of intensive, repeated practice in a multitude of contexts. Even then, the road extends beyond the law school education into the professional world. The formal educational path to be paved along the way is addressed *infra*, from which the poet laureate ultimately shall emerge.

or on a clearly erroneous assessment of the evidence"); *Singleton*, 260 F.3d at 1301 (stating findings of fact underlying the determination of admission of evidence to be reviewed based on the standard of "clear error").

⁷⁰ The recognition of the relationship between the concept of distillation and poetry is inherent in the very title prefacing a collection of poems by a late French author. See GUILLAUME APOLLINAIRE, *ALCOOLS* (1913), reprinted in, *ALCOOLS: POEMS* (Donald Revell trans., 1995). "Alcool" is the French word for "alcoholic beverage." *Alcool*, LAROUSSE, FRENCH DICTIONARY (2011). Among alcoholic beverages are "distilled spirits," which are purified after fermentation through a process called distillation. *Alcoholic beverage*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/alcoholic-beverage> (last visited Feb. 9, 2019). They are hence, in their purified state, more potent in terms of alcoholic content. See *id.*

II. FROM THE SUPERIOR TO THE SUPERB

A. *Unity of Thought and the Creation of Synergy*

The question is then precisely how to enhance such a fine education as that currently provided in law school. Ideally, most, if not all, law school courses should be taught with increased, specific emphasis on analysis per se. As stated, time and the pressures of a voluminous syllabus often preclude the ideal in the context of the subject courses. Those professors that succeed in doing so nonetheless are to be profusely applauded, and those that do not must be encouraged to so strive. Undoubtedly, however, there are educators in law schools throughout the country placing supreme emphasis upon detailed analysis in whatever course they teach. At issue is the *extent* to which this education takes place, the *development* of analysis as a topic of study itself, and its overall *open recognition* in legal education. *To effectuate the requisite change, therefore, every member of the legal profession must be enlightened to the cause!*

Professors teaching the subject courses might devote at least one aspect of the students' examination to a question that poses a hypothetical in a procedural context. This approach tests the students' ability to understand just how the procedural context in which an issue arises affects its substantive disposition, instead of merely viewing all law in a vacuum. To take analysis yet one step further, a suggested examination model is as follows:

Students attend the examination equipped with their basic knowledge acquired in the subject course, and are presented with a hypothetical consisting of particularized issues new to them. They also are given relevant cases with which they are unfamiliar, or excerpts thereof, to assist them in their assessment of the new, particularized issues. The students are then asked to apply the basic law they studied in class, in concert with the new, more specific cases decided under the law, to perform an analysis and arrive at a conclusion regarding the merits of a claim.

The above combined knowledge of the basic law, with that derived from newly researched cases on point, forms the very basis of an attorney's analysis of the merits of a case: a method simple in approach, yet profound in substance. The suggested examination therefore provides an excellent forum to test the true depths of students' understanding of the law studied in

class, and their ability to stretch that understanding, in a new, wholly substantive, analytic context. *Most important, it signals to the students the degree to which analysis plays a role in furtherance of their developing the abilities of a practitioner.*

Professors teaching the subject courses, and those teaching analytic doctrine, should confer wherever advantageous to coordinate aspects of law and thought. They thereby create a conceptual unity among all the courses offered, to the extent practicable, in furtherance of that *synergy of learning* so necessary to the development of a complete legal mind. Just as analytic doctrine is central to every law school course, so too is every law school professor, to whom a student is entrusted, a permanent part of what should be the student's *one, cohesive, education experience.*

One means of coordination is for the professor teaching analytic doctrine to isolate a general topic that is the object of instruction in one of the subject courses. Then, in drafting a hypothetical, that professor focuses on a more specific issue, within that general topic, not covered in the subject course. Students are then required to research and perform a written analysis focusing on that isolated issue. In this manner, students have an opportunity to experience analysis of a specific issue, presented in one course, but in the context of the bigger picture, presented in the other, and be the better for it, in both courses. Students, however, only benefit in this regard if both professors, though acting independently, communicate with one another and are each aware of the other's instructional focus at a given time. From this awareness, a unity of discourse may evolve naturally between the two classes, involving students and professors alike, thereby creating the synergy. All that is required is openness of mind.

B. *Specialized Analytic Training: First Year and Beyond*

1. ***The Model Beginning.*** A legal writing course presents the natural model for specialized, professional analytic training, throughout the first year up to graduation. Its potential lies in a structure consisting of frequent, varied, and increasingly complex, written assignments, required throughout the year. In the context of these assignments, class lectures must provide intense instruction in analytic concepts and their significance. Additionally, discourse between students and professor must evolve with a view toward challenging students' analytic abilities. The purpose of this discourse is to both enforce what they have learned, and ever carry those

abilities *upward* toward the next assignment and beyond, *always with the professional standard in sight*.

Schools, however, must robustly acknowledge the central role of such course, and thereby convey to students the appropriate message regarding the weight it carries in their education. Unfortunately, the word “writing” is often misinterpreted. It suggests a course about form. Writing is certainly essential, as, in performing the task of expression, students gain further insight into analysis and the subject before them. Of course, they also remain with a documentation of their thinking. But that is just it: it’s about thinking as a lawyer. The structure of a discussion section of an informational memorandum of law or an argument section of an appellate brief, the basic documents drafted in a legal writing course, is far less about superficial appearance and organization as it is about *an intrinsic grasp of the underlying workings of the law*. Without such grasp, how are students to: identify the conceptual framework that governs the overall structure of their analysis; isolate the legal foundation that dictates the paragraphs contained within that framework; articulate the pertinent analytic components of supporting authority; and assess the significance of those components to the facts of their case, while arriving at conclusions each step of the way. Such is the general, core structure of legal writing, which, by very necessity, is rooted in substantive thinking in furtherance of the intrinsic case law analysis demanded in the practice of law. Very rarely, when a student approaches this author with a question about form, in any educational context, is it not instead purely and profoundly about substance. Failure to so recognize leaves the student’s question unanswered.

a. First Semester: The Professional Groundwork. There is extraordinary potential for enhanced development of analytic thinking in the first semester legal writing course alone. Students learn the most when professors stretch their inventiveness to the limits. To accomplish an in-depth understanding of the aspects of any analytic component of case law, one suggestion, as stated, is that individual writing assignments be designed to create a select emphasis on one or two analytic components at a time. One assignment may involve a hypothetical necessitating focus upon the role of the underlying reasoning of a statute, and its significance to statutory interpretation. Another may focus upon the recognition of dictum contained in a United States Supreme Court opinion, and how that dictum may influence the outcome of a future case. Students’ analytic journey might

require that they study the lower court decision that underlies an appellate opinion on point, to open their minds to procedure and the insight acquired in learning the entire history of a case. Imagination in the creation of assignments is often the best educator.

b. Second Semester: Advocacy as Multi-Dimensional Substantive Training. The second-semester appellate brief assignment represents, in many respects, the culmination of all analytic training the students have had for the year, in all courses. It thus occupies a position of great prominence among requirements of the first year. This assignment generally involves a confluence of two or more of the subject courses, procedure necessarily being one of them; however, a detailed, more sophisticated focus on isolated aspects of those subjects is required to advance an argument. Even oral argument, the culmination of the appellate brief assignment, represents so much more than just the formalities of addressing the court. It rather is a discourse focused on the distilled, pivotal issues of the case in controversy. This discourse is necessarily conducted between lawyers: the judge or panel of judges, on the one side, and the advocates on the other. Thus, in mock oral argument, analytic concepts, studied year-long, are embodied in the questions from the bench, and the responses from the student-advocates. Such concepts become personified in the minds of the students, leaving an indelible mark in their memory.

Additionally, in assuming the role of advocate themselves, students acquire a first-hand grasp of the textured substance underlying appellate court decisions, which largely constitute the class reading assignments throughout their law school experience. This grasp includes an insightful appreciation of the lower court determination underlying that of an appellate court, and how both lower court and appellate decisions are the product of a *dynamic of thought*, created by judge and advocates working within an adversary system. Students thus view the arguments of both sides submitted to the appellate court, the lower court decision, and the law that governed that decision, as all having a life of their own. They no longer regard the case book decisions that they read each day as two-dimensional writings, but rather the *multi-dimensional documents they are meant to represent in the law*. Such, in part, is why additional instruction in analysis, from an advocacy perspective, is required beyond the first year: to re-enforce that

multi-dimensional insight, and expand upon it.⁷¹ Most crucial, over time, students come to appreciate that, as advocates, they are an impetus for growth in the law. By advising the panel of judges of their position, in their role as officers of the court, advocates influence judicial decisions in a way that ultimately may change the tide of precedent. *The better the advocate's analytic abilities, and consciousness of the gravity of that role, the potentially wiser and more responsible the influence.*⁷²

It is thus essential, based upon the sterling significance of the appellate brief assignment, that ample time be devoted to one-on-one analytic discourse between professor and student to open the student's mind to the multi-dimensionality of the law, both in the context of the specific moot court problem before them, and all other aspects of their legal study. Here is where the professor's assumption of the role of senior partner, providing a guiding legal hand, and, at the same time, playing devil's advocate, is the most critical; and where the discourse between professor and student evolves into the professional.

2. *Every Step Thereafter.* To lay the optimum analytic foundation for students' entry into the legal profession, courses devoted to analysis per se must be developed and incorporated into the remainder of the law school curriculum. To the extent practicable, they should be mandatory to afford each student the same advanced training. *Without reinforcement and development of the analytic instruction conducted in the first year, a significant portion of students' first-year training fades from memory, and their ability to attain the optimum advancement in analytic thinking, which academia has the unique potential to offer, is far less.*

Courses that follow the first year should enhance upon the first-year model, gradually tailored to students' continual advancement, but otherwise varied based upon the individual professor's creativity. A syllabus may include, for example, more complex legal topics. As analysis transcends topic boundaries, the professor is not limited to one subject, but can pick and choose among unique and thought-provoking aspects of a *multitude* of subjects. Indeed, repeated practice in the application of analytic concepts, but in the context of constantly diverse topics, better assists students in their grasp of those concepts. *The advantage of diversity is that, with each new*

⁷¹ See *infra* Section II(B)(2) (discussing instruction beyond year one).

⁷² See *infra* Section III(B) (discussing the role of analytic training in development of maturity in judgment and ethics).

assignment, students bring to the table abstractions with which they are already familiar, but are presented with a topic that provides a fresh insight into application of those abstractions. This advantage is present in the first year as well, but becomes increasingly more beneficial as students advance, for they have increased knowledge and experience upon which to build, while the foundation laid in the first year is yet fresh in their minds. *The opportunity to build, and build, upon excellence is why continued instruction in analytic doctrine is so important each year of the law school education.*

The professor also may direct, in the context of an advocacy assignment, that students take the side of defendant, and then switch over to plaintiff, and then assume the role of judge. The assumption of diverse roles, but in the context of the same problem, teaches students first hand that attorneys' substantive command of their own position is dependent upon a comparable command of that of their adversary. Moreover, in embracing the perspective of judge, the bird's eye view, they can better recognize the relevant merits and flaws of both sides, and the distilled, pivotal issues hanging in the balance. As judge, they also experience directly the substantial influence of advocates in the decision-making process. Thus, students' understanding is turned inside out, backwards, forwards, upside down, and sideways, and thinking as a lawyer, with all the layered complexities that entails, begins to feel like second nature.

Analysis is by no means limited to the litigation context. Assignments can be created to dissect the role of analysis in, for example, creating a will, drafting and negotiating a contract, taking a deposition, or defending one. *The express expansion of analysis to all lawyerly tasks instills in the minds of soon-to-be graduates an all-encompassing appreciation of the level of requisite thinking that is right on target with the practice of law.*

Class discourse on the inner-workings of the pertinent law and each student's role in drafting the assignment continues to be of profound significance. Moreover, individual student-professor conferences, at this advanced stage of learning, not only enforce students' grasp of the assignment, but provide an opportunity to guide students in charting their *own* analytic path in reaching a conclusion. No one written analysis, though based upon the precise same law and facts, is identical to any other, nor should it be. From individuality comes increased insight, which leads to

enhancement of the living law. One-on-one conferences therefore assist students in honing their own, unique imagination as lawyers. They thereby recognize themselves capable, not only of grasping the law presented, but reaching beyond the basic understanding of analysis acquired in the first year, into the depths of independent thinking. That same imagination that makes the best educators, also makes the best practitioners, judges, and overall leaders.

When students begin their work in the profession, they may be fortunate enough to have a superior with the willingness, and sparing amount of time, to guide them analytically in their maturity as lawyers, or they may not be so fortunate. Even directors of law school clinics, which provide valuable instruction in many aspects of legal representation, likely find themselves in a position similar to that of the busy practitioner and jurist. Their primary concern is producing work and meeting deadlines, in furtherance of serving the public. Under such circumstances, there is little opportunity to provide the analytic instruction available in a purely scholastic environment. Students thus need at least to experience that instructional relationship in the formal law school context, with a professor in that role of senior partner, as long as possible. To the extent such mentorship is absent from their professional work environment, they may draw from that optimal, in-school experience to stand them in good stead.

III. BENEFITS TO THE PROFESSION

A. *The Passion of the Living Law*

Aside from the fact that instruction in analytic doctrine releases better academically trained lawyers into the world, it also serves yet greater, more poignant purposes to the profession as a whole. For one, education in analytic doctrine promotes passionate thinking at the onset of a lawyer's career, an attribute essential in every profession. Students must be mindful that, underlying the court decisions that have shaped the image of justice in this country, are likely briefs submitted by counsel with sensitivity to common law analysis in a manner leaps and bounds beyond a definitional knowledge and reflex application. Analytic training potentially opens our minds to a heart-felt vision of not just what the law *is*, but what it *could be*, for the benefit of our society. Such is what the concept of the living law is all about.

B. *Maturity and Ethics*

The most important aspect of analytic doctrine is that it provides a significant medium for the development of the maturity in judgment and legal ethics essential to every individual entering the profession. No young person, no matter how serious-minded and conscientious, enters law school fully grasping the weightiness of the responsibility of providing legal representation to another human being.⁷³ That level of maturity is acquired over time, if at all, and only with the fullest of instruction. Pronounced training in analysis assists students in recognizing the various legal positions they may embrace on behalf of a client, and choosing the ones most viable from the perspective of technical knowledge, strategy, and justice. Most significant, however, they must learn that there are some arguments that they are *obliged* to recognize as lawyers, within ethical boundaries, in furtherance of competent representation. Such recognition is required regardless of whether they are on what they perceive to be the winning side or losing side of a case, and is essential to the function of our adversarial system.

This training in professional responsibility applies to all lawyerly occupations. There is no area within the vast confines of the legal profession that does not require the sensitivity to right and wrong, and to lawyerly purpose, that analytic doctrine assists in cultivating. Students must be presented with the reality of the all-encompassing obligation they face, in furtherance of developing the character and fitness that is the key to entrance into the practice of law. Thus, instruction in analytic doctrine opens an avenue of necessary learning that might otherwise only be addressed tangentially, and not in the repeated context of actual substance, as all legal education must be.

CONCLUSION

Contrary to what the title of this paper suggests, the consummate legal education is not achieved in any law school, regardless of how fine the curriculum, as that curriculum already is, or as it could be. As lawyers, not only do we *teach* from the perspective of the learner, we are necessarily *learners ourselves* all our professional lives, in our never-ending pursuit of

⁷³ See *supra* Section II(B)(2) (regarding the ethical responsibility of advocates as impetus for change in the law).

command of the law. Such pursuit is what makes this profession so challenging and so fulfilling to so many, and the passion that is the impetus for that pursuit of knowledge benefits society-at-large.

The enhanced analytic training pronounced herein, however, provides the future generation of lawyers with a *stronger lawyerly foundation*, enabling them to strive all the better in that eternal quest for the consummate legal education, and to convey their superior abilities to generations that follow. Consequently, the legal profession itself benefits further in the process, and so too the public that it serves each day. The quality of that service must be, after all, the ultimate concern of every law school. Academic acumen, that passion for the law, maturity, and ethics, attributes essential for entrance into this profession, are all emboldened by improved emphasis upon the analytic core of legal education.

To provide such lawyerly foundation, we must bridge the antiquated rift between the law school institution and the practicing bar, to the extent that rift prohibits the student's access to the full breadth and depth of analytic training. In eliminating this rift, we elevate the analytic discourse to its optimum level, and thereby build upon the foundation that Christopher Langdell laid when he showcased an approach to teaching law all those years ago. Thus, the enhancement of the role of analysis within the law school curriculum is not merely a hypothetical means of legal education, nor is it an alternate means; it rather lies at the very heart of the case law method, and most important, paves the life-long path of a lawyer.