

## BACK TO THE FUTURE IN LAW SCHOOLS

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### I. INTRODUCTION

It was a pleasure participating in the Symposium on the Profession and the Academy: Addressing Major Changes in Law Practice and hearing thoughtful (and interesting) people discuss the future of my professions—the practice and teaching of law. Of particular interest was the willingness of participants to talk about law in contexts other than BigLaw<sup>1</sup> and “T14”<sup>2</sup> schools.<sup>3</sup> No doubt that was partially due to

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1. There has been much discussion lately about the viability of the traditional BigLaw business model. *See, e.g.*, Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2088 (2008) (examining the long-term effects of introducing external market forces into the legal industry). Many have predicted its demise to some extent. *See generally, e.g.*, John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67, 68–70 (2009) (suggesting that large firms will continue to shrink and dissolve because of their collective participation in what has increasingly become a “winner-take-all” market); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (arguing that the recent downsizing of large firms is due more to a fundamentally flawed business model than to a shrinking economy and predicting dire consequences for firms that fail to adapt to changing corporate environments). I believe that prediction is unlikely because the doomsayers overlook several factors. First, the cost of lawyers in a large business transaction is small in comparison with the cost of other players in such an exchange—especially investment bankers. *E.g.*, CHRIS RISEY, WHITE PAPER: INVESTMENT BANKING FEES EXAMINED 4 (2009), available at <http://www.lanternadvisors.com/InvestmentBankingFeesExaminedWhitePaper.pdf> (noting that, on average, when companies employ financial consultants at fee rates typical of corporate law firms, “the total cost of the same service with a positive result is a fraction of what investment bankers charge”). Clients dealing with very large sums of money are not going to concern themselves with this sort of “loose change.” Second, a client does not have to worry about being second-guessed if she chooses a prominent firm like Wachtell, something all too likely to happen if disaster strikes while using legal talent with a less prestigious name. Third, prestige itself counts. What general counsel at a meeting of museum trustees wants to admit that her company uses Dewey Cheatham & Howe? In short, as companies start making large profits again, they will become less concerned with cost and more concerned with reputation.

2. “T14” refers collectively to the fourteen schools that consistently place at the top of annual law school rankings. Martha Neil, *Yale’s Still #1 in Latest U.S. News Rankings; Harvard, Stanford, Columbia & Chicago Follow*, A.B.A. J. (Apr. 15, 2010, 12:09 AM), [http://www.abajournal.com/news/article/law\\_school\\_rankings/](http://www.abajournal.com/news/article/law_school_rankings/). Recently, critics who doubt whether law school makes economic sense as an investment have questioned the continued willingness of persons to apply to law school. *See generally* Neil J. Dilloff, *The Changing Cul-*

the Symposium's location in Baltimore, but it nevertheless helped remind us that most lawyers do not practice at Skadden or Cravath and that most lawyers receive their education at schools other than Harvard or Yale.

The Symposium took place during a time of great uncertainty in the legal profession with many observers calling for radical changes in the ways that law schools and law firms function. This Essay will concentrate on law schools by discussing the future of legal education.

There have been endless calls to prepare law students better. The calls for change seem to have accelerated in recent years, perhaps receiving some impetus from the desperation caused by the economic crisis. The suggestions for change that follow those calls generally make eminent sense, although they often seem aimed at helping students achieve employment with large law firms,<sup>4</sup> where most will be performing very simple work in their first couple of years.<sup>5</sup> The main problem with these suggestions is that they cannot all be accommodated within a three year curriculum (and I will resist the urge to redo the entire format of legal education from scratch in this Essay).

Therefore, rather than focus on the many subjects and skills that might be nice to include in the required curriculum, I shall examine the work that almost all lawyers perform<sup>6</sup> and suggest how law schools can best prepare students to perform these tasks.<sup>7</sup> That examination leads me to conclude that there are some historical truths in legal

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*tures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341 (2011) (noting that the recent economic recession has raised questions about the value of a law degree); Alex Williams, *No Longer Their Golden Ticket*, N.Y. TIMES, Jan. 15, 2010, [http://www.nytimes.com/2010/01/17/fashion/17lawyer.html?\\_r=1&em](http://www.nytimes.com/2010/01/17/fashion/17lawyer.html?_r=1&em) (discussing the depreciating value of a legal education and explaining that "associates do not just feel as if they are diving into the deep end, but rather, drowning"). I have serious reservations with this argument. Apart from concerns about the accounting assumptions underlying its logic (for example: If there are no jobs for recent college graduates, why should we worry about foregone income?), I also doubt its validity. First, the argument overlooks the prestige value of a Juris Doctor, not just to the recipient but also to her parents; choosing to attend law school, in other words, is not a purely economic decision. Second, Americans seem to be an optimistic lot; even if I (a prospective student) believe that law school will not make economic sense for most, I believe that I am better than most; as a result, law school looks good to me.

3. See, e.g., Ward B. Coe III, *Profound "Nonchanges" in Small and Midsize Firms*, 70 MD. L. REV. 364 (2011).

4. See Dilloff, *supra* note 2, at 342.

5. No one seems willing to address the question of how one prepares very able students for the utter drudgery of document review, a dreary task that will befall many of them in the early years of their career.

6. See *infra* Part II.A.

7. See *infra* Part II.C–D.

education. After reviewing these eternal verities, I discuss a worrying development in legal education.<sup>8</sup>

In short, law schools have been very successful institutions for many decades, and any reform of legal education should begin with preserving what has worked so well.

## II. WHAT LAW SCHOOLS DO WELL

### A. *What Lawyers Do*

I start with two premises. First, a lawyer's basic job is to solve legal problems for clients.<sup>9</sup> Lawyers do much in addition to, or even instead of, problem solving for others, but it is this task in particular that separates the legal profession from other callings.<sup>10</sup> Second, law schools should train students to solve problems for clients.<sup>11</sup> Together, these premises help clarify what is essential to every law student's training: she should acquire an understanding of those basic legal concepts that are used in every area of the law, and she should develop the professional skills needed to represent a client. Lawyers perform an infinite variety of tasks that require an enormous range of skills and the knowledge of subjects ranging from admiralty to zoning. Further, not every area that is trendy now will be so in the future, and many areas unheard of today will become important over the next few decades. Accordingly, law schools cannot hope to prepare students for everything they might encounter in practice, especially when those areas may not even be known at the time the students are in law school. For these reasons, it is useful to think about what we as educators can do to prepare students for the world they will meet—not only upon graduation but also for many years into the future.<sup>12</sup>

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8. *See infra* Part III.

9. For an objective validation of this assessment that notes in its introductory description of the occupation, "[w]hether acting as an advocate or an advisor, all attorneys . . . apply the law to the specific circumstances faced by their clients," see U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 257 (Library ed. 2010–11) [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK].

10. I hope that statement is self-evident, but here is a bit of elaboration: Only lawyers, of course, can (formally) advise on the law, and that advice is rarely given in the abstract; rather, it is given in response to a client's request for legal advice in the context of a problem that needs resolution. *See generally* Michelle M. Harner, *The Value of "Thinking Like a Lawyer,"* 70 MD. L. REV. 390, 417 (2011) ("Lawyers do not just dispense rote legal advice. Not every client has the same legal issues, and even those with similar issues often require individualized advice.").

11. This objective is often measured in terms of how well a graduating student can "think like a lawyer." *Id.* at 392.

12. In this Essay, I do not seek to be comprehensive but, rather, to give some strongly held, but incomplete, views on the best direction for legal education. For a discussion of

These fundamental premises and what follows from them lead me to conclude that we should train students in the basic concepts that underlie vast areas of our law and that cut across many different disciplines. I will now examine the traditional first-year curriculum, long thought to be one of the glories of American higher education.<sup>13</sup>

*B. Essential Foundations in the First-Year Curriculum*

I have taught more than two dozen courses over almost four decades of teaching. No matter what the course—art law, business associations, conflict of laws, or European Union law—the material demands an understanding of the traditional first-year basics: civil procedure, contracts, criminal law, property, and torts. This is not surprising for those courses deal with the most basic concepts we lawyers need to master in order to deal with the world around us.<sup>14</sup> Expressed somewhat differently, if a law student understands the material from her first-year courses, then she will likely not be surprised by what she later encounters in apparently unrelated areas of the law. This is why, for instance, the early venturers in environmental law could draw on their experiences in tort<sup>15</sup> and constitutional law,<sup>16</sup> not to mention the highly relevant concepts that they learned in their property courses.<sup>17</sup>

Consider contract law, a subject that deals with how we as individuals order the world around us, especially the economic world.<sup>18</sup> The

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selected measures aimed at helping to achieve this ambitious undertaking, see *infra* Part II.B–D.

13. See, e.g., Nelson P. Miller & Heather J. Garretson, *Preserving Law School's Signature Pedagogy and Great Subjects*, MICH. B. J., May 2009, at 46, 46 (asserting that “first-year subjects are the foundation of our society” and that the first-year curriculum teaches “the universal doctrines that exist in varying degrees and varying forms in most ordered societies”).

14. Cf. Patrick E. Hobbs, *Guidelines for Quality Legal Education Across the Globe*, 43 S. TEX. L. REV. 727, 730 (2002) (citing these courses as a “necessary foundation in common law”).

15. See generally, e.g., Marshall S. Shapo, *Tort Law and Environmental Risk*, 14 PACE ENVTL. L. REV. 531, 531 (1997) (“[T]ort is an important element in the social response to environmental hazards.”).

16. See generally, e.g., Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 204–06 (1974) (undertaking an early examination of environmental protections flowing from the U.S. Constitution).

17. See generally, e.g., Kirsten Engel & Dean Lueck, *Property Rights and the Environment*, 50 ARIZ. L. REV. 373, 373 (2008) (“The importance of property rights in determining the use and value of environmental assets has been noted by both economists and legal scholars since the middle of the 20th Century.”).

18. See generally CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 2 (2010) (noting that “[m]any of the transactions you encounter in your own daily life are grounded in contract, and the principles of contract law pervade many other areas, including commercial, consumer, family, property, and corporate law”).

study of contract law necessarily includes learning about the world of commerce, of course, but it also goes much further, including such matters as the tension between efficiency and fairness, reflections on free will, and much more.<sup>19</sup> These concepts have relevance for law that deals with business relations, of course, but they also extend beyond the world of economic transactions into all agreements involving private citizens.<sup>20</sup> Prenuptial agreements provide a good example of contract law bringing order to the nonbusiness world.<sup>21</sup> In short, a deep understanding of contract law is essential for many aspects of a lawyer's job.<sup>22</sup>

The same can also be said of the other first-year courses. For example, tort law, the study of how private citizens deal with one another on a nonconsensual basis,<sup>23</sup> pervades our entire legal world.<sup>24</sup> Tort issues, such as liability for defective products and defamation, are relevant to our private lives as well.<sup>25</sup> In addition, agency law, so fundamental to the business world, is an amalgam of tort and contract law that is relevant and important to the everyday practice of law. For these reasons, tort law should also be included as a core part of every student's legal training.

Although property law is perhaps the least obvious of the first-year courses that deserves retention in the core curriculum, it too supplies many of the basic building blocks for a proper grounding in the

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19. Especially interesting is the contrast contract law provides between ostensibly fixed rules—such as the “rule” that conditions must be complied with literally—and the messy exceptions to such rules—such as substantial performance and waiver—that the law has developed to permit judges to do justice in individual cases. This contrast makes for fascinating class discussion.

20. See, e.g., DAVID G. EPSTEIN ET AL., *MAKING AND DOING DEALS: CONTRACTS IN CONTEXT* 6 (2d ed. 2006) (noting that “[i]n a democratic society, contracts and contractual relationships permeate almost every aspect of day-to-day life” and that “[b]usiness and commercial dealings and relationships . . . are fundamentally contractual in nature”).

21. E.g., *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (“Prenuptial agreements are contracts and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.”).

22. See EPSTEIN ET AL., *supra* note 20 (explaining that because contract law “touches virtually every field of legal practice,” “every lawyer must be conversant with, and every law student must have exposure to, the basic rules and principles of contract law”).

23. See HARRY SHULMAN ET AL., *CASES AND MATERIALS ON THE LAW OF TORTS* iii (5th ed. 2010) (explaining that tort law is concerned with human relationships and physical harms).

24. See, e.g., Jeremy Friedman, Note, *Prying Eyes in the Sky: Visual Aerial Surveillance of Private Residences as a Tort*, 4 COLUM. SCI. & TECH. L. REV. 3, 3, 18 n.48 (2002) (explaining “privacy tort law” and noting that it “gained widespread acceptance by 1960”).

25. See, e.g., Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 93 (2002) (explaining that “[t]ort rights and remedies are rapidly evolving to confront information age wrongs such as online defamation”).

law. In property, students learn about the relationships among persons with respect to things,<sup>26</sup> a concept that arises in other areas such as family law (concurrent ownership)<sup>27</sup> and business organizations (tenancy in partnership).<sup>28</sup> Property concepts remain relevant in our digital times, as the debates over claims of right in Second Life<sup>29</sup> and with respect to issues of personal privacy<sup>30</sup> illustrate.

A student who has mastered the traditional law school core curriculum is not likely to be surprised (or overwhelmed) by anything she meets in practice. Mastery, however, requires more than exposure to doctrine, and we do not discharge our duties to our students without demanding that they really grapple with, for instance, the problems of contract law over an extended period of time. Mastery of a subject requires more than rote learning; it demands an understanding that comes with constant exposure to the problem.<sup>31</sup> Unfortunately, most law schools have cut back the number of credits allotted to basic courses to accommodate more trendy curricular offerings.<sup>32</sup> I believe this to be a mistake<sup>33</sup> given the importance of these traditional, core courses for law students and new attorneys.

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26. See generally JESSE DUKEMINIER ET AL., PROPERTY xxxi (6th ed. 2006) (“To study property is to study social history, social relations, and social reform.”).

27. See Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 797 (2001) (exploring the concept of “concurrent ownership of real property,” including “family residences”).

28. See Daniel S. Kleinberger, *The LLC as Recombinant Entity: Revisiting Fundamental Questions Through the LLC Lens*, 14 FORDHAM J. CORP. & FIN. L. 473, 476 (2009) (explaining that the oldest version of the uniform business act “characterize[d] the partners’ relationship to the means of production as ‘tenancy in partnership’”).

29. See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 595 (E.D. Pa. 2007) (“This case is about virtual property maintained on a virtual world on the Internet. Plaintiff . . . claims an ownership interest in such virtual property.”). Second Life is a virtual Internet world in which users interact with each other through individualized avatars. *What Is Second Life?*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (last visited Dec. 23, 2010).

30. See, e.g., *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 655 (N.J. 2010) (holding that plaintiff-employee could reasonably expect personal e-mails exchanged with her attorneys, but sent from her work-issued laptop, to remain protected by the attorney-client privilege).

31. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 55 (2007) (differentiating between “[k]nowledge” and “[u]nderstanding” and explaining that the latter “indicates a higher level capacity to work with, manipulate, and apply knowledge including in unfamiliar situations”).

32. Cf., e.g., Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL’Y 267, 397 (2000) (explaining that since the 1970s, professors, judges, and lawyers “have complained about the apparent easing of grading standards, the dilution of traditional course content, the introduction of trendy new electives, and the retreat from the rigorous law teaching methods of glorious yesteryear”).

33. I confess to supporting a reduction in credit for the first-year courses a few years ago. I can still justify the particulars, but I will not try. I recant, clad in sackcloth.

*C. Beyond the Traditional*

The law and legal profession do change, however, and those changes require some rethinking of the basic curriculum. Given recent changes, constitutional law is one candidate for addition to the traditional core curriculum. When I was a law student in the late 1960s, I was told that an attorney could only make money practicing constitutional law by handling interstate tax cases. Those days are long gone, thanks to the activism of the United States Supreme Court over the last half century and the consequent intrusion of constitutional law into everyday life. As a result, I would place constitutional law into the same category as contracts or torts as a subject that should receive deep and careful treatment in law schools.

Another popular candidate for inclusion in the core curriculum is a course that includes the word “international” in its title.<sup>34</sup> Although there seems to be a consensus that globalization demands such an offering,<sup>35</sup> I am not sure how thoughtful that consensus is. The question that should be asked is how a particular course in international law will serve as a foundation for much of what many students will do in practice. Few law school graduates, however, will be working in international law,<sup>36</sup> so unless our only goal is to train good citizens (and I certainly think this is part of our mission), such a course should not be required.

More promising perhaps is trade law, but, again, because so few law school graduates will actually work with tariffs and the World Trade Organization, trade law is not a good candidate for inclusion. I am decidedly not saying that these courses should not be taught (I have even taught some myself), but simply that they should not be included in the core curriculum.

A better candidate for inclusion might be a comparative law course that deeply exposes the student to the workings of another le-

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34. See, e.g., Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 276 (2003) (noting that many law schools—including University of Michigan, Georgetown, Columbia, and University of Chicago—are beginning to incorporate an international offering in their law curricula).

35. See, e.g., Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267, 273 (2006) (explaining that “the consensus of the participants [at “a workshop on globalizing the law school curriculum”] was in favor of introducing international, transnational, and comparative law issues into the core curriculum”).

36. Cf. Jim Dunlap, *Where Are the Jobs in International Law?*, NAT'L JURIST, Nov. 2009, at 18, 23 (“[T]he relative dearth of opportunities to launch right into an international law position after graduation makes it more likely that international law will be an acquired skill set.”).

gal system.<sup>37</sup> The trouble is that the most relevant countries for such comparisons—the European Union, Canada, and China—are so different from one another that what is learned through individual comparisons to the United States would be difficult to transfer to the other contexts.<sup>38</sup> If an internationally flavored course is to be added, then administrators and professors must decide on courses that will prove applicable to most first-year students in their legal careers.

*D. Professionalism, Problem Solving, and the Socratic Method*

Teaching is about more than doctrine. A good law professor should also inculcate a sense of professionalism in her students. The professor must first set a proper example. This is not just a question of showing up on time and being prepared, although these are of course important attributes. Respect for others and a willingness to admit that you are wrong or do not know the answer are also markers of a consummate professional. A professor who properly sets an example of professionalism can then demand that her students act accordingly.

We teach doctrine and policy in our courses, but we should also teach problem solving, which is what lawyers do for their clients.<sup>39</sup> The teaching of problem solving should happen naturally, in the course of things. Hypotheticals thrown out in class along with problems found in the course casebook force students to think about

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37. See Gevurtz et al., *supra* note 35, at 273–75 (explaining that participants in a globalization and curriculum workshop endorsed revisions in curricula that would incorporate comparative law classes).

38. See JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM I (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf) (“Civil law is the dominant legal tradition today in most of Europe . . . [T]he law of the European Community [is] in large part the product of persons trained in the civil-law tradition.”); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 22 (1997) (“[C]ontract law can be compared within the Western legal tradition because its market economies are relatively homogeneous. However, the same assumption cannot be extended across the great families (for example, German law vs. Chinese law) without first taking into account the underlying political, economic, and cultural conditions.”); *Alphabetical Index of the Political Entities and Corresponding Legal Systems*, JURIGLOBE, <http://www.juriglobe.ca/eng/sys-juri/index-alpha.php> (last visited Dec. 24, 2010) (noting that Canada, except for the province of Quebec, is a common law country and that China is largely a mix of civil and customary law).

39. I see little use for a stand-alone course in “problem solving.” The skill is context-dependent and lends itself very well to traditional classroom techniques. Harvard apparently has started a stand-alone course in the area. That comes as no surprise. *2010–11 Course Catalog (Print View)*, HARV. L. SCH., <http://www.law.harvard.edu/academics/courses/2010-11> (last visited Dec. 24, 2010) (listing seven “Problem Solving Workshop” sections and an advanced seminar in “Problem Solving”).



applying law and policy to different sets of facts.<sup>40</sup> This, however, is not enough. It is of particular importance that teachers involve students in actively working through the factual variations. The best way to do so is by calling on students and encouraging them to wrestle publicly with the problem, just as they will do in practice.<sup>41</sup>

Clearly, I am endorsing the Socratic method, a teaching technique that has become increasingly less fashionable during my tenure as a teacher.<sup>42</sup> I strongly believe in using the Socratic method, especially in first-year classes. It serves many purposes, chief among them to ensure class preparation, to keep students focused on the material at hand, and to bolster student self-confidence. I use other teaching methods as well—especially short, usually impromptu, lectures—but I firmly believe in calling on students in class.<sup>43</sup> Still, whether learned Socratically or otherwise, professionalism and problem solving are clearly vital for all new attorneys in the public sector and private practice.

### III. A CONCERN ABOUT THE PUBLIC/PRIVATE LAW DISTINCTION

Although I have many concerns about the future of legal education, the concerns I shall share involve a preoccupation in legal academia with questions of public law—generally in the contexts of international and constitutional law, as well as jurisprudence.<sup>44</sup> Oddly enough, few law students will practice in these areas;<sup>45</sup> rather, most

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40. See STUCKEY ET AL., *supra* note 31, at 158 (explaining that grappling with hypotheticals “requires [the student] to recall and consult more material, and it requires him to replicate the deductive process that governed an earlier case by applying the process to a new set of facts” (alteration in original)).

41. Of course, this is also more fun for the professor—and a lot more work than preparing a lecture.

42. See, e.g., Robert J. Rhee, *The Socratic Method and the Mathematical Heuristic of George Pólya*, 81 ST. JOHN’S L. REV. 881, 881–82 (2007) (“The Socratic method, once the staple of legal teaching and perhaps the popular conception of the law classroom, is declining in popularity and use.”). Even the term has become something of a conundrum, for it has been used to describe a wide variety of teaching methods and it is often associated with classroom nastiness. That should not be part of the Socratic method—Socrates was never nasty.

43. I have come to recognize that not all teachers handle the Socratic method well, so a mix of teaching techniques is probably in the best interest of most students.

44. See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1210 n.39 (1998) (explaining that preoccupation is generally concentrated in the public law areas of constitutional law, administrative law, and legislative studies, rather than criminal law).

45. See generally Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 L. & SOC’Y REV. 851, 851 (1996) (explaining that while a significant number of law students indicate that they are interested in public interest law, “[this] interest wanes significantly during law school”).

will practice business law, litigation, or criminal law.<sup>46</sup> I shall discuss two aspects of this dichotomy: Why I believe it might be a problem, and how it arose in the first place.

A. *Why Worry?*

There can be little doubt that many areas, such as commercial law, have been relegated to second-tier status at many law schools, especially the elite schools.<sup>47</sup> The shift to a law school focus dominated by public law concerns has been accompanied by a corresponding decline in the importance accorded private law.<sup>48</sup> This decline has been most marked in commercial law,<sup>49</sup> but it surely is present in other areas in which students will practice, including real estate transactions and estate planning.<sup>50</sup> This shift has been most prominent in the elite schools, a phenomenon well documented by Professor Larry Garvin,<sup>51</sup>

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46. Cf. Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403, 426 (2007) (“At most schools, a large percentage of the students wish to enter business law, whether as litigators or dealmakers.”).

47. See Kerry L. Macintosh, “*We Have Met the Enemy and He Is Us.*,” 26 LOY. L.A. L. REV. 673, 673–75 (1993) (criticizing law students, practitioners, and academics for “undermin[ing] the intellectual vigor and practical efficacy” of the Uniform Commercial Code (“UCC”) and explaining that UCC courses receive a “relatively low position . . . in the law school hierarchy”); Nate Oman, *Commercial Law and the Law School Curriculum*, CONCURRING OPINIONS (Mar. 15, 2007, 9:00 AM), [http://www.concurringopinions.com/archives/2007/03/commercial\\_law.html](http://www.concurringopinions.com/archives/2007/03/commercial_law.html) (asking whether law schools should offer UCC courses and commenting that Harvard Law School did not offer such a course while the author was there, as far as he could remember).

48. See MARY ANN GLENDON, A NATION UNDER LAWYERS 217 (1994) (noting that “[a] commonality among contemporary law professors concerns their [negative] attitudes toward the practice of law, especially private practice” and that “[s]uch attitudes not only have widened the separation between the academy and the bar; they have also created an unfortunate gap between the interests of professors and the concerns of students” (citing JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 14 (1992))).

49. See Garvin, *supra* note 46, at 404 (suggesting that commercial law is “[a] d[ying] field”).

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50. See Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 REAL PROP. TR. & EST. L.J. 385, 387–88 (2009) (explaining that a study in the late 1990s reviewed law school syllabi and discovered that there were “significant reductions in real estate transactions and estates classes” (citing Roberta Rosenthal Kwall & Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205 (1997))). Corporate law is the only area of business law that seems to have survived rather well. I am not sure why this is so, though perhaps, I think, it can be traced to the fact that corporate law seems to attract people with strong backgrounds in economics, an academic subject.

51. See *generally* Garvin, *supra* note 46. Garvin describes the situation, which he argues is perpetuated by law schools, as a catch-22: “For the finest schools to say that they will not hire in commercial law because there is no one good enough, and then not to produce people good enough because they offer no classes, is—well, convenient, perhaps, but also irresponsible and unworthy.” *Id.* at 425.

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but I suspect it is a problem at all levels of the academy as the “lesser” schools copy the elites in the never-ending struggle to increase their place in “The Rankings.” Courses in those areas are increasingly taught by adjuncts and by those we in the academy call “true” visitors—those who come to a school to teach for a limited time but do not expect to be hired permanently.<sup>52</sup>

This is not a knock on the adjuncts and visitors. They can be fired, and, as a result, they often are very good in the classroom—sometimes better than regular faculty members.<sup>53</sup> But, there is a lot to be said for having tenure-track faculty teach courses in the areas of law in which students will practice. Those who write about a specific subject tend to develop a broader view, which includes more theory, history, and connections with other disciplines. This broader view, I believe, helps students develop a better understanding of the subject, even if the tenured professor is not as skilled in the classroom as the adjunct.<sup>54</sup>

Moreover, a school sends a message to students when it staffs a subject with faculty members who have less academic prestige than those who teach in other fields. That message, of course, is about the relative importance of the subject, and it can have unfortunate consequences, perhaps leading students to look elsewhere when making career choices.<sup>55</sup>

Staffing areas such as estates and trusts or commercial law with adjuncts also means that the scholarship in those fields might suffer. This is because adjuncts and related short-term professors are not ex-

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52. See *id.* at 413 (“Commercial law may thus be edging toward an academic netherworld, with adjuncts valued as much as regular faculty.”); John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in 2 *PRESSING PROBLEMS IN THE LAW: WHAT ARE LAW SCHOOLS FOR?* 1, 6–7 (P.B.H. Birks ed., 1996) (noting an increase in the use of practitioners to teach courses that have “an intensely practical component,” such as “taxation, securities, commercial law, banking, [and] employment law,” and to serve as clinical professors).

53. See Dilloff, *supra* note 2, at 359 (arguing that the frequent use of adjuncts is advisable because of their “real world experience”); David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 *U. DAYTON L. REV.* 285, 289–90 (describing the many benefits of incorporating adjuncts into the classroom, including their “supplemental perspectives and insights,” “often extraordinar[y] enthusias[m],” and “practical expertise”).

54. A tenure-track professor can always use adjuncts for guest lectures, panel discussions, and the like to bring the practitioner’s particular focus and knowledge to her students.

55. See Garvin, *supra* note 46, at 412 (concluding that if courses are taught by “dynamic, productive faculty,” then students will be drawn to them, but noting that if courses are taught by “less dynamic faculty,” or “adjuncts,” then students “might turn their attentions elsewhere”).

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pected to write, which leads to less writing about the subject in total.<sup>56</sup> To be sure, there is much practitioner writing in commercial law<sup>57</sup> (and some of it is very good indeed), but, once again, the perspective and scholarly focus of a tenure-track academic will help produce a body of writing that is quite different.<sup>58</sup>

### B. *How Did This Happen?*

It is interesting to speculate about how this state of affairs came to pass. One obvious answer, I think, is the traditional academic disdain for those practice areas in which one might make money.<sup>59</sup> Moreover, most legal academics have had little or no exposure to private practice—and certainly did not spend enough time in practice to acquire a deep knowledge and appreciation for, say, real estate transactions.<sup>60</sup>

In addition, an increasing number of young faculty members possess a doctorate degree or have been through a post-J.D. program,

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56. Cf. Lander, *supra* note 53, at 291 (“[A]lthough many adjuncts do write articles, nearly all of the true legal scholarship is done by full-time faculty and very little is done by adjuncts. Thus, research and publications will suffer in any area where a significant percentage of course coverage is done by adjuncts.”). Indeed, commercial law scholarship published in U.S. law reviews has dropped since the 1960s, even as the number of professors and law journals has increased. Garvin, *supra* note 46, at 415–16.

57. See Garvin, *supra* note 46, at 417 (stating that commercial law practitioners “with an analytical bent will often write” about this area of law).

58. The American Bar Association also emphasizes the value of full-time faculty over adjunct faculty by placing greater weight on full-time faculty in calculating student/faculty ratios, which must be less than twenty to one for schools to presumptively comply with accreditation standards. A.B.A. STANDARDS FOR APPROVAL OF LAW SCHOOLS 402 interp. 1(1), 402 interp. 2(1) (2010–2011), available at <http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%204.pdf>. Law school faculties are rapidly becoming heavily stratified. There are tenure-track faculty and, increasingly, all sorts of others of lesser job statuses—“lesser” both because these jobs are less secure and because these individuals are not expected to write. See David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815, 816 (2009) (“Adjunct faculty, lawyers and judges with full-time occupations who also teach part-time in law schools in non-tenure track positions, have a growing but ambivalent position in US legal education. Recent surveys suggest roughly one quarter of courses in US law schools are taught by adjuncts, and that economic pressures will almost certainly expand their use.” (footnote omitted)).

59. Cf. GLENDON, *supra* note 48 (suggesting that law professors, even clinical professors, “tend to look down on the many areas of legal work [including private practice] that do not meet their standards of social awareness”).

60. See Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600–01 (2003) (finding in his study of those entering law teaching from 1996 to 2000 that eighty-seven percent had legal practice experience but that the average number of years of practice experience was three to seven).

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usually at an elite law school,<sup>61</sup> in which they have engaged in think tank-like activities. For law schools, these faculty are attractive to hire because they have a track record of solid publication, are skilled at presenting a well-honed “job talk” during hiring visits, and can speak knowledgeably about “research agendas.”<sup>62</sup> They therefore seemingly have an advantage over applicants who come from law firms or from the government where work takes time away from writing academic scholarship or developing skilled job talks. The advent of faculty members who possess a doctorate degree or have been through a post-J.D. program has been generally good for the profession, in my opinion. Legal history written by a trained historian is different, and usually better, than “law office history.” This is because historians have formed habits of the mind that are very useful in analyzing policy questions.<sup>63</sup> We must be careful, however, to include a balance of professors who understand private law and who are enthusiastic about teaching and writing about it.

#### IV. CONCLUSION

My worry is that we lose out on both those who are interested in “The Law” in all its broad sweep and those who are excited by every nook and cranny of the law—from the rule against perpetuities, to appellate procedure, to how equitable subordination works in bankruptcy. This grand passion for the law is something I hope every student encounters during law school, but I fear that the passion is not as prevalent in the academy as it once was. Moreover, as I have argued, legal academia’s preoccupation with public law causes problems for our students because their professors are more interested in those areas than in the fields in which their students will spend their professional lives.

In reforming legal education, we should not dispense with what law schools do so well—namely, train law students to solve problems for clients. This training requires a foundation in the basic concepts

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61. See Langbein, *supra* note 52, at 3, 6 (stating that in the 1960s it was “virtually unheard of for a Harvard law professor to have an advanced degree” but noting that the trend has changed); Redding, *supra* note 60, at 596–600 (finding in his study of those entering law teaching from 1996 to 2000 that forty-five percent had an advanced degree in addition to a J.D.).

62. I hate it when candidates talk about a research agenda that goes beyond what they are working on at present. What I really want them to say is, “I want to write about all of the many subjects that interest me.”

63. Moreover, “[i]f scholarship becomes a habit, teaching is much more likely to retain freshness, depth, and interest throughout the teacher’s career.” Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 10 (1986).

of law, which students properly receive through the traditional first-year curriculum, thus ensuring they are not overwhelmed upon entering practice. In addition, law students need to acquire a sense of professionalism and an ability to solve clients' problems in the moment, in front of colleagues. Legal education reform must reverse the increasing emphasis on public law to the detriment of private law. The rise in the use of adjunct professors to teach private law courses and the subsequent decrease in scholarship have adversely affected soon-to-be legal professionals who have, or may have otherwise had, an interest in private law practice.