

# LEGAL WRITING: A HISTORY FROM THE COLONIAL ERA TO THE END OF THE CIVIL WAR

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## *INTRODUCTION*

This is a history of the teaching of legal writing.

The practice of law is the practice of skills taught in legal writing classes. To be a successful lawyer, a student must be able to analyze the facts of the case, find the applicable law, analyze and apply that law to the facts, and then communicate that analysis, either through writing or speaking. Certainly, knowledge of and a familiarity with the substantive law is also vital. But it is the skills taught in the legal writing curriculum that bridge the gap between knowledge of the law and its actual application.

For that reason, the history of the teaching of law has, in large part, also been the history of the teaching of legal writing. As long as lawyers have been taught, educators have sought to find methods to teach not only the substance of the law, but also the skills necessary to use and communicate that law. These methods have had varying degrees of success, and the emphasis on teaching writing and communication skills as a part of the legal education curriculum has waxed and waned, but the teaching of legal writing has always been present in some form.

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Even though the teaching of legal writing and communication skills has always been a fixture in legal education, legal scholars have made relatively little attempt to chronicle its history. That is not to say that the subject has been completely neglected. A number of well-written articles chronicle at least some of the history of legal writing in the law school curriculum.<sup>1</sup> However, those articles were written with a different purpose in mind: the authors sought to employ history to show the pedigree of legal writing and argue for an equal place in the curriculum with doctrinal courses and an equal position for its teachers with other “case-book” faculty.<sup>2</sup> Because of this purpose, they understandably focused a large part of their historical narrative on legal writing in the “modern law-school,” an entity that has existed only since the late 1800s.<sup>3</sup> The articles paid considerably less attention to the era that preceded it, beyond brief mentions of the Inns of Court in England, apprenticeship in America, and the private law schools and early attempts at law teaching that preceded Langdell’s introduction of the case method.<sup>4</sup>

This approach, while entirely proper for the Authors’ arguments, gives a limiting, and understandably distorted, view of the historical narrative of legal writing. The approach leaves the reader with the impression that the apprentice system was an idyllic time when tutor and pupil collaborated on learning necessary skills and that the whole enterprise of teaching legal writing was undone by Langdell because he did not believe that writing

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1. See e.g. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117, 126–134 (1997); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?* 40 Ariz. L. Rev. 105 (1998); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 Vt. L. Rev. 371 (2003); David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105 (2003).

2. See e.g. Romantz, *supra* n. 1, at 136–145.

3. For example, the excellent, groundbreaking, and widely revered article by Marjorie Dick Rombauer, *First Year Legal Research and Writing: Then and Now*, 25 J. Leg. Educ. 538 (1973), begins the discussion of legal history in the early 1900s. See also e.g. Arrigo, *supra* n. 1, at 123–124 (reciting a history of legal education starting with the Roman Empire, but legal writing only as recently as the early twentieth century); Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 Touro L. Rev. 507, 527 (2005) (beginning its history in the “late 1940s and 1950s”).

4. See e.g. Romantz, *supra* n. 1, at 109–135. Romantz devotes approximately two-and-a-half pages to the period before Langdell in 1870, and approximately twenty-three pages to the period after that.

was important.<sup>5</sup> This impression is a false one: the apprenticeship system was far from an idyllic legal writing pedagogy,<sup>6</sup> and Langdell is at worst an unwilling and unwitting villain, given his enthusiastic participation in the legal writing curriculum of his day.<sup>7</sup>

This Article seeks to provide a more detailed history, presented for its own sake, rather than as a support for, or footnote to, an argument for the relevance and place of legal writing in the law school curriculum. It chronicles, insofar as possible, the history of the teaching of legal writing as part of the teaching of the law in the United States. This Article focuses on the teaching of legal writing from Colonial America to the end of the Civil War. It seeks to shed some light on the apprentice system as it was used in Colonial America and how it taught (or failed to teach) legal writing and other skills.<sup>8</sup> It also examines the rise of the private law schools, which grew out of the apprentice system,<sup>9</sup> how legal education evolved into the university-based system that exists today, and how the teaching of legal writing evolved with it.<sup>10</sup>

### I. *FIRST THINGS FIRST: WHAT IS THE TEACHING OF "LEGAL WRITING"?*

Many people would no doubt be surprised to learn that legal writing has been taught in law schools, and before that in apprentice-based systems, since the teaching of law began. A common misconception among legal educators and scholars is that the subject of legal writing is a relatively new addition to the law school curriculum. This is true only insofar as legal writing means an actual law school subject by that name. The modern legal writing

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5. See Eichhorn, *supra* n. 1, at 109–111 (hypothesizing that “[p]erhaps Langdell, like Socrates, believed speech to be a purer medium than writing for the expression of analytic thought . . . . Perhaps Langdell believed it important to train students to accustom themselves to the pressure of public questioning and saw no role for writing in furthering this goal.”); Grant, *supra* n. 1, at 383 (arguing that legal writing “simply did not fit into Langdell’s vision of the academic study of law”).

6. See *infra* nn. 27 to 46 and accompanying text (describing the problems with the apprenticeship system).

7. See *infra* n. 185 and accompanying text (describing Langdell’s participation in moot court while at Harvard). A description of Langdell’s use of legal writing in teaching will be forthcoming in the next article in this series.

8. See *infra* pt. I.

9. See *infra* pt. II.

10. See *infra* pts. III, IV.

class first found its foothold in legal education in the 1930s and 1940s,<sup>11</sup> at the same time that other courses such as Administrative Law and Labor Law were making their way into the law school curriculum.<sup>12</sup> Nevertheless, the skills that form the subject matter of a legal writing class had always been a part of the law school curriculum, just under different names. This is true of many classes that lawyers now think of as venerable law school subjects. For example, in 1870, when Harvard first began teaching Torts as a subject, it was regarded as a “radical move” because it brought together under one subject a collection of legal actions that had previously been thought to be entirely different areas of the law.<sup>13</sup> In the same way, simply because law faculty did not teach legal writing skills in a course called “legal writing” does not mean that faculty did not teach them.

What, then, qualifies as the teaching of (capital letters/big picture) Legal Writing? For the purposes of this history, we chose to focus on the broad collection of skills taught in most modern Legal Writing classes. These include the teaching of legal analysis in general (as opposed to the teaching of legal analysis as a by-product of the teaching of a specific doctrinal area); legal research; the theory and preparation of legal documents, such as briefs and pleadings; rhetorical skills; and oral argument.<sup>14</sup> They do not include the same skills taught in a “live-client” clinical program. This is not because those skills are not valuable; indeed

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11. See Arrigo, *supra* n. 1, at 126–134; Romantz, *supra* n. 1, at 128–131.

12. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 159–160 (U.N.C. Press 1983) (noting the spread of such courses, in part as a consequence of New Deal legislation).

13. See Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* vol. 2, 376 (Lewis Publ. Co. 1908). The American Law Review, in its review of Addison’s *The Law of Torts*, the text that had been specifically abridged for use in the class, bemoaned the fact that the subject of torts did not fit well with the then-prevalent orderly and scientific conception of the law, stating, “We are inclined to think that Torts is not a proper subject for a law book.” *Book Notices*, 5 Am. L. Rev. 337, 341 (1871) (reviewing C.G. Addison, *The Law of Torts Abridged for Use in the Law School of Harvard University* (1870)).

14. See ALWD & LWI, *2011 Report of the Annual Legal Writing Survey*, at iv–v (2011) (available at <http://www.alwd.org/wp-content/uploads/2013/02/2011-survey-results.pdf>) (summarizing curriculum and common practices of law schools). This yearly survey, jointly sponsored by the Association of Legal Writing Directors and the Legal Writing Institute collects data on program design, curriculum, workload, and status issues in the field of legal writing, and provides a wealth of information on these issues. *Id.*

they are so valuable as to deserve their own history, or as the case may be, histories.<sup>15</sup>

Most of the skills that make up the modern day Legal Writing class were a part of law school pedagogy from the beginning. In the days of the apprentice system, these skills were taught (effectively, diffidently, or not at all) in the course of preparing documents for the lawyer who was the master.<sup>16</sup> The private and early university law schools that would follow taught these skills in one of two places. The first was classes on the subject of pleading, which at the time was a much more intricate and involved process than today.<sup>17</sup> However, the main place that these schools taught legal writing skills during this time period was in what were called “moot courts.”<sup>18</sup> Unlike the extracurricular interscholastic competitions that bear the same name today, the moot courts of this period were mandatory exercises in the law school curriculum, modeled after the “moots” of the Inns of Courts in England.<sup>19</sup> The law school professors of the day gave the students a fictitious case and assisted the students in drafting the pleadings and other documents, preparing the arguments, and then arguing the case.<sup>20</sup> In theory, if not always in practice, these were the forerunners of today’s legal writing classes that emphasize persuasive writing.

## II. THE EARLIEST YEARS: COLONIAL AMERICA

In Colonial America, a person who wanted to become a lawyer had three main options for training: he (and of course, aspiring lawyers were all male at this time) could serve as an apprentice or clerk in the office of a lawyer; serve as clerk for a court of

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15. See e.g. Philip G. Schrag & Michael Meltzner, *Reflections on Clinical Education* (N.E. U. Press 1998). Of course, this distinction is hard to maintain with regard to the earliest history of Legal Writing, in that the teaching took place in connection with an apprenticeship.

16. See *infra* nn. 27–46 and accompanying text.

17. See *infra* nn. 135–140 and accompanying text.

18. See e.g. *infra* nn. 53–57 and accompanying text (describing moot courts at Litchfield); *infra* nn. 168–182 and accompanying text (describing moot courts at Cumberland).

19. For a brief explanation of the way the “moots” worked in the English Inns of Court, see Robert N. Wilkin, *The Spirit of the Legal Profession* 39–47 (Oxford U. Press 1938).

20. Of course, the extent to which the instructors were involved in the moot courts differed with the institution. Compare *infra* nn. 168 to 182 and accompanying text (describing the elaborate moot court system at Cumberland in the 1850s), with *infra* nn. 156 to 160 and accompanying text (describing the more rudimentary moot courts at the University of Virginia in the 1830s).

record; or learn the law on his own through reading whatever books, statutes, and reports he could find.<sup>21</sup> Some aspiring lawyers did go to one of the Inns of Court in England to study.<sup>22</sup> But the Inns at that time were mere shadows of what they had once been.<sup>23</sup> In their Golden Age, the Inns had taught the law through oral Readings; elaborate “Moots” simulating actual argument in court, complete with written pleadings; and less-elaborate “Bolts” discussing legal questions.<sup>24</sup> Unfortunately, these elaborate structured exercises had gradually fallen out of favor, in preference to dependence on simply reading about the law, which the students saw as a quicker and safer route to practice than the “toilsome participation in Moots and other exercises.”<sup>25</sup> By the mid-to late 1700s, the experience of a student at the Inns was simply reading the law and whatever other education he could arrange.<sup>26</sup>

The usual route to law practice in Colonial America, and for a long time after, was through apprenticeship in the office of a practicing lawyer.<sup>27</sup> In this office, the apprentice learned the law through reading books, asking questions, observing the lawyer at work, and performing certain legal services under the lawyer’s watchful eye.<sup>28</sup> While this might seem an ideal way to teach practical skills, in reality, experiences varied widely, depending on the diligence and inclination of the master. For example, John Ad-

21. Anton-Hermann Chroust, *The Rise of the Legal Profession in America*, vol. 2, 173 (U. Okla. Press 1965).

22. *See id.* (discussing the fourth possible option for training).

23. *See* Anton-Hermann Chroust, *The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession after 1400*, 10 *Vand. L. Rev.* 79, 116–122 (1956) (discussing the decline of the Inns of Court from the end of the 1500s to Colonial times).

24. *Id.* at 109–111. Chroust notes that these exercises were quite practical ways of learning the law in an era where few written books existed. *Id.* at 110–111.

25. *See id.* at 116–118 (discussing the decline of the Readings, Moots, and Bolts). By the early 1600s, it was a practice of many students to send “deputyes” in their place to argue at the Moots, or to be absent from the Inns when their turn came to argue. *Id.* at 117. This attitude on the part of the students was also apparently shared by their instructors. Chroust states that the Readings, Moots, and Bolts would probably have continued if those in control of the legal training would have insisted upon it, but they also tended to find excuses not to participate, probably because “they . . . felt that the time and effort required . . . could be employed more profitably in the practice of law.” *Id.* at 118.

26. *See* William S. Holdsworth, *A History of English Law* vol. 6, 481 (2d ed., Sweet & Maxwell Ltd. 1937) (stating that “[b]y the end of [the seventeenth century] the Inns of Court had ceased to be educational bodies; and the student was left to make his own arrangements for his education”).

27. Chroust, *supra* n. 21, at 173–174.

28. *See id.* at 174–175. The apprentice also did much of the copying of documents and performed other small duties such as service of process. *Id.* at 174.

ams began his legal education in 1756 at the office of James Putnam, a Worcester attorney.<sup>29</sup> Unfortunately for Adams, Putnam was not the best teacher. Although he had a good-sized library, he provided little actual legal training.<sup>30</sup> Adams felt this deficit acutely when he wrote and filed his first writ, a Declaration in Trespass for Rescue, in the case of *Field v. Lambert*.<sup>31</sup> In his diary, he wrote,

If my first Writt should be abated, if I should throw a large Bill of Costs on my first Client, my Character and Business will suffer greatly. It will be said, I don[*t*] understand my Business. No one will trust his Interest in my hands. I never Saw a Writt, on that Law of the Province. I was perplexed, and am very anxious about it. Now I feel the Disadvantages of Putnams Insociability, and neglect of me. Had he given me now and then a few Hints concerning Practice, I should be able to judge better at this Hour than I can now. . . . But, it is my Destiny to dig Treasures with my own fingers. No Body will lend me or sell me a Pick axe.<sup>32</sup>

Adams's fears unfortunately were borne out: the court abated his writ for the failure to list the county in the directions to the constable.<sup>33</sup> His diary recorded that "Field's Wrath waxed hot this morning."<sup>34</sup> Adams resolved that "I should endeavour at my first setting out to possess the People with an Opinion of my subtilty and Cunning. But this affair certainly looks like a strong Proof of the Contrary."<sup>35</sup>

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29. Daniel R. Coquillete, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775* (reprinted in *The History of Legal Education in the United States: Commentaries and Primary Sources* vol. 1, 75, 76 (Steve Sheppard ed., Salem Press, Inc. 1999) [hereinafter *The History of Legal Education*]).

30. *See id.*

31. *See Diary and Autobiography of John Adams* vol. 1, 62–63 (L.H. Butterfield ed., Harv. U. Press 1961). Adams had been hired by Joseph Field to recover damages caused by two horses owned by Luke Lambert. These horses had broken into Field's meadow, and Lambert had driven them back out without paying Field for damages. *See* L. Kinvin Wroth & Hiller B. Zobel, *Editorial Note on the Case of Field v. Lambert*, in *The Earliest Diary of John Adams* 82, 82–83 (L. Butterfield ed., Harv. U. Press 1966).

32. *Diary and Autobiography of John Adams*, *supra* n. 31, at 62–63.

33. Wroth & Zobel, *supra* n. 31, at 86–87.

34. *Diary and Autobiography of John Adams*, *supra* n. 31, at 64.

35. *Id.* at 65. As time went on, however, this sentiment seems to have escaped Adams's memory. When later advising Jonathan Mason, who had been admitted as student in his office, about law study in 1776, Adams stated,

Depend upon it, it is of more importance that you read much than that you draw many writs. The common writs upon notes, bonds, and ac-

This lack of consideration for the apprentice was sadly all too typical in these situations. A law student said of Constitutional Framers James Wilson that

Mr. Wilson devoted little of his time to his students in his office . . . and rarely entered it except for the purpose of consulting books. Hence his intercourse with them was rare, distant, and reserved. As an instructor he was almost useless to those who were under his direction. He would never engage with them in professional discussions; to a direct question he gave the shortest possible answer and a general request for information was always evaded.<sup>36</sup>

It must be said that most apprentices did gain some practical skill in writing. As part of their office work, apprentices of the period were generally expected to copy out pleadings and other documents and also to draft briefs.<sup>37</sup> How much actual instruction they received in the art of doing so is questionable.<sup>38</sup> At the very least, the repetition might have made the apprentices more able than young John Adams to do actual work in court.

Still, even in the most conscientious law offices, there was a lack of connection between the writing apprentices engaged in and the theoretical purpose behind the writing. Because much of the writing was simple copying of writs and pleadings,<sup>39</sup> divorced

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counts, are mastered in half an hour. Common declarations for rent, and ejectment, and trespass, both of assault and battery and *quare clausum fregit*, are learned in very nearly as short a time. The more difficult special declarations, and especially the refinements of special pleadings, are never learned in an office. They are the result of experience and long habits of thinking. If you read Plowden's Commentaries, you will see the nature of special pleadings. In addition to these, read *Instructor Clericalis*, Mallory, Lilly, and look into Rastall and Coke. Your time will be better spent upon these authors than in dancing attendance upon a lawyer's office and his clients.

Ltr. from John Adams to Jonathan Mason (July 18, 1776), in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations* vol. 9, 422, 423–424 (C.F. Adams ed., Little, Brown & Co. 1854).

36. Warren, *supra* n. 13, at vol. 1, 133 (quoting *Sanderson's Biography of the Signers to the Declaration of Independence* 434–435 (Robert T. Conrad ed., Thomas, Cowperthwait & Co. 1846)).

37. *Id.*

38. See Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. Leg. Educ. 124, 128 (1976) (arguing that the work was more repetitious than educational).

39. Because of the lack of printed forms, every document, along with all copies, had to be written-out. See Paul Mahlon Hamlin, *Legal Education in Colonial New York* 43

from the theory of the underlying case and unaccompanied by instruction,<sup>40</sup> the educational value was suspect. Ideally, the copying supposedly provided the apprentice with a familiarity with the filing of writs and with the preparation of pleas and other documents.<sup>41</sup> In actual practice, the result of this endless copying of the “stream of writs, pleadings, and briefs flowing through the office”<sup>42</sup> was that apprentices often felt that their writing was more drudgery than education, as exemplified by William Livingston, who wrote regarding his apprenticeship under James Alexander:

Is it the father’s intention, when he puts his son to an attorney, and gives a large sum into the bargain, that he shall only learn to write a good hand? But whoever attentively considers how these apprentices are used, and forms a judgment from the treatment they meet with, would certainly imagine, that the youth was sent to the lawyer on purpose to write for him, because his father could find him no employment . . . I aver, that ‘tis a monstrous absurdity to suppose, that the law is to be learnt by a perpetual copying of precedents.<sup>43</sup>

The apprentice system, with all of its inconsistencies, would continue to be the dominant manner of legal education for American lawyers from colonial times until the early nineteenth century.<sup>44</sup> Some conscientious practitioners would endeavor to thoroughly educate their students in both the theory and practice of law, including “conveyancing, pleading, copying, and other writing.”<sup>45</sup> Others would find that outside duties, including service in

(N.Y.U. L.Q. Rev. 1939).

40. See McKirdy, *supra* n. 38, at 128.

41. Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. Leg. Educ. 311, 313 (1998).

42. *Id.*

43. Warren, *supra* n. 13, at vol. 1, 134.

44. See Chroust, *supra* n. 21 at 175–176.

45. Frederic Hathaway Chase, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts 1830–1860*, at 120 (Houghton Mifflin Co. 1918). Shaw’s training seems to have been particularly formal, in that he drew up rules for his students to follow, but also made rules for himself, stating that

[s]tudents are requested to report to me each Monday in the forenoon the course of their reading the preceding week, and receive such advice and direction as to the pursuits of the current week as the case may require . . . . At any and all other times students are invited to call me and enter into free conversation upon subjects connected with their studies . . . .

*Id.*

Congress, made them too busy to properly attend to apprentices.<sup>46</sup> By as early as the 1780s, some progress was being made to teach both practical skills and the theory behind them, including writing, in what became the first “private law schools.”

### III. THE FIRST AMERICAN LAW SCHOOLS

In 1784, in Litchfield, Connecticut, an attorney with the curious name of Tapping Reeve founded the first professional law school in American history. The Litchfield Law School was a private, proprietary institution that started as an outgrowth of Reeve’s office practice, where he had taught a number of apprentices, including his brother-in-law, Aaron Burr.<sup>47</sup> Unlike many practitioners, Reeve was a particularly conscientious master to his apprentices, and in addition to supervising their usual work, he gave lectures on the law.<sup>48</sup> He would follow this pattern in his law school, where he, and later James Gould, would lecture to the students in a systemized and orderly manner on subjects spanning the whole of Anglo-American law.<sup>49</sup> Very few of these subjects would seem familiar to law students today; American law at the time had no categories such as Constitutional Law or Torts.<sup>50</sup> Rather, the classes covered subjects such as Municipal Law and Writs of Error.<sup>51</sup> Nevertheless, the subjects encompassed the

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46. See Joseph Story, *Experiences as a Law Student*, in *The History of Legal Education*, *supra* n. 29, at 127. In his autobiography, Story wrote that during my professional studies in Mr. Sewall’s office, I was left very much alone . . . I was driven, therefore, back upon my own resources . . . Mr. Sewall’s absence in Congress for about half the year was a serious disadvantage to me, for I had no opportunity to ask for an explanation of difficulties, and no cheering encouragement to light up the dark and intricate paths of the law.

*Id.*

47. See Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* 59 (Oceana Publications, Inc. 1986) (discussing the founding of the school).

48. *Id.* at 59–63; see also Brian J. Moline, *Early American Legal Education*, 42 *Washington L. J.* 775, 796 (2004) (also describing Reeve’s legal practice.)

49. See McKenna, *supra* n. 47, at 60–63; James Gould, *Law School at Litchfield*, 3 *U.S. L.J.* 400 (1823) (reprinted as *Description of the Law School*, in *The History of Legal Education*, *supra* n. 29, at 187–189).

50. See McKenna, *supra* n. 47, at 64–65. The idea of Torts as a doctrinal field did not appear until the 1850s. See G. Edward White, *Tort Law in America: An Intellectual History* 11–13 (Expanded ed., Oxford U. Press, 2003).

51. See McKenna, *supra* n. 47, at 64 (listing lecture subjects covered by Reeve and Gould).

whole of what most lawyers were called to do during this time period.<sup>52</sup>

More importantly, Reeve made an important step in skills training: he introduced formal moot courts as a part of the Litchfield curriculum, though on an optional basis.<sup>53</sup> Initially, the students themselves conducted the moots, though by 1803, when James Gould was teaching at Litchfield, he presided over the arguments.<sup>54</sup> The rules Gould imposed for the moots required not only oral argument, but also written argument, because the litigants had to produce writs and pleadings as well.<sup>55</sup> Although a far cry from modern legal writing programs, these moot courts at least endeavored to provide some practical training in the production of persuasive writing.<sup>56</sup>

The Litchfield Law School would flourish from 1784 until 1833, providing practical legal training to students from across the nation, and producing many illustrious graduates.<sup>57</sup> Other private law schools cropped up in the 1790s as well.<sup>58</sup> They comprised not only the first attempts to systematically teach the law,

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52. See *id.* at 65.

53. See Albert J. Harno, *Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession* 30 (Lawbook Exchange, Ltd. 1953).

54. See Samuel H. Fisher, *The Litchfield Law School 1775–1833*, at 8 (Yale U. Press 1933). In 1797, one of the arguments considered whether the Constitution provided for judicial review. For an impressive account of that argument, see Donald F. Melhorn, Jr., *A Moot Court Exercise: Debating Judicial Review Prior to Marbury v. Madison*, 12 *Const. Comment.* 327, 346–352 (1995).

55. See *Advertisement of the Litchfield Law School* (1828) (reprinted in *The History of Legal Education in the United States*, *supra* n. 29, at 181–182); *Rules of the Debating Society of Law Students in Mr. Reeve's Office 1794–98* (reprinted in *The History of Legal Education*, *supra* n. 29, at 183–184).

56. Unfortunately, it is unknown how much instruction on the writing of such writs and pleadings was actually given, and how much the students were expected to divine on their own or through their work in the office. Nor is there recorded how much feedback the students got on their written work. We do know that the arguments and the judgment of James Gould were preserved and written down. See *Advertisement of the Litchfield Law School*, *supra* n. 55, at 182.

57. See Chroust, *supra* n. 21, at 210–214. Among the Litchfield alumni were 2 Vice-Presidents of the United States, 3 Supreme Court Justices of the United States, 34 state court justices, 28 United States Senators, 101 United States Congressmen, 14 state governors, 6 United States Cabinet members, and 3 college presidents. *Id.* at 214.

58. See *id.* at 214–220. These included Peter Van Schaak's law school in Kinderhook, New York, which began as early as 1786. *Id.* at 217. One of the most notable of these was the school started by George Wythe in Richmond Virginia, which he founded upon his retirement as the holder of the law professorship position at the College of William and Mary. See *id.* at 215. For an account of Wythe's teaching at William and Mary, see *infra* nn. 61 to 64 and accompanying text.

but also set the mold for contemporary legal education.<sup>59</sup> The moot court model pioneered by these schools would become the preferred way to teach practical skills such as writing and rhetoric.

#### IV. THE ROLE OF UNIVERSITIES

Universities came rather late to training for the actual practice of law. This is not to say that universities in the late 1700s did not engage in legal education. Rather, their approach was much more theoretical than practical.<sup>60</sup> In 1779, Thomas Jefferson, then the Governor of Virginia, established “a Professorship of Law and Police” at William and Mary College.<sup>61</sup> George Wythe, a signer of the Declaration of Independence and, not coincidentally, the lawyer under whom Jefferson apprenticed, was appointed.<sup>62</sup> The purpose of the course of study Wythe taught was less about producing practicing lawyers than it was educating the statesmen of the New Republic.<sup>63</sup> Wythe did attempt to blend in some practical training with his lectures and readings through the use of a moot court and a moot legislature, though there is no indication that Wythe required any writing on the part of the students.<sup>64</sup>

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59. See Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, in *The History of Legal Education*, *supra* n. 29, at 13 (noting that “[t]he Litchfield lectures established the framework for instruction in the professional law school”). Eventually, many of these private law schools merged with the university law schools, or had their professors employed by them. See *infra* nn. 98 to 115 and accompanying text.

60. See Chroust, *supra* n. 21, at 176–177. Chroust notes that Jefferson, at least, was following the continental model of university training. *Id.* at 177 n. 14. Albert Harno, however, suggests that the establishment of chairs of law at universities was the result of Blackstone's influence in teaching the law. See Harno, *supra* n. 53, at 23.

61. See Warren, *supra* n. 13, at vol. 1, 169. The word “police” in the title did not refer to law enforcement, but rather the transliteration of the Greek word for “state”; thus it meant government or political science. Thomas Hunter, *The Teaching of George Wythe*, in *The History of Legal Education*, *supra* n. 29, at 144.

62. See Warren, *supra* n. 13, at vol. 1, 170; Chroust, *supra* n. 21, at 177.

63. See Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: A Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. Marshall L. Rev. 1041, 1069–1072 (2006) (noting the debate over the purpose of the teaching); Hunter, *supra* n. 61, at 146–147 (noting the course of study at William and Mary).

64. See Hunter, *supra* n. 61, at 146. In a letter written in 1780, John Brown, a student of Wythe's at William and Mary College, stated that the moot legislature considered and debated legislation that had been drawn up by the statutory revision committee in Virginia, which the moot legislature would then “debate and alter . . . with the greatest freedom.” Ltr. of John Brown to William Preston, July 6, 1780 (reprinted in *Glimpses of Old College Life*, 9 Wm. & Mary College Q. (Ser. 1) 75, 80 (1900)).

When Wythe moved to Richmond in 1790, St George Tucker succeeded him to the chair.<sup>65</sup> Tucker did not continue the moot court or moot legislature, preferring instead to conduct lectures at his home.<sup>66</sup> He did attempt, in 1802, to organize a student-led legal society to conduct arguments, but this failed because no student was sufficiently qualified in legal procedure to direct the sessions.<sup>67</sup> Many of Tucker's students attributed their lack of success in practice to insufficient practical training.<sup>68</sup> After Tucker resigned in 1803, the chair at William and Mary passed to a series of local judges who would serve without distinction or note for the next thirty years.<sup>69</sup>

Other attempts by universities to enter the legal education market in the late 1700s and early 1800s were less successful, in spite of, or perhaps because of, their association with some of the leading or nascent legal giants of the day. In 1789, Supreme Court Justice James Wilson, who as has already been noted was an indifferent teacher at best, was hired by the College of Philadelphia to deliver a series of lectures on the law over the course of three years.<sup>70</sup> The lectures focused mainly on legal generalities, and were "not intended to prepare young men for the routine handling of legal matters."<sup>71</sup> Wilson eventually stopped lecturing, and the lectures were formally discontinued when the College of Philadelphia merged into the University of Pennsylvania.<sup>72</sup> Scholars said that "the lectures had not entirely met the expectations that had been formed."<sup>73</sup>

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65. William H. Bryson, *Legal Education in Virginia, 1779–1979: A Biographical Approach* 24, 661 (U. Press of Va. 1982).

66. *See id.* at 663; *see also* 661–668 (detailing Tucker's teaching methods).

67. *Id.* at 667.

68. *Id.* at 683.

69. *See* W. Hamilton Bryson, *Essays on Legal Education in 19th Century Virginia* 15 (William S. Hein & Co. 1998). Tucker's resignation appears to have been motivated by campus politics, including the resolution of the college board requiring that all lectures be held on campus. *See* Bryson, *supra* n. 65, at 683–684. The subsequent professors from 1804 to 1833 were Judge William Nelsen Jr. (1804–1811), his brother Chancellor Robert Nelson (1812–1818), and Judge James Semple (1819–1833). *See* Chroust, *supra* n. 21, at 178. Although Bryson characterizes these judges as "undistinguished," *see* Bryson, *supra* n. 69, at 15, Chroust states that, at least during the Hugh Nelson period, "[i]t was said . . . the law course at William and Mary was superior to that at Litchfield." Chroust, *supra* n. 21, at 178.

70. *See id.* at 178–180.

71. *Id.* at 178.

72. *See* Sheppard, *supra* n. 59, at 15.

73. *See* Hampton L. Carson, *An Historical Sketch of the Law Department of the Uni-*

Columbia turned to James Kent for its first professorship of law in 1794.<sup>74</sup> Kent's plan was apparently to give a more liberal arts type of training to students, but one that would still be useful to those who wanted to become lawyers.<sup>75</sup> He did not appear to have intended to offer skills training of any sort.<sup>76</sup> Unfortunately, Kent's lectures apparently turned out to be "too professional in content for undergraduate students of the arts, while too academic to attract apprentices at law steeped in the tradition of office study."<sup>77</sup> After three years with little student attendance, Kent quit the business, and Columbia did not offer legal education again until Kent returned in 1824.<sup>78</sup>

Of these early attempts, only one university was really successful in attracting students. The University of Transylvania, in Lexington, Kentucky, founded a professorship of Law and Politics in 1799.<sup>79</sup> It was heavily influenced by Wythe's program at William and Mary and apparently included the same ideas of a moot court and moot legislature.<sup>80</sup> Transylvania's law department continued in operation until 1858.<sup>81</sup> Even then, its success had less to do with its pedagogy and more to do with its location. As one of the first institutions in the area, it attracted students from Kentucky, Ohio, and Tennessee, who loved the social life of Lexington,

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versity of Pennsylvania 15 (Press of Phila. Times Prtg. House 1882).

74. Chroust, *supra* n. 21, at 181. Columbia had previously had a professorship of "natural law" when it had been King's College, but Chroust reports that "it is unlikely that anything remotely resembling a methodical or practical training in the common law was taught there." *Id.* at 180.

75. See Julius Goebel, Jr., *A History of the School of Law, Columbia University* 15 (Colum. U. Press 1955) (discussing Kent's purposes).

76. See *id.*

77. *Id.* at 17.

78. See *id.* at 17–20; John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Colum. L. Rev.* 547 (1993) (reprinted in *The History of Legal Education*, *supra* n. 29, at 207). Kent's first series attracted "seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to the college." Langbein, *supra* n. 78, at 212 (quoting memoirs by James Kent's great grandson, William). His second course attracted two students, along with his own law clerks. *Id.* A third course attracted no students, *id.*, but Kent later read lectures to six or eight students in his office, see William Kent, *Memoirs and Letters of James Kent LL.D.* 77 (Little, Brown & Co. 1898).

79. See Warren, *supra* n. 13, at vol. 1, 177.

80. See Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *Mercer L. Rev.* 673, 679 (1990). Carrington notes that there is evidence later on of moot courts and moot legislatures, and theorizes that they were introduced by Professor James Brown, who had studied law under Wythe. *Id.*

81. See *id.* at 697–699.

the “Athens of the West.”<sup>82</sup> The training it provided was not seen as a substitute for the apprentice system, and its students were still expected to study in an office if they wanted to practice law.<sup>83</sup> This focus on theory ultimately contributed to the death of the law department, as it did not compete well with those universities that finally began to offer more comprehensive programs.<sup>84</sup>

All in all, universities’ first attempts to enter into the field of legal education were abject failures. In large part, the universities failed because they over-emphasized the theory of law, and stinted or completely neglected practical legal training, such as legal writing. Because the university programs were not seen by prospective students as useful training for the practice of law, they lost out to the more practical pathways of apprenticeship and private law schools.<sup>85</sup> Only later, when they married the theoretical and the practical instruction, including the teaching of writing and speaking about the law, would university programs rise to become the dominant force in legal education.<sup>86</sup>

## V. THE SECOND LAW SCHOOL ERA—PUBLIC AND PRIVATE

### A. The Prelude: An Early Attempt to Balance Theory and Skills

Universities’ second attempt to enter the field of legal education started as inauspiciously as the first, when in 1816, David Murray Hoffman was appointed to a professorship of law at the University of Maryland.<sup>87</sup> Unfortunately, financial problems at the university doomed the program, and it never really got off the ground.<sup>88</sup> However, Hoffman did put together a comprehensive

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82. *See id.* at 677–678, 683–684.

83. *Id.* at 683.

84. *See id.* at 698 (stating that one of the factors leading to the demise of the law department at Transylvania was competition from colleges such as Harvard and Yale, as well as the nearby law schools at the University of Cincinnati and Cumberland).

85. *See* M.H. Hoeflich, *Plus Ça Change, Plus C’est Law Même Chose: The Integration of Theory and Practice in Legal Education*, 66 *Temple L. Rev.* 123 (1993) (reprinted in *The History of Legal Education in the United States*, vol. 2, 862 (Steve Sheppard ed., Salem Press 1999)).

86. *Id.* at 128 (noting that in order to be successful the university law schools were forced to “design educational programs that would combine the practicality of instruction in the apprenticeship system with the theoretical richness contained in their ideas of law as a liberal science”).

87. *See* Sheppard, *supra* n. 59, at 15.

88. *See id.* at 15–16. Hoffman was not able to give his first lecture until 1822, and the

plan of legal study that reflected how well universities were learning from past mistakes. His plan for a “legal seminary” provided for lectures on the substance of the law but also gave due consideration to “skills courses,” such as rhetoric, logic, and legal bibliography.<sup>89</sup> Hoffman also devised a complicated moot court arrangement, to include written pleadings and motions, and oral arguments that would continue throughout the course of study.<sup>90</sup> Hoffman stated that the exercise of this moot court would provide the student with many benefits:

[I]t brings him, on the easiest terms, into a gradual, but certain acquaintance with the *modus operandi* of the various courts of judicature: it familiarizes him with the mode of applying legal principles: it renders him not only acquainted with the sources of knowledge, and the art of tracing out a point of law, from its first crude and undefined dawning, to its full establishment, but it instructs him in the means of presenting his claim or defence in a lawyer-like manner, and according to the most approved precedents of pleading: it unfolds to him the practical application of many rules of evidence founded on the soundest logic, which had hitherto rested in his mind only as so many abstract principles: it teaches him . . . the mode of extracting from the pleadings, like the roots of an equation, the true points in dispute, and of so analyzing a cause as to refer these points, with all imaginable simplicity to the court or jury . . . practice in a moot court would seem to possess, at once, all the advantages ascribed by lord Bacon to *reading*, *writing*, and *conversation*; the first making a *full* man, the second an *exact* man, and the last a *ready* man.<sup>91</sup>

Hoffman also proposed to hold four legal writing competitions, for essays between thirty and sixty pages, complete with prizes.<sup>92</sup>

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task proved harder than he had anticipated. *Id.* at 15. Because of its financial problems, the University was not willing to pay Hoffman much for his services, and he ultimately abandoned the idea. *See id.* at 16.

89. *See generally* David Hoffman, *A Course of Legal Study: Addressed to Students and the Profession Generally* vol. 2 (2d ed., Joseph Neal 1836).

90. *See id.* at 810–825.

91. *Id.* at 810–811.

92. David Hoffman, *A Lecture, Introductory to a Course of Lectures* (J.D. Toy 1823) (reprinted in *The History of Legal Education*, *supra* n. 29, at 278).

Hoffman's grand scheme represents the first real attempt by a university to pull together the various skills encompassed in modern legal writing: legal bibliography to enable the student to find the law; rhetoric, logic, and forensics to enable the student to analyze and communicate the law; and writing competitions and a moot court setting to integrate these skills into practice. While Hoffman never got a chance to put his full plan into operation at Maryland,<sup>93</sup> his ideas influenced the next round of university-based programs.<sup>94</sup>

### B. The Rise of the University Law School.

Over the next forty years, the university came first to rival the apprenticeship system and the proprietary law school and eventually to surpass them as the chief provider of legal education. This did not happen all at once, however. Along the way, the universities adopted the methods of teaching that were the hallmark of the private, proprietary school, including the reliance on a moot court program to provide needed skills instruction. In the 1820s, many schools did this in the most expedient way possible: by acquiring private schools or by bringing in proprietors of private law schools as professors.<sup>95</sup> This had the default consequence of importing the private school teaching methods of research, writing, and oral communications into the university law school curriculum. By the 1830s and 1840s, even those universities that did not collaborate with private schools began to realize the necessity for these types of courses, and to implement them.<sup>96</sup> By the 1850s and 1860s, many of the skills that make up what is thought of as the modern-day legal writing course were standardized in the curriculum.<sup>97</sup>

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93. Hoffman managed to deliver some courses of lectures to between twenty and forty students from 1822 to 1832. Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822–1833*, 32 J. Leg. Educ. 127, 129 (1982). His grand scheme for the moot court and other programs never actually occurred, except in rudimentary form. *Id.* at 136–137. Because of the small amount he was being paid by Maryland, he had to maintain a law practice, and also to take in private students as well. *See id.* at 133. Sometime after 1833, he fled to Europe to escape his creditors. *See* Alfred Zantzinger Reed, *Training for the Public Profession of the Law* 125 (Arno Press 1976); Shaffer, *supra* n. 93, at 138 (putting the time of departure as 1836).

94. *See* Hoeflich, *supra* n. 85, at 865.

95. *See infra* nn. 98–115 and accompanying text.

96. *See infra* nn. 141–182 and accompanying text.

97. *See infra* nn. 183–227 and accompanying text.

### 1. The Early 1800s

The next round of university-based law schools came from a practice of collaboration between universities and private law schools.<sup>98</sup> Universities garnered greater success by jettisoning the idea that law could be taught only in theory and instead sought a system that combined the theoretical with the practical, as many of the private law schools had done. The universities did this in the most expedient way: either by absorbing nearby private law schools under the university banner or by hiring their proprietors as professors. These new professors brought with them the standard fixtures of their trade, including the teaching of writing and practice through their use of moot courts.

Harvard made the first move through the foundation of an entire school of law in 1817 with noted lawyer Asahel Stearns at its head.<sup>99</sup> Like the early private law schools, Harvard attempted to use the moot court model to supply practical legal training to go along with classroom instruction. Students argued the moot court questions before the professor, but Harvard also involved legal writing, in that students drew up the pleadings, bills of exceptions, demurrers to evidence, special verdicts, and motions

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98. Stevens, *supra* n. 12, at 5.

99. Warren, *supra* n. 13, at vol. 1, 304. In 1815, Harvard established the Royall Professorship of Law and tapped the Chief Justice of Massachusetts, Isaac Parker, to fill it. *Id.* at 291–292. His job was to deliver a series of fifteen lectures to the Senior Class. The proposed subjects now seem incredibly expansive. Judge Parker was to

exhibit . . . the theory of law in its most comprehensive sense; the principles and practical operation of the Constitution and Government of the United States and [the] Commonwealth [of Massachusetts]; a history of the jurisprudence of [Massachusetts] under the Colonial and Provincial as well as under the present government; an explanation of the principles of the Common Law of England, the mode of its introduction into [the United States], and the sources and reasons of its obligation therein; also the various modifications by usage, judicial decision and Statute; and, generally those topics connected with law as a science which will best lead the minds of the students to such inquiries and researches as will qualify them to become useful and distinguished supporters of our free system of government, as well as able and honorable advocates on the rights of the citizen.

*Id.* at 298. Parker delivered his lectures through the summer of 1816 and received good reviews, which success led Harvard to take the next step in creating a law department. *Id.* at 302–303. The law department did not exactly get off to a smashing start: only one student entered in 1817 (though five more eventually entered throughout the year); only eight students studied in 1818–1819. *Id.* at 333, 335. By 1827–1828, the number of students throughout the course of the year was still only thirteen. *Id.* at 357.

with the professor's help.<sup>100</sup> In his report to Harvard's Board of Overseers, Professor Stearns touted the value of these practical skills exercises, writing that "no other exercise is so powerful an excitement to industry and emulation or so strongly interests the student in their professional pursuits."<sup>101</sup> In the 1826–1827 school year, the school held thirty-five Moot Courts and thirty-four less formal exercises in disputation.<sup>102</sup>

At the same time he was attempting to integrate skills training through moot courts, however, Stearns also noted what was to be a common problem with moot courts and competent legal writing instruction in general: the amount of work it took on the part of the professor. Stearns lamented that

[a] large portion of the Professor's time is employed in selecting and preparing suitable questions and cases for argument at the moot court, and in assisting the students to put them into this form of judicious action, examining their declarations, pleas, replications, demurrers, bills of exceptions, motions, etc., and directing them in the course of their investigations and researches.<sup>103</sup>

Harvard's attempt to combine skills training and theory was more successful than Columbia's next attempt at operating a law school. In 1824, Chancellor James Kent again attempted to revive the law program, this time with more practical training.<sup>104</sup> For two years, Kent delivered a series of lectures and tried to hold some rudimentary moot courts.<sup>105</sup> He then abandoned the endeavor in April of 1826 as too difficult, thus ending Columbia's second entry into legal teaching.<sup>106</sup>

While Columbia was trying and failing, and Harvard was struggling, to make a go of the law school business, Yale neatly solved the problem of getting a law school by simply absorbing the

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100. *See id.* at 334.

101. *Id.* (quoting Professor Stearns's Report to the Overseers, Jan. 9, 1826).

102. *Id.* at 354 n. 2.

103. *Id.* at 357.

104. *See* Goebel, *supra* n. 75, at 20–21.

105. *See id.* at 20.

106. *Id.* In a letter in 1824, Kent complained that "I am compelled to study & write all the time, as if I was under the whip & spur." *Id.* at 20 n. 121 (quoting a letter from J. Kent to M. Kent, Jr., written on November 9, 1824). Goebel writes that, in Kent's defense, he was trying to do by himself what both Parker and Stearns were doing at Harvard. *Id.* at 20.

private New Haven law school operated by attorneys Samuel Hitchcock and David Daggett.<sup>107</sup> In order to make the system work with part-time proprietors, the method of instruction followed the text-and-recitation system, under which the students read treatises and then recited in class.<sup>108</sup> The curriculum included skills training as well, as students participated in moot courts “[held] once a week, or oftener” with the students drawing up pleadings and investigating and arguing questions of law.<sup>109</sup> Students were also “called upon, from time to time, to draw declarations, pleadings, contracts, and other instruments, connected with the practice of law.”<sup>110</sup>

Not every university, even in this second period, bowed to the mixture of theory and practice. The law program at the University of Virginia opened in 1826, and, under John Tayloe Lomax, employed Thomas Jefferson’s ideal of law as a liberal arts subject.<sup>111</sup> The teaching was entirely by lecture on such subjects as “the Common and Statute law, that of the Chancery, the laws feudal, civil, mercatorial, maritime and of nature and nations; and also the principles of government and political economy.”<sup>112</sup> There was no attempt to actually teach students how to practice law through writing and other skills. This ideal of law as a liberal art was not enthusiastically embraced by the students, who demanded that the school change the course of study from two years to one so that they could then learn their trade through an apprenticeship.<sup>113</sup> Lomax lamented that “[the students] are eager that the period [before applying for the bar] shall be devoted to such instruction as may practically fit them for their profession. Their demand for the law is as for a trade, the means, the most expeditious and convenient, for their livelihood.”<sup>114</sup> Education in

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107. See John H. Langbein, *Blackstone, Litchfield, and Yale*, in *History of the Yale Law School: The Tercentennial Lectures* 17, 32–36 (Anthony T. Kronman ed., Yale U. Press 2004).

108. See John H. Langbein, *Law School in a University*, in *History of the Yale Law School*, *supra* n. 107, at 54–56.

109. Frederic C. Hicks, *History of the Yale Law School to 1915*, at 21 (Yale U. Press 1935) (quoting from the first annual Yale Law School announcement).

110. *Id.*

111. See John Ritchie, *The First Hundred Years: A Short History of the School of Law of the University of Virginia for the Period 1826–1926*, at 11 (U. Press of Va. 1978).

112. *Id.*

113. See *id.* at 14–15.

114. *Id.* at 15.

the actual practice of law would not come to the University of Virginia until the 1830s.<sup>115</sup>

Harvard's efforts began to take off in 1829, with the appointment of Supreme Court Justice Joseph Story to the newly established Dane Professorship of Law and the appointment of John Hooker Ashmun to the Royall professorship.<sup>116</sup> The school had forced out Parker as Royall Professor in 1827, and Stearns was unceremoniously dumped as head of the school in 1829 to make way for these appointments.<sup>117</sup> In this next attempt at a successful law school, Harvard took a page from Yale's book: Ashmun had previously been the principal behind the private Northampton, Massachusetts law school and thus could provide not only teaching experience, but also a ready-made group of students.<sup>118</sup> Harvard expected Story's name recognition to then attract more students.<sup>119</sup> The plan was a rousing success, with twenty-seven students enrolled by October of 1829.<sup>120</sup>

While most of the curriculum at Harvard during this time consisted of lecture and student recitation, skills development was also provided in the form of weekly moot courts, during which students argued questions of law before professors and submitted occasional written disputations on legal subjects.<sup>121</sup> Although Stearns had previously used moot courts in his teaching at Harvard, Story and Ashmun refined them.<sup>122</sup> Cases were handed out the week before argument, and two counsel were assigned to each side.<sup>123</sup> The cases would then be argued the next Friday, with the other students taking notes of the argument; the professor in charge that week would issue a written opinion.<sup>124</sup>

The cases used for these moot courts were often actual cases that Story had heard in the circuit courts or the United States Supreme Court.<sup>125</sup> Sometimes, in fact, they were cases that had not yet been decided; in 1842, Story gave out *Swift v. Tyson*, a

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115. See *infra* nn. 156 to 160 and accompanying text.

116. See Warren, *supra* n. 13, at vol. 1, 421–422.

117. *Id.* at 358–359, 365–366.

118. See *id.* at 425–426; Stevens, *supra* n. 12, at 5.

119. Stevens, *supra* n. 12, at 5.

120. See Warren, *supra* n. 13, at vol. 1, 432.

121. *Id.* at 434–435.

122. *Id.* at vol. 2, 70.

123. *Id.*

124. *Id.* at 70, 71.

125. *Id.* at 74.

case that was then before the Supreme Court awaiting a decision.<sup>126</sup> On one occasion, Professor Simon Greenleaf, who had taken over the Royall Professorship on the death of James Ashmun in 1833, assigned as a moot court case to be argued before Story a case that Greenleaf himself actually expected to argue later before Story in the Supreme Court.<sup>127</sup> Unfortunately, Story was called away before the moot argument, and Greenleaf had to preside over it instead.<sup>128</sup>

In addition to the moot courts, Harvard provided some other writing instruction. The Annual Reports of the President from 1833–1834 and 1845–1846 indicate that “students are instructed in . . . the preparation of pleadings, and other legal instruments.”<sup>129</sup> In an 1840 report, Professor Greenleaf remarked that he attended “a class in extra exercises in practice of drawing up pleadings.”<sup>130</sup>

This era also marks the beginning of the widespread use of what might be properly termed the first legal writing books: treatises designed to help the student navigate the perilous world of common law pleadings. The 1832–1833 course textbook list assigned two such books: *Chitty on Pleading* and *Stephen on Pleading* and also assigned one pleading book in equity, *Cooper on Pleading*.<sup>131</sup>

While lawyers tend to think of pleading as an element of civil procedure in the modern law school curriculum, pleading in the early nineteenth century was a fundamental legal writing and communication skill. The system of common law pleading at the time was highly complex. Pleadings were formalized and could in theory continue indefinitely.<sup>132</sup> “The whole grand scheme was, by rigid stages of denial, avoidance, or demurrer, eventually to reach a single issue of law or fact that would decide the case.”<sup>133</sup> Courts

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126. *Id.* Interestingly, Story then ended up writing the majority opinion in the actual case. *See id.*; *Swift v. Tyson*, 41 U.S. 1 (1842).

127. Warren, *supra* n. 13, at vol. 2, 75.

128. *Id.*

129. *Id.* at 85.

130. *Id.* at 87.

131. *Id.* at vol. 1, 436–437 n. I (reproducing the book list in full).

132. *See* Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 455 (7th ed., West 2011).

133. *Id.* at 467. Wright and Kane note that “This system was wonderfully scientific. It was also wonderfully slow, expensive and unworkable.” *Id.* at 468. They stated that the system was “better calculated to vindicate scientific rules of pleading than it was to dispense justice.” *Id.*; *but see* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1941).

could dismiss actions simply because the lawyer picked the wrong form of action, and various other procedural traps awaited the unwary.<sup>134</sup>

Thus, the idea that courses in pleading were roughly analogous to modern Civil Procedure courses<sup>135</sup> is only superficially true, especially with regard to the treatises used. Some pleading treatises did fit this description: *Stephen on Pleading* was an attempt to organize all of the general rules of pleading according to their reasons for existing and their uses and thus was somewhat like a treatise on civil procedure.<sup>136</sup> However, because of the numerous arcane technical requirements of the common law pleading of the time, many books went beyond simply identifying the requirements of pleading in general terms. For example, *Chitty on Pleading* contained detailed directions teaching a student how to construct pleadings. One of the chapters detailed the facts necessary to be stated in each pleading, as well as the manner in which the facts were to be stated.<sup>137</sup> The treatise then devoted over 400 pages to telling the reader how to construct the numerous common law pleadings of the day in each kind of action, beginning with the declaration that commenced the action and proceeding through to the demurrer that would strike it as defective.<sup>138</sup> *Chitty on Pleading* also devoted a second 888-page volume of examples of each of these different pleadings, in the manner of a form book.<sup>139</sup> Although these examples were all from the courts

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Clark admitted that “[t]he system lent itself to prolonged paper disputations, of which advantage was taken by lawyers naturally anxious to obtain admissions from their opponents without committing themselves.” *Id.* However, he argued that most of the ordinary cases were decided on “simple pleadings” in general assumpsit or trespass on the case. *Id.*

134. See Peter Julian, Student Author, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality,”* 104 Nw. U. L. Rev. 1179, 1183–1186 (2010).

135. See e.g. Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 Ariz. St. L.J. 397, 405–407 (1998) (describing pleading courses as an early form of instruction in civil procedure).

136. See generally Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (James DeWitt Andrews ed., Callaghan & Co. 1894). In his book, *Legal Bibliography*, J.G. Marvin characterizes *Stephen’s Pleadings* as “a master piece of exhausting and elegant legal writing . . . characterized by an accurate statement and clear elucidation of the principles of Pleading, by a perspicuous and logical arrangement, and by a comprehensive and yet concise treatment of the subject.” J. G. Marvin, *Legal Bibliography, or a Thesaurus of American, English, Irish, and Scotch Law Books* 664 (King & Baird 1847).

137. See Joseph Chitty, *A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading* vol. 1, 209–228 (5th ed., Samuel Brooke 1831).

138. *Id.* at 244–680.

139. See generally Chitty, *supra* n. 137. In contrast to his comments about *Stephen’s Pleadings*, J. G. Marvin said of Chitty’s work: “As a practical treatise it surpasses all

of England, they still provided concrete examples that students could understand to help them structure their pleadings.<sup>140</sup> In the system of the mid-1800s, when form was often more important than substance, this was of great value to the student.

## 2. The 1830s

The 1830s saw more fits and starts in the founding of university-based schools, with those schools that became successful following the trend of adding skills training such as legal writing to the curriculum. The law program at William and Mary was revitalized by the hiring of Nathaniel Beverly Tucker, son of St. George Tucker, to its law professorship.<sup>141</sup> Tucker instituted a program based mainly on Virginia law, including a moot court.<sup>142</sup>

Other schools also attempted to enter the field. Attorney General Benjamin F. Butler worked to establish a law department at New York University in 1838, but it apparently ceased operations after only one year.<sup>143</sup> Judge John Reed established a law school in conjunction with Dickinson College in Carlisle, Pennsylvania in 1834.<sup>144</sup> Although this school would later affiliate with, and then disassociate from, Penn State University, it

others upon the law of Pleading, in the variety and extent of its learning and the copiousness of its forms . . . The student should familiarize himself with every part of it.” Marvin, *supra* n. 136, at 190–191. Marvin did however, fault Chitty as “deficient in the exposition of principles, and wholly so in the philosophy of the practice of Pleading.” *Id.* at 190.

140. English Common Law procedure was then still relevant to the practice of law in America. Bruce Kimball and Pedro Reyes note that “[b]eyond being influential, pre-1830 English common-law procedure, with its apex in the King’s Bench, was actually operant in the United States during the 1870s. In fact, it can be argued that it was the most universally operant system in the United States.” Bruce A. Kimball & Pedro Reyes, *The “First Modern Civil Procedure Course” as Taught by C.C. Langdell, 1870–78*, 47 Am. J. Leg. Hist. 257, 279 (2005).

141. See Robert J. Brugger, *Nathaniel Beverly Tucker*, in *Legal Education in Virginia*, *supra* n. 65, at 643–646.

142. *Id.* at 645–647.

143. See Leslie J. Tompkins, *The New York University Law School, Past and Present* 8–12 (1904). Butler’s main contribution to the field of legal education was his 1835 publication of his plan for the establishment of the school. See Benjamin F. Butler, *A Plan for the Organization of a Law School in the University of the City of New York* (N.Y.U. Press 1835). Butler proposed a three-year course of study that could be used in conjunction with apprenticeship in a law office, and that put an emphasis in pleading and practice in the first year. *Id.* at 11–30. His main contribution to NYU was enabling its law school to date its founding from 1835, which was the year Butler prepared his plan. See Alden Chester & Edwin Melvin Williams, *Courts and Lawyers of New York: A History, 1609–1925* vol. 1, 1338 (Am. Historical Socy. 1925).

144. Burton R. Laub, *The Dickinson School of Law—Proud and Independent* 9–15 (Dickinson U. Press 1976).

struggled to attract students for its first fifteen years of existence and, upon Reed's death in 1850, ceased operations entirely until 1890.<sup>145</sup> The most successful startup of the period was the Cincinnati College of Law (then associated with Cincinnati College but later a founding partner of the University of Cincinnati) in 1833.<sup>146</sup> It was founded by three attorneys, including Timothy Walker, who was part of the class that studied law with Ashmun at Northhampton and moved with him to study at Harvard under Story and Ashmun.<sup>147</sup> As at Northhampton, the curriculum followed the standard proprietary school model, with teaching by lectures and "practice in Moot Courts."<sup>148</sup>

Successful or not, the law schools of the 1830s had a common feature—the recognition of the importance of a moot court to provide practical oral and written training.<sup>149</sup> Reed, in particular, focused on the presentation of "fictitious cases, and training the students through all the forms and distinctions of actions, with pleas and pleadings—familiarizing them with all the modes of procedure from the inception of a suit to its consummation by final execution."<sup>150</sup>

As the university schools were recognizing the value of practical training, moot court was also a common fixture in the private law schools of the period. Briscoe G. Baldwin, proprietor of a law school in Staunton, Virginia, noted in his introductory lecture to his class that

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145. *Id.* at 17–23.

146. See Irvin C. Rutter & Samuel S. Wilson, *The College of Law: An Overview 1833–1983*, 51 U. Cin. L. Rev. 311, 311 (1983).

147. See *id.* at 312.

148. See Roscoe L. Barrow, *Historical Note on the University of Cincinnati College of Law (Cincinnati Law School)*, in *The Law in Southwestern Ohio* 289, 289 (George P. Stimpson ed., Cin. B. Assn. 1972) (available at <http://law.uc.edu/sites/default/files/HistoricalNoteByRoscoeBarrow.pdf>) (quoting the proposed teaching method, which included "practice in Moot Courts organized on the mode of the several Courts in Ohio").

149. See Brugger, *supra* n. 141, at 647 (stating that while Tucker's moot court was "no innovation in legal training," Tucker enjoyed using it); Butler, *supra* n. 143, at 29 (stating that "with the higher view of preparing students for speaking and writing on legal subjects, it will be useful to exercise their minds by forensic debates in moot courts, and by requiring from them written opinions on questions of law, and readings and dissertations on statutes and other themes, as circumstances permit"); Laub, *supra* n. 144, at 14 (quoting Reed's letter to the Dickinson College Trustees on a course of study); Barrow, *supra* n. 148, at 289.

150. Laub, *supra* n. 144, at 14 (quoting Reed's letter to the Trustees of Cincinnati College).

I had originally considerable doubts whether a moot court could be regarded as a useful appendage to a law school, having understood its exclusive object to be discussion amongst students of abstract legal questions, and fearing that mere learners, besides being but indifferently qualified for such discussions, might be tempted to engage in them with so much emulation as to neglect their regular studies. Further reflection has satisfied my mind that, when a practical character is given to lectures, a moot court may be an important auxiliary both for the teacher and the pupil . . . There is no mode, it seems to me, by which such purposes are better effected than to require the pupils to prosecute and defend the appropriate suits and actions through all their different stages, from the first institution to the final termination, and, of course to prepare the proper declarations, pleas, demurrers, fills, answers, and all the other requisite pleadings.<sup>151</sup>

Creed Taylor, the proprietor of a private law school in Needham, Virginia, organized his entire teaching around the moot court program, organized into a county monthly court, a county quarterly court, a county superior court, a general court, a superior court of chancery, and a supreme court of appeals, with written depositions for use as evidence.<sup>152</sup>

By this time, even the liberal arts-inclined University of Virginia finally recognized the need for some sort of moot court. In 1833, Professor John Davis, who had taken over the Law Department from John Taylor Lomax, encouraged his students to organize the Law Society.<sup>153</sup> At the meetings, over which Davis presided, students litigated fictitious cases with pleadings and conducted exercises in conveyancing.<sup>154</sup>

### 3. *The 1840s*

During the 1840s, legal education at some places, such as Harvard and Yale, continued on much as it had in the 1830s.<sup>155</sup>

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151. Briscoe Gerald Baldwin, *Introductory Lecture Delivered by General Briscoe G. Baldwin before His Law School, in Staunton, on Monday the 3d day of October, 1831*, in Bryson, *supra* n. 69, at 73.

152. Susan A. Riggs, *Creed Taylor*, in Bryson, *supra* n. 65, at 592.

153. Ritchie, *supra* n. 111, at 20.

154. *Id.*

155. See Warren, *supra* n. 13, at vol. 2, 83–113 (chronicling the school from 1833 to the appointment of Joel Parker in 1847). Daggett and Hitchcock continued to run Yale's law school until Hitchcock's death in 1845. See Langbein, *supra* n. 108, at 56. As Daggett was

Other schools, however, made significant changes, especially with regard to teaching the practice of law. At Virginia, New Chair of Law John Barbee Minor effected a substantial change in the program.<sup>156</sup> Minor, a graduate of the school, was a firm believer in teaching both the theoretical study of law and the practical business of being a lawyer.<sup>157</sup> He stated that, while most universities were primarily concerned with theoretical study:

it has been generally supposed that the [practice of the law] could be acquired no otherwise than by actual practice in the Courts of the Country. Much reflection and some experience assure me that this idea is fallacious, and that a law school may be made the vehicle of peculiarly efficient . . . instruction in this later department of elementary study. I think it not only practicable but easy if the teacher will work as hard as he ought . . . to make every student of average ability and industry a more accomplished practitioner of law, whether its abstract philosophy or its routine of practice be regarded, than nine-tenths of the lawyers of five years' standing now are.<sup>158</sup>

Minor believed in the use of treatises to impart the theoretical underpinnings of the law. His plan for teaching the practice of law was particularly audacious. He stated that

[t]he exemplifications of the processes and details of practice might be effected through the medium of a Moot Court, so organized as to present a precise counterpart of the several tribunals [of] original jurisdiction in Virginia. Cases should be exhibited as they really occur, mixed with extrinsic and irrelevant matter, so as to exercise the judgments and shrewdness of the student in seizing the material points, and extricating them from the mass of useless facts. They should be so varied

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then eighty years old, the school was in danger of extinction. *Id.* After some New Haven lawyers took over the teaching for a short time, two new professors were finally hired in 1847. *See id.* at 57–58. This led to the gradual decline of the law school, and it was almost closed down in 1869. *Id.* at 58. Nevertheless, “for the student, the school went along from day to day, term to term, and year to year, with little interruption of its continuity.” Hicks, *supra* n. 109, at 94.

156. The John Davis regime at Virginia had ended tragically when Davis was shot and killed by a university student while trying to quell a disturbance. Ritchie, *supra* n. 111, at 24. The famous Henry St. George Tucker took over for four years, without substantial variance in the curriculum, before he was replaced by Minor. *Id.* at 27–29.

157. *See id.* at 33–34.

158. *Id.*

and so numerous, as to afford each student many life-like examples of every description of practice he is likely to encounter. He would thus be accustomed to give advice . . . to devise and execute every species of assurance, to draw and to interpret wills, to offer them for probate and to resist the probate, to move for . . . the establishment of bills and to apply and conduct writs of prohibition, for mandamus, and of quo warranto, to prepare bills of exception and demurrer to evidence, to apply for and carry through writs of error, and of super-sedas, to file bills and answers, and draw . . . and orders in chancery, to prepare and conduct chancery cases, and in short to do frequently until expertise and accuracy are attained, everything both in and out of court which a lawyer can expect to be called on to do.<sup>159</sup>

Minor's moot court met weekly throughout the year during the 1840s and 1850s.<sup>160</sup>

The 1840s also brought another round of law school expansion, much of it in new places, where the only prior option for becoming a lawyer had been apprenticing in a law office.<sup>161</sup> As before, some institutions flourished, while others did not.<sup>162</sup> Also, as before, those that flourished recognized the need to offer practical training with some sort of written component.<sup>163</sup>

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159. *Id.* at 34–35.

160. *Id.* at 35.

161. One notable apprentice at this time was Abraham Lincoln, who learned law in the 1830s through books he borrowed from the law offices of two Springfield attorneys, there being no law schools in Illinois. Mark E. Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln* 30–33 (N. Ill. U. Press 2006).

162. Saint Louis University attempted to establish a law school in 1843, which allowed it to claim to be the first law school west of the Mississippi, but it closed unceremoniously in 1847. See St. Louis U. Sch. of L., *Alumni—School of Law History*, <http://www.slu.edu/school-of-law-home/about-us/history> (accessed Dec. 3, 2014). Tulane, then the University of Louisiana, started a law department in 1847, but it struggled to attract students owing to the fact that New Orleans was at this time “long on lawyers.” See John P. Dyer, *Tulane: The Biography of a University 1834–1965*, at 24–25 (Harper & Row 1966). The law school finally shut down entirely for the Civil War, and did not reopen again until 1865. *Id.* at 32–33. Princeton established a law school in 1846, but closed in 1852 having graduated only six students. Stevens, *supra* n. 12, at 8.

163. Those schools that did not embrace the idea of practical training did not fare as well during the 1840's. Baylor established a series of law lectures in 1846, though it would have to wait another decade for a true “Law Department.” See Charles Alfred Mackenzie, *A History of the Baylor University School of Law from the Lectures of Abner S. Lipscomb through the Deanship of Abner V. McCall* 2–3 (Master of Arts Thesis, Baylor U. 1988). Instead, the lectures were given voluntarily by founder R.E.B. Baylor himself and a judge, Abner Lipscomb. As they were both trustees of the school, neither Baylor nor Lipscomb were allowed to receive a salary for their teaching. *Id.*

A typical university entrant into law teaching of the time was the University of Indiana at Bloomington, Judge David McDonald became the one and only law professor in 1842.<sup>164</sup> McDonald's students studied, among other things, *Chitty on Pleadings*, and he held a moot court every Saturday at which the students were "given exercises in pleading and in arguing legal questions."<sup>165</sup> Similarly, when the University hired William Horn Battle, a former head of a private law school, as its first law professor, in 1845, his students read and recited, and engaged in a moot court at which they discussed legal questions and drafted "pleadings and other legal instruments."<sup>166</sup> "Mock trials" were also a feature of the curriculum when the University of Louisville established a law department in 1846.<sup>167</sup>

The biggest development in practical legal training came in 1847 at Cumberland School of Law in Lebanon, Tennessee. Abraham Caruthers, the first law professor at Cumberland, believed that "no exercise is of so much importance to a lawyer as that of communicating his knowledge."<sup>168</sup> The curriculum of the school reflected this: students recited in class daily, and the moot court program at Cumberland was rigorous.<sup>169</sup> Carruthers believed that the law school should be a place "where the law will be studied practically; so studied I mean as to prepare the student for practice."<sup>170</sup>

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164. James Albert Woodburn, *History of Indiana University*, vol. 1, 179–180 (Ind. U. 1940).

165. *Id.* at 180. This would be the general course of action, with varying degrees of success at Indiana until 1877, when the legislature abolished the law department and the medical department on the curious grounds that it was not the "duty of the people to help men into these easy professions." See *id.* at 280 (quoting an unnamed legislator); Paul D. Carrington, *Teaching Law in the Antebellum Northwest*, 23 U. Toledo L. Rev. 3, 18–21 (1991).

166. See Albert Coates, *Evolution of Legal Education in the University of North Carolina*, 47 N.C. L. Rev. 11, 13–14 (special issue 1968) (quoting from the 1845–1846 University catalogue).

167. See Dwayne D. Cox & William J. Morison, *The University of Louisville 24–25* (U. Press Ky. 2000). The classes at Louisville were taught in the afternoon by practicing attorneys. *Id.* at 24. However, the course of training at Louisville did not pretend to be complete, and the students' main training in the law still came through apprenticeships. *Id.*

168. David J. Langum & Howard P. Walthall, *From Maverick to Mainstream: Cumberland School of Law 1847–1997*, at 24 (U. Ga. Press 1997) (quoting Abraham Caruthers, *Inaugural Address of Hon. A. Caruthers . . . on the 29th of July, 1847*, at 8–9 (Banner of Peace Office, Lebanon, Tenn., July 29, 1847)).

169. *Id.*

170. *Id.* at 25 (quoting Caruthers, *supra* n. 168, at 19–22).

The entering Cumberland students first studied lessons from a book written by Carruthers, *History of a Lawsuit*.<sup>171</sup> This book was a manual on practice so that students could work their way through the moot court program.<sup>172</sup> It contained step-by-step instructions on what to do in a lawsuit. The first section set up an example legal problem, which directed the student to sue on a note.<sup>173</sup> The next section directed the student how to file a prosecution bond, explained what the bond should contain, and gave an example of such a bond.<sup>174</sup> The third section then explained how to file a pauper oath, in case the client was too poor to file a prosecution bond, and gave an example of such a filing as well.<sup>175</sup> The following sections walked the student through the process of obtaining a writ in all of the courts of Tennessee, figuring out the jurisdiction and venue, choosing the type of action, obtaining service, drawing up and filing all of the various pleadings, and conducting a trial.<sup>176</sup> At every stage, the book provided not only information on how to take these steps, but also provided examples for the student to review.<sup>177</sup> The class worked through the textbook, with the professor explaining it and the students reciting on it, and then the students showed their mastery of the subject by using it in moot court.<sup>178</sup>

The students at Cumberland needed all of this information just to complete the rigorous legal skills training. In Cumberland's program, the students received a statement of facts and then had to prepare all of the documents and pleadings, take depositions, and try the cases in front of the professor.<sup>179</sup> They then had to make post-trial motions and take or defend an appeal.<sup>180</sup>

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171. *Id.* at 27. The subjects at Cumberland were arranged in series, so that each class studied only one subject at a time. *Id.* at 25.

172. See Arthur Caruthers, *History of a Lawsuit in the Circuit Court of Tennessee*, at preface (2d ed., W.F. Bang & Co. 1856). The first edition, written in 1847 was forty to fifty pages in length. Langum & Walthall, *supra* n. 168, at 27. By the time Caruthers had finished, the book had grown to six hundred pages. *Id.*

173. Caruthers, *supra* n. 172, at 1.

174. *Id.* at 1–6.

175. *Id.* at 6.

176. *Id.* at 7–163.

177. *Id.*

178. See Nathan Green, *Law School of Cumberland University*, 2 Green Bag 63, 64 (1890).

179. See Langum & Walthall, *supra* n. 168, at 27–28.

180. *Id.* at 28.

These moot courts were held at least once every two weeks.<sup>181</sup> This very practical legal writing and practice training was an instant success, and from Cumberland's first class of seven, enrollment soared to seventy-four by 1850.<sup>182</sup>

#### 4. *The 1850s*

As the existing law schools grew bigger during the 1850s, moot courts became an even more important tool for the teaching of law. At Harvard, a new teaching team of Professors Joel Parker and Theophilous Parsons placed particular emphasis on moot courts, holding two each week.<sup>183</sup> They noted that moot court

trains the student for the actual practice of his profession better than any other exercise and the diligence and ability exhibited in the examination of the authorities, the preparation of the briefs and in the arguments at the bar would have done credit to practitioners of considerable experience.<sup>184</sup>

One avid participant in these moots during the 1850s was a student named Christopher Columbus Langdell, who drew particular attention for his elaborate brief in a losing effort in one case in 1852.<sup>185</sup>

Unfortunately, this was really the last hurrah for the moot court as the teacher of practical writing and oratory skills at Harvard, at least in the pre-Civil War era. In recounting the history of the school, Joel Parker lamented that after the early success with the twice-weekly moot courts

in the course of a few years, a change came over the spirit of the dreams of [the students], the interest flagged, and then came a term at which it was difficult to find students who were entitled to act as counsel, and who were willing to be retained, and I yielded very reluctantly to a proposition to change the rule (requiring moot courts twice per week). The

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181. *Id.*

182. *Id.* at 17.

183. Warren, *supra* n. 13, at 129.

184. *Id.* (quoting from the annual reports of April 27 and October 1849).

185. *See id.* at 177.

School changed afterwards, but I could never procure its restoration.<sup>186</sup>

At Cumberland, however, the moot courts became even more elaborate to keep up with the huge increase in the number of students and the University's increasing reputation as a school for law practice.<sup>187</sup> From their bi-weekly beginnings, moot courts became weekly by 1852.<sup>188</sup> By 1856, the school conducted moot courts every day, with appellate sessions "as often as the number of appeals may require."<sup>189</sup> In addition, public moot courts were held at the end of each school term; these attracted large audiences.<sup>190</sup> By 1856, the school hired an additional professor, alumnus Nathan Green, Jr., to teach as a judge of the moot court. In the fall of 1856, he spent his time "employed exclusively in holding the [moot] Circuit and Chancery Courts, and preparing cases for them."<sup>191</sup>

There was also a change in the number of law schools. The death of its founding professor caused Dickinson to close in 1850.<sup>192</sup> On the other side of the ledger, a number of other law schools opened in this last decade before the Civil War.<sup>193</sup> As before, they all incorporated moot courts to some extent as the vehicle for teaching the practice of law.

In 1850, the University of Pennsylvania re-established its Law School.<sup>194</sup> In its early years, with just one professor, the course of study was by lecture; however, eventually the school held a moot court once each month on a question presented by the professor, though the system appears to have been oral only.<sup>195</sup> Later, when the school established two more professorships, each

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186. Joel Parker, *The Law School of Harvard College* 21 (Hurd & Houghton 1871).

187. See Langum & Walthall, *supra* n. 168, at 28–29. Cumberland experienced a large increase of students between the 1849 and 1850 school years, from 48 students to 74. *Id.* at 17. By 1860, Cumberland had 180, making it the largest law school in the nation at a time when Harvard had 166, and Virginia 131 students. *Id.* at 18.

188. *Id.* at 28.

189. *Id.* at 29 (quoting the Cumberland University Catalogue from 1855–1856).

190. *Id.*

191. *Id.* at 28–29 (quoting the Cumberland University Catalogue from 1855–1856)..

192. Laub, *supra* n. 144, at 28–29.

193. And, as before, some would just as quickly close. See Reed, *supra* n. 93, at 153–154. Among these casualties was the law school at the University of Nashville, billed by its president as the "Harvard of the South" at its founding in 1854; it lasted one year. See *id.*

194. Carson, *supra* n. 73, at 21.

195. See *id.* at 22.

professor “combined examinations and moot courts with his lectures, so as to make the system as complete as possible.”<sup>196</sup> The school’s proximity to the Law Academy of Philadelphia, the first professional legal association in the United States, provided students with an additional opportunity to argue and debate current legal issues.<sup>197</sup>

Practical training was the main focus of Albany Law School, which was founded in New York in 1851.<sup>198</sup> The mission of the school was that of “fitting the [law student] to enter at once on the successful practice of his profession,”<sup>199</sup> and the curriculum reflected this. The school used a variety of educational methods, including moot courts and observation in Albany courtrooms.<sup>200</sup> Moot courts were conducted by a professor, covered a wide range of topics, and were designed to illustrate either “some vexed points arising in the lectures, or . . . real cases pending before the Supreme Court or Court of Appeals.”<sup>201</sup> The school expected that, from these moot courts, which were held twice weekly, students would “acquire good habits of speaking, learning never to sacrifice sense to sound, or solid argument to showy declamation.”<sup>202</sup>

The University of Mississippi established a law school in 1854, heavily influenced by the University of Virginia’s model.<sup>203</sup> Although dedicated to the idea that the theory of law and government was a proper subject for teaching, the University did not stint on moot court as a way to apply legal principles to cases.<sup>204</sup>

In 1858, Columbia once again “relaunched” its law program, this time under the tutelage of Professor Theodore Dwight, for-

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196. *Id.* at 24.

197. *Id.* at 25.

198. See Elizabeth K. Allen & Diana S. Waite, *Albany Law School 1851–2001: A Tradition of Change* 13–14 (Mount Ida Press 2000). Some of its founders had been involved in the short-lived New-York State and National Law School in Ballston Spa, New York. *Id.* at 13.

199. *Id.* at 19 (quoting from the first bulletin of the law school).

200. *Id.* at 21. The primary teaching method in classes was lecture, but textbooks and written examinations were also staples. *Id.*

201. *Id.* at 25–26 (quoting from the early school bulletins).

202. *Id.* at 26 (quoting the 1854–1855 Albany law school circular).

203. See Sylvester John Hemleben & Richard T. Bennett, *A Historical Sketch of the Early Law School of the University of Mississippi: A Newly Found Memoir*, 37 *Miss. L.J.* 28, 36, 41 (1965). This article was based on a memoir written by Charles Bowen Howery, an 1867 graduate of the school. *Id.* at 28. The memoirs were discovered in a file by the registrar of the school. See *id.*

204. See *id.* at 41, 44, 49 n. 196.

merly of Hamilton College.<sup>205</sup> Although Dwight would become famous as the teacher behind the “Dwight Method” of textbook reading and recitation, moot court formed a vital part of his system of teaching as well.<sup>206</sup> By 1861, he was holding two moot courts a week, during which he sat as judge, along with two students; all three judges delivered written opinions.<sup>207</sup> The students acting as lawyers were expected to “prepare written points [of law] in the ordinary manner.”<sup>208</sup>

As with Parker at Harvard, Dwight soon became disappointed with his students’ attitude toward their moot court duties. Many of the students failed to take the practical training of moot court seriously.<sup>209</sup> Part of this might have been due to the fact that many of the students were also pursuing a traditional law office apprenticeship at the same time and may have felt they were already getting enough practical training.<sup>210</sup>

The New York University School of Law also revived operations in 1858.<sup>211</sup> In its first promotional materials, the school proposed not only to have moot courts but also moot legislatures.<sup>212</sup>

Baylor’s law lecture program evolved into the establishment of a full law department in 1857.<sup>213</sup> It was geared toward giving “practical legal education.”<sup>214</sup> Students spent the first year in the department (their junior year in college) learning from treatises and lectures; their second year (their senior year) included moot

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205. Goebel, *supra* n. 75, at 29.

206. *See id.* at 35–39 (discussing Dwight’s teaching methods).

207. *Id.*

208. *Id.* at 61 (quoting from the 1864 report of the Board of Trustees).

209. *See id.* at 64. A student at the time wrote that “how [Dwight] managed to preserve a straight face while listening to some of the arguments presented, it was difficult to understand, especially as they were calculated to and did provoke great merriment among the students.” Theron G. Strong, *Landmarks of a Lawyer’s Lifetime* 254 (Dodd, Mead & Co. 1914).

210. *See id.* at 253 (noting that because the students were also working at law firms, they were only required to attend two daily sessions of two hours each at the school); Goebel, *supra* n. 75, at 44 (noting that most of the students were expected to be those who were also apprentices, and in fact many of the students in the early years were already members of the bar).

211. *See* Tompkins, *supra* n. 143, at 15.

212. *Id.* at 18. It is not known whether either of these were actually instituted in the pre-Civil War days. A regular moot court was made a part of the curriculum in 1871. *Id.* at 26.

213. MacKenzie, *supra* n. 163, at 3.

214. *Id.* at 5.

courts in the law of procedure, pleading, and evidence.<sup>215</sup> The professors supervised the moot courts, which simulated practice in the district courts and the Supreme Court of Texas.<sup>216</sup> Students also participated in a debating society called the Wheeler Law Club, in which they discussed questions and improved on their “debate and elocution.”<sup>217</sup>

In 1859, the University of Georgia opened a law school. Its course of study consisted of lectures and a weekly moot court on Saturdays.<sup>218</sup> Unfortunately, the minds of the students were on the approaching Civil War, and the school closed in 1861 “for the duration of the war.”<sup>219</sup>

Northwestern Law School also opened in 1859, as a branch of the old Chicago University.<sup>220</sup> Its teaching methods included recitation of readings, and one writer noted that in its “conservative” method of teaching law, students learned “how to draught the papers used in the practice of law.”<sup>221</sup> While no evidence exists of a moot court program at the school until 1873, it would seem unusual for the school not to have had one from the beginning, given that one of its founders was formerly a part of the same New York State and National Law School that spawned the law school at Albany.<sup>222</sup>

The University of Michigan also got into the law school business in 1859 with the aim to make “not theoretical only, but practical lawyers; not to teach principles merely, but how to apply them.”<sup>223</sup> From the beginning, this aim included the use of compulsory moot courts.<sup>224</sup> One of the original professors at the school, Thomas Cooley, stated,

215. *Id.* at 6.

216. *Id.*

217. *Id.*

218. Gwen Y. Wood, *A Unique and Fortuitous Combination: An Administrative History of the University of Georgia School of Law* 12 (U. Ga. Press 1998).

219. *Id.* It would not reopen until 1867, with a curriculum consisting of a series of lectures. *Id.* at 13–14.

220. James A. Rahl & Kurt Schwerin, *Northwestern University School of Law—A Short History to Commemorate Its Centennial 1859–1959*, at 5–6 (Nw. U. Sch. of L. 1960).

221. See James E. Babb, *Union College of Chicago*, 1 Green Bag 330, 335–336 (1889). In 1873, the law department had come under the jurisdiction of both Northwestern University and the modern University of Chicago, and had taken the name Union College of Law to reflect this. *Id.* at 331.

222. See *id.* at 331, 337.

223. Elizabeth Gaspar Brown, *Legal Education at Michigan, 1859–1959*, at 20 (U. Mich. Press 1959) (quoting the 1860 University catalogue).

224. *Id.* at 226.

“It was agreed by the professors at their first meeting that moot courts must be made a special feature of the course, quite beyond what had been customary in law schools, and that the professors must give freely of their time in assisting the students assigned to take part in them in their preparation for the hearings. This understanding was carried out with liberal expenditure of labor, and the moot courts became an attractive feature in the instruction.”<sup>225</sup>

Compulsory moot courts at Michigan occurred once a week. In addition to the actual hearings, students obtained a statement of facts and were then required to prepare pleadings and draw up a brief. They submitted these pleadings to the professor who taught pleading and practice, and he reviewed them, noting errors and giving advice on how to correct them.<sup>226</sup> Students could also participate in voluntary student-run “Club Courts,” which focused on the law in different states.<sup>227</sup>

##### 5. *Legal Education on the Eve of the Civil War*

As can be seen, legal education, especially related to skills training, was becoming more uniform by the late 1850s and early 1860s.<sup>228</sup> Although apprenticeship and proprietary law schools were still common means of entering the profession, the university law school was becoming increasingly accepted, with twenty-one such schools in existence by 1860.<sup>229</sup> At each of these schools, and indeed at most proprietary law schools, students gained their practical training in the law through classes on pleading and through moot courts. Moot courts were regarded as an important part of legal education at all of these schools, and at some schools such as Cumberland, they were the main feature.<sup>230</sup> In these settings that the skills that would make up present-day legal writing were taught.

However, cracks were already appearing in the moot court model. At some schools, students who were combining their edu-

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225. *Id.* at 227 (quoting Thomas Cooley).

226. *See id.* at 229 (quoting a catalogue from 1883–1884).

227. *See id.* at 229–230.

228. *See* Reed, *supra* n. 93, at 154–159 (noting the similarities of law schools across the country).

229. *See id.* at 158.

230. *See supra* nn. 171 to 182 and 187 to 191 and accompanying text (describing the moot courts at Cumberland in the 1840s and 1850s).

cation at the university with internships in a law office were reluctant to put in the time and effort required to make moot court effective.<sup>231</sup> Meanwhile, at Harvard, there was also resistance to the twice a week mandatory moot court structure.<sup>232</sup> The school catalogues suggest a possible reason for this: in the 1830–1831 school year, the number of titles assigned for the regular course was twenty-three (consisting of twenty-five books, as one of the titles assigned was Kent’s three-volume treatise).<sup>233</sup> By 1853–1854, the number of titles of the regular course had swollen to eighty-three.<sup>234</sup> It may be that, as the substance of the law was becoming more complex, students and professors alike found it difficult to fit everything in.

## VI. THE CIVIL WAR YEARS

The Civil War wreaked havoc on legal education. Attendance at schools fell precipitously: Harvard went from 103 students at the beginning of fall of 1861 to 87 students during the next spring.<sup>235</sup> Meanwhile, the then-largest school in the nation, Cumberland, shut down entirely as most of its students left to fight for the Confederacy.<sup>236</sup> While most of the university-based law schools would live to reopen after the war, some would not.

Yale survived the war mostly intact, but the decline and death of its sole law professor proved to be more problematic.<sup>237</sup> By 1867 and 1868, Yale had only “a meager list of sixteen or seventeen students . . . of whom a considerable part could scarcely be called students.”<sup>238</sup> Of the Northern law schools, the one least affected appears to have been Columbia: out of approximately 428

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231. See *supra* nn. 205–208 and accompanying text (describing problems with moot court at Columbia).

232. See *supra* nn. 209–210 and accompanying text.

233. See *A Catalogue of the Officers and Students of Harvard University for the Academic Year 1832–33*, at 27 (Harv. U. 1832).

234. See *A Catalogue of the Officers and Students of Harvard University for the Academic Year 1853–54* (Harv. U. 1853).

235. Warren, *supra* n. 13, at 282.

236. See Langhume & Walthall, *supra* n. 168, at 47.

237. See Langbein, *supra* n. 108, at 58.

238. *Id.* (quoting Theodore D. Woolsey, *Historical Discourse by Theodore D. Woolsey and Oration on the Influence of Lawyers on Free Governments* 11 (L. Dept. of Yale College 1874)).

students enrolled between 1860 and 1865, only eighteen served in the military during the Civil War.<sup>239</sup>

The Southern law schools were more heavily hit. William and Mary closed in 1861 in the wake of the Peninsula campaign and federal occupation; its law school would not reopen until 1920.<sup>240</sup> Mississippi also closed down for the war, and when it reopened, it would be without its two pre-war professors.<sup>241</sup> Georgia's fate was similar: it closed in 1861, and two of its co-founders died during the war.<sup>242</sup> The University of North Carolina's law school hung on with reduced enrollment, but finally the whole university shut down in 1868 in the wake of reconstruction.<sup>243</sup> Even the schools that remained open suffered great loss in enrollment. Virginia's law school, which had 135 students in 1860–1861, saw only thirty-one students total attend during the next four years.<sup>244</sup>

As the war receded and the nation returned to normalcy, those law schools that survived or reopened came into a new legal era. After the Civil War, the university law school would become the dominant form of legal education.<sup>245</sup> Both demand and supply would increase. In the five years following the Civil War, no fewer than ten university-based law schools would be founded.<sup>246</sup> Along with these new and newly reopened law schools would come a change in the law school attendance and curriculum that would have a profound effect on the teaching of practical skills such as legal writing.<sup>247</sup>

## VII. CONCLUSION

The teaching of legal writing skills has been a part of legal education in America since colonial times. In the beginning, these

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239. Goebel, *supra* n. 75, at 53.

240. See Bryson, *supra* n. 65, at 472.

241. See Hemleben & Bennett, *supra* n. 203, at 45. Judge Trotter died soon after the war, and Professor Stearns, a northerner by birth, was effectively exiled. *Id.* The law school would reopen in 1866. *Id.* at 46.

242. See Wood, *supra* n. 218, at 13. One of the co-founders, Thomas Cobb, was a brigadier general in the Confederate army, and was killed at the Battle of Fredericksburg. *Id.* at 10.

243. See Coates, *supra* n. 166, at 14–15. It would reopen in 1880. *Id.* at 16–17.

244. See Ritchie, *supra* n. 111, at 44.

245. See Stevens, *supra* n. 12, at 205.

246. See Reed, *supra* n. 93, at app. A.

247. See generally *id.* at 273–280 (describing the “Vitality of Legal Education between 1865 and 1890”).

skills were taught as part of the apprenticeship system that was the predominant means of becoming a lawyer.<sup>248</sup> The teaching varied widely depending on the time and inclination of the lawyer doing the teaching. While some lawyers took care in instructing their apprentices, many provided next to no instruction at all.<sup>249</sup>

During the last two decades of the eighteenth century, lawyers began establishing private law schools to teach larger numbers of students.<sup>250</sup> In addition to lectures on the subject of the law, they introduced moot courts to teach its practical application. These moot courts required both writing and oratory skill on the part of the students and would be the predominant means of delivering legal writing skills until after the Civil War.<sup>251</sup>

Meanwhile, the earliest attempts of the universities to enter the field of legal education were almost uniformly unsuccessful, primarily because they approached law as a theoretical field, rather than a practical one.<sup>252</sup> Only after the universities began adopting the teaching methods of the proprietary law schools did they begin to supplant the apprenticeship system and those proprietary schools as the providers of legal education in America.<sup>253</sup> While the Civil War interrupted or even permanently ended some of those university-based programs, most returned, and others sprung up shortly after the war.<sup>254</sup>

This then, was the state of legal writing immediately after the Civil War, and significant changes were on the horizon. Very soon, Christopher Columbus Langdell would introduce the case method and usher in the era of the “modern law school,” and legal writing would begin a serpentine journey along with it.

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248. *See supra* pt. I.

249. *See supra* nn. 27–46 and accompanying text.

250. *See supra* pt. II.

251. *See supra* pt. II.

252. *See supra* pt. III.

253. *See supra* pt. IV.

254. *See supra* pt. V.