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“From Grimm to Glory: Simulated Oral Argument as a Component of  
Legal Education’s Signature Pedagogy”

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**FROM GRIMM TO GLORY:  
SIMULATED ORAL ARGUMENT AS A COMPONENT OF LEGAL  
EDUCATION'S SIGNATURE PEDAGOGY**

LISA T. MCELROY\*

ABSTRACT

*The past two years have been a period of landmark transformation in legal education. With the issuance of the Carnegie and Best Practices in Legal Education reports, law schools and law professors have re-begun the essential process of analyzing and transforming legal pedagogy. This widespread re-examination of the law school curriculum has yielded two important changes in legal education: first, law schools – including those in the top tier - have begun radically to amend their curricular goals and structures; and, second, legal scholars have begun to turn their attention to the theory and implementation of better legal education. As Carnegie and Best Practices note, this nascent metamorphosis in scholarly thought about legal education has the potential to transform both the law school and the law practice experience, as well-grounded pedagogy will remove the barriers to learning that some law students have historically experienced while better preparing them to practice law.*

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*This article represents one of the first concrete responses to Carnegie and Best Practices. In proposing that law professors regularly use oral argument exercises to supplement traditional Socratic dialogue, it meets head on the concerns expressed by Best Practices and Carnegie that over-reliance on the Langdell method neither mimics law practice nor nurtures student learning. It also responds directly to the suggestion in both reports that simulation exercises may yield better legal analysis and knowledge. Finally, this article advances a novel theory directly related to the objectives and conclusions of the Reports; namely, that for experienced advocates and law students alike, practice oral argument may be a starting point, rather than a mere end point, for teaching, learning, and executing the fundamentals of legal analysis. In the style of the transcribed classroom conversations of the Carnegie Report, it discusses and demonstrates by example a simulation exercise designed for professors to use in introducing this teaching methodology. The exercise, based on seven fairy tales used as precedent cases, provides a familiar, non-threatening technique for students to learn about rule synthesis, weight of authority, analogy and distinction, and theme through oral argument.*

## I. INTRODUCTION

Oral argument, United States Chief Justice John G. Roberts, Jr., has said, is more than just an oral presentation to the justices of what is already in the briefs.<sup>1</sup> Indeed, as other justices have often noted, oral argument, when done well, is a chance to explore legal concepts and application far beyond what a 20- or 50-page brief can even begin to address.<sup>2</sup> It is an opportunity for a conversation with the justices, an occasion to extend

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<sup>1</sup> John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, SCHOOL LAW IN REVIEW, 7-1, 7-2 (1997).

<sup>2</sup> See, e.g., Patricia Wald, *19 Tips from 19 Years on the Bench*, 1 J. APP. PRAC. & PROCESS 7, 17 (1999) (“I think [oral argument] is very important in close cases. . . . A judge’s physical presence in the courtroom alongside the counsel with the opportunity to engage in a one-on-one dialogue . . . produces a qualitatively different stimulus to the judge’s creative juices and perceptions of the issue than the isolated experience of judge alone with cold briefing text.”); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999) (“Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel.”). *But Cf.* William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3-4 (1999). (“[R]arely is good oral advocacy sufficient to overcome the impression made by a poorly written brief.”).

hypotheticals to potentially important real-life situations.<sup>3</sup> While many judges and justices enter the courtroom with some tentative pre-formed ideas about a case, attorneys may use oral argument to persuade them to change their minds.<sup>4</sup>

In addition to persuading judges, oral argument serves to help lawyers solidify key themes in and ideas about their cases.<sup>5</sup> Indeed, most oral

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<sup>3</sup> Chief Justice John G. Roberts, Jr., Address to my law students on the occasion of their visit to the United States Supreme Court (Feb. 27, 2006); Assoc. J. (Ret.) Sandra Day O'Connor, Address to my law students on the occasion of their visit to the United States Supreme Court (Mar. 1, 2004).

<sup>4</sup> Roberts, *supra* note 3; O'Connor, *supra* note 3; *see also* Wald, *supra* note 2, at 17 ("It is not unusual for a judge to come to conference after an argument saying, 'I came into the courtroom with a tilt toward the appellant (or appellee); now I'm not so sure at all. . . . Oral argument seldom brings you 180 degrees around, but if your tilt is, say, 50-49%, it can make a big difference."); Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 8 (1998-1999): "Since I have served on the court, oral argument has changed my initial view of how an appeal should be decided in no more than ten percent of the cases. Some of my colleagues disagree with me about the importance of oral argument. I confess that I have seen cases where a good oral argument compensated for a poor brief and saved the day for that particular lawyer's position. I have also seen effective oral argument preserve a victory in a deserving case." Ginsburg, *supra* note 2, at 570: "In my view it is in most cases a hold-the-line operation. In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument." *Cf.* Rehnquist, *supra* note 2, at 3: "I cannot think of any better way to convey the importance of the brief than to say that in many cases that we hear, some if not all members of our Court will come on the bench with a tentative view of the merits based on a reading of the briefs." Carter Phillips, a top Supreme Court advocate, sides with Chief Justice Rehnquist: "They analyze the briefs very carefully. They understand the case quite well. The decision-making process is 99.9% based on the briefs. The oral argument is not going to be the basis on which you are going to drive somebody to your side of the case very often, if ever." Carter Phillips, *Advocacy Before the United States Supreme Court*, 15 T.M. COOLEY L. REV. 177, 189-90 (1998).

<sup>5</sup> Roberts, *supra* note 1, at 7-2: "[R]ehearsing can be an invaluable part of preparation. . . . [the goal of the first practice session is not so much] to have all the answers to the judges' questions as it is to learn what the difficult questions are, so that you can keep them in mind as you shape your argument." Bob Foster agrees: "The necessity of adequate preparation cannot be overemphasized. If possible, set up one or more moot courts with members of your firm or agency so that you can repeatedly practice the argument in advance. Merely thinking about

advocates report that mooted a case teaches them a great deal about the “holes” in the case, or the areas of potential weaknesses. It helps them to organize and frame their arguments.<sup>6</sup> Because speaking – like writing – is in and of itself a form of thinking,<sup>7</sup> the very act of arguing a case out loud provides important insight for attorneys and judges alike.<sup>8</sup>

In the law school context, students have some opportunities to engage in legal analysis as preparation for an oral argument. Most first-year legal

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the argument is not enough. Repeated practice in presenting your case and responding to questions is critical. . . .” Bob Foster, *Oral Advocacy at the Supreme Court of the United States*, 49-SEP FED. LAW. 23, 23 (2002). But Carter Phillips uses another approach: “I do not have moot courts before my arguments. Instead, I sit around a table and talk to people a great deal. Fortunately, we have people at the firm with a fair amount of experience at the Court. They ask a lot of questions, and I practice through this process. But, what I have really found to be the most helpful is trying to explain my case to my children. Ever since my children were six years old, I have sat down before the oral argument and explained the case to them. If I can explain the case so that my children can both understand the case and think that there is some sympathy in my position, then I know that I am in good shape. It seems quite clear to me that if I can explain the case to my children that well, then I will be able to explain the case to anybody else, including to people who are as smart as the Justices.” Phillips, *supra* note 4, at 194.

<sup>6</sup> See *supra* note 5.

<sup>7</sup> Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk about Law*, 54 J. LEGAL EDUC. 570, 570-571 (2004).

<sup>8</sup> Hence, the old axiom: “A lawyer actually makes three oral arguments: one to the mirror in the morning before the argument, one in the courtroom, and one in the car on the way home.” Interestingly, however, there are very few articles on the subject of teaching students to argue well. See, e.g., Emily Zimmerman, *Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy*, 10 NO. 3 PERSP. TEACHING LEGAL RES. & WRITING 109, 109 (2002) (asserting that “advocacy is not an abstract pursuit but an activity that involves real issues that are of pressing concern to real people.”); Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 NO. 1 PERSP. TEACHING LEGAL RES. & WRITING 17, 17 (1998) (stating that a primary benefit of oral argument exercises is that “many [students] are excited to have the opportunity to argue like lawyers . . . almost all students come away from [a moot court argument] feeling that it was a high point of their first year.”); Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 871, 878 (2006) (asserting that students, to their detriment, rarely have more than one opportunity to engage in oral argument during the first year of law school); Kathleen Miller, *Making Practice Oral Arguments Interesting*, 14 NO. 1 PERSP. TEACHING LEGAL RES. & WRITING 26 (2005) (discussing, *inter alia*, the value of having students prepare questions before class and actually “sit” as “judges”).

research and writing courses contain an oral advocacy element,<sup>9</sup> and many students compete on intramural or interscholastic moot court teams.<sup>10</sup> Just as lawyers do, students analyze and prepare a case for oral argument by synthesizing rules from multiple authorities, weighing authority, analogizing and distinguishing, and using reasoning to predict and argue case outcomes.<sup>11</sup>

But this article will seek to turn that formula around.

Because lawyers work through and analyze their cases through the oral advocacy process, this article will assert that law professors can better train their students to engage in legal analysis by having them argue that analysis on their feet in simulated oral argument exercises.<sup>12</sup>

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<sup>9</sup> ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE, 2007 SURVEY RESULTS 7 (2007)

<sup>10</sup> For example, in 2006, 152 student teams from 92 ABA accredited law schools competed in the American Bar Association's National Appellate Advocacy competition. See Craig Linder, *Regent Students Win ABA National Appellate Advocacy Competition*, STUDENT LAWYER, October 2006, at 2.

<sup>11</sup> This type of analytic process occurs in many other contexts, as well, as noted by the Reports. For example, in addition to the professional school contexts described by the Reports, students who engage in debate competitions report that they learn a great deal about the ins and outs of their substantive subject through the preparation process (see, e.g., Robert S. Littlefield, *High School Student Perceptions of the Efficacy of Debate Participation*, 38 ARGUMENTATION AND ADVOCACY 83, 87 (Fall 2001)); other cultures routinely use oral exams as a teaching and learning method (see, e.g., Barbara M. Kehm, *Oral Examinations at German Universities*, 8 ASSESSMENT IN EDUCATION 26 (2001); Frances C. Fowler, *Testing, French Style*, 74 THE CLEARING HOUSE 197, 199 (2001)); drivers' education courses contain an on-the-road component (AMERICAN DRIVER AND TRAFFIC SAFETY EDUCATION ASSOCIATION, NATIONAL DRIVER DEVELOPMENT STANDARDS 5 (2006)); many students learn foreign languages through immersion programs. See, e.g., Kim Potowski, *Students Spanish Use and Investment in a Dual Immersion Classroom: Implications for Second Language Acquisition and Heritage Language Maintenance*, 88 THE MODERN LANGUAGE JOURNAL 76 (2004).

<sup>12</sup> See, e.g., Ricks, *supra* note 7, at 570-71 ("Talking confidently about law is an important skill in legal practice, yet law teachers rarely devote much attention to developing students' oral skills when fluency doesn't come to them naturally. Learning to talk about law can be important to success within law school ... One assumption underlying the question-and-answer format widely used in our classrooms is that talking about law is an effective way to learn and to demonstrate understanding of legal concepts.") Mary Kate Kearney and Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method*

What's more, this article will assert that the use of simulated oral argument exercises to teach analytic process in the law school classroom is exactly the type of learning experience anticipated and recommended by two recent landmark reports on legal education: the Carnegie report ("Carnegie" or "Sullivan") and the *Best Practices in Legal Education* report ("*Best Practices*" or "Stuckey") (together, the "Reports").<sup>13</sup> The Carnegie report proposes "an integration of student learning of theoretical and practical legal knowledge and professional identity."<sup>14</sup> While legal educators far and wide have heralded the importance of the Reports, few –

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*with the Writing Process*, 64 TEMP. L. REV. 885, 887 n.9 ("[M]ost teaching is not the communication of true propositions. It is teaching people to do things . . .") (quoting Richard B. Parker, *A Review of Zen and the Art of Motorcycle Maintenance with Some Remarks on the Teaching of Law*, 29 RUTGERS L. REV. 318, 326 (1976) (book review)); Vitiello, *supra* note 8, at 903-04 ("Motivated professors can introduce oral advocacy into their classes through the use of simulation exercises.").

<sup>13</sup> See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 221(2007)

("The Socratic method can be used to explore multiple dimensions of lawyering and to develop a broad range of capacities. Nonetheless, the method may be less effective than others with regards to some of our goals. . . For example, we have found it difficult to compose Socratic questions that will lead students to adopt critical meta-analytic perspectives on the application of doctrine. Moreover, Socratic discussion of appellate cases clearly is not the best context for learning about crucial aspects of lawyering . . . We have found it easier to foster meta-analysis and to develop capacities for interpretive and problem-solving work in simulation . . . exercises."); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 26 (2007) ("[Learning theorists talk about] a *creating* within the more formal contexts of classroom learning of a 'cognitive apprenticeship' – an educational experience focused on teaching beginners and journeymen the more advanced knowledge of the domain. The emphasis is not on acquiring information, as such; rather, it is on learning the concepts and procedures that enable the expert to use knowledge to solve problems. This requires learning the 'subject matter' of law . . . but in a way that is already structured for performance, according to the explicit norms of the professional community. *In many professional fields, though less so in law, these insights into learning have given rise to the widespread use of simulation as a form of teaching and learning. Particularly in medicine, carefully developed simulation practices have improved student learning and performance over traditional apprenticeship techniques*) (emphasis added).

<sup>14</sup> SULLIVAN, *supra* note 13, at 13.

if any - scholars have yet proposed concrete approaches to implementing the Reports' recommendations in a first-year casebook class.<sup>15</sup>

As outlined and demonstrated below, simulated oral argument exercises should be a key brick in the road of developing a new-and-improved "signature pedagogy" for the first-year casebook curriculum.<sup>16</sup> Although many first-year students are interested in careers in legal fields other than litigation,<sup>17</sup> the analytical and public speaking skills learned through oral argument are easily translatable to other contexts. Some students will eventually become transactional attorneys; their experience practicing their oral communication skills in law school will prepare them well for their eventual presentations to boards of directors. So, too, will

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<sup>15</sup> Indeed, while a few published articles have cited the Reports, they have largely done so to support the already-prevalent teaching techniques going on in clinical, professional responsibility, and legal writing classes. *See, e.g.,* Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); James H. Backman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1 (2007); C. Michael Bryce, *ADR Education from a Litigator/Educator Perspective*, 81 ST. JOHN'S L. REV. 337 (2007). This article therefore enters somewhat uncharted territory in seeking to suggest ways in which casebook professors in typical first-year classes can incorporate and implement the recommendations of the Reports.

<sup>16</sup> SULLIVAN, *supra* note 13, at 23-24. Note that, just as the Carnegie report focuses on the first-year experience ("Because that experience is so significant in shaping the whole of legal education, it is our emphasis."), SULLIVAN, *supra* note 13, at 3, so, too, does this article concentrate on the use of simulated oral argument exercises in the first-year classroom. Because they are so valuable analytically, however, the use of such exercises should not end in the first year. Once students learn to use simulated oral argument as an analytical technique, further simulated exercises may be useful in the second and third years, as well. Simulated oral advocacy exercises can and should be used as a pedagogical tool for students to learn the law and the nuances of the law in the particular classes. For example, in Business Organizations students could argue about piercing the corporate veil, agency liability, or merger issues. In Criminal Procedure students could argue over whether the Fourth Amendment is implicated by a new technology – a case on cert could be used fruitfully. In Criminal Law students could argue whether a homicide is justified self defense. In Evidence students could argue motions *in limine*; and so on. Moreover, once students learn the rudiments of simulated oral argument early in their law school career, they can fruitfully use the technique in all of their other classes, including all first year classes. Therefore, participation in simulated oral argument exercises will become a seminal law school skill, akin to briefing a case.

<sup>17</sup> *See, e.g.,* Louis N. Schulze, *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 73 (2007).

someday real estate attorneys learn to present to zoning boards, legal services attorneys learn to talk through a case with a client, and so on.<sup>18</sup> Therefore, through the use of simulated oral argument exercises in the casebook classroom, professors can advance many of the goals of the Reports: They can help students become better at legal analysis,<sup>19</sup> they can improve student satisfaction with the first-year experience,<sup>20</sup> they can involve students in their own learning,<sup>21</sup> and they can help students

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<sup>18</sup> Of course, as Jennifer Rosato notes, lawyers orally present ideas in many contexts. Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 44 (1997) (“[M]ost lawyers are regularly ‘called on’ to articulate their arguments to an inquisitive, incredulous audience – be it a client, senior partner or a judge.”). Vitiello agrees: “[L]awyers in many different settings face demanding questioning as part of their work. . . Often the lawyer[s] must answer specific questions and offer thoughtful responses, beyond [their] planned presentation.” Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 990 (2005).

<sup>19</sup> See SULLIVAN, *supra* note 13, at 100 (“By giving learners opportunities to practice approximations to expert performance and giving these students feedback to help them improve their performance, educators are providing an apprentice-like experience of the mind. Understanding develops through the actual performance of modes of thinking. This process can be greatly enhanced by the skillful use of mental representations to provide the scaffolds through which feedback can become meaningful to the learner in the effort to achieve mastery of new concepts or abilities.”)

<sup>20</sup> See SULLIVAN, *supra* note 13, at 13 (“Legal doctrine does not apply itself; rather, legal analysis is the prior condition for practice because it supplies the essential background assumptions and rules for engaging with the world through the medium of the law. The analysis, critique, and development of legal doctrine thus, in combination, constitute the first, essential element of legal education. *However, this type of knowledge often comes most fully alive for students when the power of legal analysis is manifest in the experience of legal practice.*”) (emphasis added); see also *id.* at 7, citing the *Best Practices* report in theorizing that overuse of the Socratic method does the opposite (“The Best Practices project report suggests that case dialogue is overused as a pedagogy, resulting in unbalanced learning . . . It may also be that its overuse, or perhaps unvaried use, in the first year leads some students to disengage from the process – a disengagement that even later experiences with fuller approximations to practice and actual clients may not be able to reverse.”).

<sup>21</sup> See SULLIVAN, *supra* note 13, at 100 (“By giving learners opportunities to practice approximations to expert performance and giving these students feedback to help them improve their performance, educators are providing an apprentice-like experience of the mind. Understanding develops through the actual performance of modes of thinking. This process can be greatly enhanced through

develop key skills they will need in law practice.<sup>22</sup> In essence, these simulation exercises can help to “bridge the gap between analytical and practical knowledge”<sup>23</sup> and “unit[e], in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice.”<sup>24</sup>

This article is organized in two major sections. First, it reviews the concerns and recommendations of the Reports. It then relates the recommendations of the Reports, underlying learning theory, and anecdotal evidence by practitioners to simulated oral advocacy exercises to support the idea that oral advocacy is an important analytical tool. Second, in the style of the transcribed classroom conversations of the Carnegie report, it discusses and demonstrates by example a simulation exercise designed for professors to use in introducing this teaching methodology, perhaps during law school orientation. The exercise, based on seven fairy tales used as precedent cases, provides a familiar, non-threatening technique for students to learn about rule synthesis, weight of authority, analogy and distinction, and theme through oral argument.

## II. THE CARNEGIE AND BEST PRACTICES REPORTS

*“If law teachers give more thought to how students learn as well as what lawyers do and how they do it, new avenues of legal scholarship will be opened beyond the traditional scholarship about doctrine and judging. . . [O]ur discourse [should be] real discourse – concerned with normative values, not the justification of the system that currently exists.”<sup>25</sup>*

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the skillful use of mental representations to provide the scaffolds through which feedback can become meaningful to the learner in the effort to achieve mastery of new concepts or abilities.”)

<sup>22</sup> This idea is reflected in STUCKEY, *supra* note 13, at 109 (“Students cannot become effective legal problem-solvers unless they have opportunities to engage in problem-solving activities in hypothetical or real legal contexts.”) and 141 “Legal education would be more effective if law teachers used context-based education throughout the curriculum. . . . to teach theory, doctrine, and analytical skills . . . .’ Context helps students understand what they are learning, provides anchor points so they can recall what they learn, and shows them how to transfer what they learn in the classroom to lawyers’ tasks in practice.” (quoting Deborah Maranville, *Infusing Passion and Context Into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 51 (2001)).

<sup>23</sup> SULLIVAN, *supra* note 13, at 12

<sup>24</sup> *Id.*

<sup>25</sup> STUCKEY, *supra* note 13, at 5.

The Carnegie report and *Best Practices in Legal Education* reports – recognized as some of the most important commentary in legal education in recent years<sup>26</sup> – make one primary assertion: While we’re doing legal education well, we could be doing it better. According to the Reports, law schools emphasize theory to the detriment of practical skills.<sup>27</sup> In fact, according to the Carnegie report, “. . . the primary emphasis on learning to think like a lawyer is so heavy that the schoolwide concern for learning to perform like one is *not* the norm.”<sup>28</sup>

But legal education can – and should – be better-designed to help students become, not only great legal thinkers, but great legal practitioners.<sup>29</sup> Indeed, according to the Carnegie report, the “signature pedagogy”<sup>30</sup> for legal education should “attempt[] to build bridges between thought and action, between relative certainty and rampant unpredictability. [This is] pedagog[y] invented to prepare the mind for practice.”<sup>31</sup> Such an improved signature pedagogy should be considered closely to ensure that it matches the goals of law schools, law professors, and law students.<sup>32</sup>

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<sup>26</sup> See, e.g., Bryce, *supra* note 15, at 359; Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, October 31, 2007, at B9.

<sup>27</sup> See, e.g., SULLIVAN, *supra* note 13, at 88 (“Educational experiences oriented toward preparation for practice can provide students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in professional work.”); STUCKEY, *supra* note 13, at 8-9 (“Law schools should . . . integrate the teaching of theory, doctrine, and practice . . .”).

<sup>28</sup> SULLIVAN, *supra* note 13, at 22.

<sup>29</sup> STUCKEY, *supra* note 13, at 8 (“Law schools should help students acquire the attributes of effective, responsible lawyers including self-reflection and lifelong learning skills, intellectual and analytical skills, core knowledge and understanding of law, professional skills, and professionalism.”); SULLIVAN, *supra* note 13, at 12 (“We are convinced that this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice. We therefore attempt in this report to imagine a more capacious, yet more integrated, legal education. Our primary concern is both curricular . . . and pedagogical (how to bring the teaching and learning of legal doctrine into more fruitful dialogue with the pedagogies of practice).”).

<sup>30</sup> A signature pedagogy, the Carnegie report claims, is a “[t]ypical practice[] of teaching and learning by which professional schools induct new members into the field [and which] can enlighten us about the personalities, dispositions, and cultures of the field[] [it] serve[s] and embod[ies].” SULLIVAN, *supra* note 13, at 23; see also *id.* at 50.

<sup>31</sup> SULLIVAN, *supra* note 13, at 23.

<sup>32</sup> The Carnegie report notes that signature pedagogies are “worthy of our analyses and interpretations, better to understand both their virtues and flaws.” *Id.*

Law students must become comfortable talking about the law,<sup>33</sup> a goal furthered in part by the currently ubiquitous Socratic method.<sup>34</sup> In order to achieve the important goal of helping students to understand the interests of clients and lawyers, however, as well as the roles each plays in any legal representation, the traditional Socratic dialogue cannot and should not stand alone as a teaching method in the first-year classroom.<sup>35</sup> Instead, “case-dialogue teaching needs to be supplemented by assignments in which students are led to ‘analyze cases in role . . . [b]y looking at cases from the perspectives of the parties, of their lawyers’ . . . By such practices, ‘students are more likely to grasp the significance – and learn the

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<sup>33</sup> Ricks, *supra* note 7, at 571 (“A key step [in legal education] is trying to teach every student to become confident talking about law in front of an audience.; see also, e.g., Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?* 40 ARIZ. L. REV. 105 (1998) (although Eichhorn does express a concern that writing is subordinated to speaking in law school education).

<sup>34</sup> SULLIVAN, *supra* note 13, at 75 ([W]hen [the Socratic method was] performed in back-and-forth argument by a professor and an advanced student, the fine points of legal arguments, especially when they serve as the turning points of these abstract dramas, can rivet students’ attention. At such moments they generate the sort of collective effervescence that burns particular classroom events into the memory, gradually reshaping students into legal professionals.”); STUCKEY, *supra* note 13, at 211, quoting Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach With Problems*, 42 J. LEGAL EDUC. 241, 245 (1992) (“Interaction with a Socratic teacher helped to sharpen students’ minds. They learned to think on their feet, to express themselves, and to read cases – skills that a practicing lawyer needs . . .”). *But see* SULLIVAN, *supra* note 13, at 188 (“One limitation [of the case-dialogue method] is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than like an apprentice practitioner, thus conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”); STUCKEY, *supra* note 13, at 222-23 (“If law teachers do not replace the Socratic dialogue and case method entirely with discussion and context-based discussion, they should consider using variations on the Socratic dialogue and casebook method. Some law teachers have developed innovative and creative techniques that make the case method come alive for students. . . .law teachers who incorporated variations into the traditional use of the Socratic dialogue and case method . . . seemed to produce more engaging and educationally effective classes.”).

<sup>35</sup> The Carnegie report stresses that “legal education requires . . . a truly integrative approach in order to provide students with a broad-based yet coherent beginning for their legal careers.” SULLIVAN, *supra* note 13, at 59.

techniques – of interpretive, narrative, and problem-solving work.”<sup>36</sup> Finally, students must take these goals to heart: they must believe that the objectives matter and feel confident that they can achieve them.<sup>37</sup> Through the use of simulation oral argument exercises in the doctrinal classroom, professors can directly relate analytic learning objectives to practical lawyering skills, the ultimate aim of the Reports.<sup>38</sup>

The Reports recognize that a survey of the literature supports the premise that, when students feel comfortable with and invested in a learning exercise, the exercise is more effective in promoting and enhancing their learning.<sup>39</sup> The movement to humanize legal education has long asserted that students do not need to be intimidated to be invested in their learning.

Furthermore, in using simulation oral argument exercises in addition to traditional Socratic teaching, professors can accomplish several goals: 1) They can erase lines between curricular departments, as well as blending the distinction between theory and practice; 2) they can train students to speak more effectively and analytically about the law, and 3) they can increase student satisfaction and self-efficacy. The Reports encourage law schools to increase practical skills training while maintaining an appropriate instructional level of content and analysis.<sup>40</sup> Furthermore, in

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<sup>36</sup> SULLIVAN, *supra* note 13, at 57, quoting STUCKEY, *supra* note 13, at 109-22 and P. C. Davis and E. E. Steinglass, *A Dialogue About Socratic Teaching*, N.Y.U. REV. L. & SOC. CHANGE 275 (1997).

<sup>37</sup> See, e.g., Ruth Anne McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEG. WRITING INST. 229, 236 (2002) (asserting that self-efficacy promotes effective learning); Kearney & Beazley, *supra* note 12, at 887-88, quoting Richard B. Parker, *supra* note 12, at 326 (“[T]he goal of any valid teaching method should be ‘[b]uilding up a student’s confidence’ to the point ‘where he can begin to train himself.’”).

<sup>38</sup> See, e.g., SULLIVAN, *supra* note 13, at 9 (“By understanding professional practice as judgment in action, this approach aims to make practice more effective, comprehensible to students, and open to critical assessment. *The focus of such attention naturally falls on teaching practices that enable learners to take part in the basic features of the professional practice itself.*”) (emphasis added).

<sup>39</sup> See, e.g., *supra* note 19. *But see* Vitiello (2005), *supra* note 18, at 1008-13 (questioning whether students whose learning styles are not addressed through a method of question-and-answer teaching are actually intellectually equipped to practice law).

<sup>40</sup> For example, *Best Practices* cites to Judith Wegner’s observations (in an unpublished manuscript later incorporated into the Carnegie report) that one variation “involves the introduction of imaginative instructional techniques that build on principles previously discussed in order to ask more of and draw more from students as they envision their responsibilities in full-fledged professional

the wake of the Reports, most law schools are interested in finding ways to erase the lines between curricular departments.<sup>41</sup> Using oral advocacy exercises to teach legal analysis in the doctrinal classroom will further both goals – it will allow students to develop oral communication skills even as they learn substantive law, it will promote interaction between skills and doctrinal faculties,<sup>42</sup> and it will require integration of skills and doctrinal pedagogies.<sup>43</sup>

Simulated oral argument exercises can also foster students' confidence in their public speaking abilities. Polls and research show that public speaking ranks near the top of a list of fears.<sup>44</sup> Law students tend to be afraid to speak in class, just as lawyers are apt to fear getting up on their feet and speaking to the court.<sup>45</sup> However, as outlined elsewhere in this

roles.' These teachers 'stretch their students' horizons by causing them to imagine themselves in significant professional roles.' STUCKEY, *supra* note 13, at 223-24.

<sup>41</sup> Indeed, as Amy Sloan notes, "The lines that have been drawn between 'doctrinal' and 'skills' courses are . . . more a matter of perception than reality. If we were to deconstruct the pedagogical goals in both of these types of courses, we would find that they have as many similarities as they have differences." Amy Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. ASS'N LEGAL WRITING DIRECTORS 3, 3 (2002).

<sup>42</sup> See, e.g., SULLIVAN, *supra* note 13, at 196 ("Faculty development programs that consciously aim to increase the mutual understanding of doctrinal and lawyering faculty of each other's work are likely to improve students' efforts to make integrated sense of their developing legal competence. However it is organized, the sustained dialogue among faculty with different strengths and interests united around common educational purpose that is likely to matter most.").

<sup>43</sup> The Carnegie report calls for exactly this, stating, "We propose an integration of student learning of theoretical and practical legal knowledge and professional identity." SULLIVAN, *supra* note 13, at 13.

<sup>44</sup> See, e.g., Rolando J. Diaz, et al., *Cognition, Anxiety, and Prediction of Performance in 1<sup>st</sup>-Year Law Students*, 93 J. EDUC. PSYCH. 420, 427 (2001)(identifying oral argument as a major stressor in the first-year law school curriculum, connecting anxiety level to success level in oral argument exercises, and recommending that "goals for assisting law students who have difficulty in public-speaking situations could center on maximizing performance by reducing anxiety."); see also a March 19, 2001 Gallup poll in which respondents ranked public speaking as their second highest fear behind snakes. The poll indicated that 40% of Americans are afraid of public speaking, with men and women responding fairly similarly (37% of men, 44% of women.). The same poll ranked fear of dying lower than fear of public speaking, perhaps indicating that students would rather die than do an oral argument.

<http://poll.gallup.com/content/default.aspx?ci=1891>.

<sup>45</sup> Chief Justice Roberts has been known to say that he was even more nervous for his thirty-ninth argument as an advocate before the United States Supreme Court

article, the ability to speak effectively about the law (often in front of groups) is an essential – perhaps the most essential – lawyering skill.<sup>46</sup> Therefore, the Reports stress that the law school curriculum should offer regular, minimally-intimidating opportunities for students to speak about, argue about, debate, and explain the law.<sup>47</sup> Regularly incorporating simulated oral argument exercises into the doctrinal classroom would benefit students in all the ways suggested by the Reports: because it would require them to prepare answers to judges' questions,<sup>48</sup> take the cases they have read and apply them to a hypothetical fact pattern,<sup>49</sup> and anticipate opponents' arguments<sup>50</sup> – all while encouraging students to speak, decreasing over time their fear of doing so, helping them to see themselves in the roles of practicing lawyers, and increasing over time their speaking effectiveness.<sup>51</sup> Were students regularly to engage in such simulation exercises, their intimidation level would likely decrease, while their confidence and abilities would increase – just as anticipated by the Reports.<sup>52</sup> Importantly, as at least one scholar has noted, even students who are initially nervous and concerned about oral advocacy exercises tend to see the experience as a “high point of the first year.”<sup>53</sup>

Moreover, as top Supreme Court advocates note, practice oral argument is often a starting point, not an end point, in analytical preparation of a case.<sup>54</sup> For seasoned advocates and law students alike,

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than he was for his first. (Author interview with Chief Justice John G. Roberts, Jr. (Chambers of the Chief Justice, Supreme Court of the United States, Washington, D.C.) (December, 2005).

<sup>46</sup> See *supra* notes 12, 18; see also Bryant G. Garth & Joanne Martin, [Law Schools and the Construction of Competence](#), 43 J. LEGAL EDUC. 469, 508 (1993)

(empirical study finding that “[o]ral and written communication skills are deemed to be the very most important skills necessary for beginning lawyers.”)

<sup>47</sup> See, e.g., *supra* notes 7, 12, 13.

<sup>48</sup> See, e.g., Roberts, *supra* note 1, at 7-2.

<sup>49</sup> See, e.g., STUCKEY, *supra* note 13, at 143, 214.

<sup>50</sup> See, e.g., Roberts, *supra* note 1, at 7-4.

<sup>51</sup> See Ricks, *supra* note 7, at 51; McKinney, *supra* note 37, at 236.

<sup>52</sup> See, e.g., *supra* note 37; Amber N. Finn, et al., *Audience-Perceived Anxiety Patterns of Public Speakers*, COMMUNICATION QUARTERLY 470, 479 (Fall 2003) (“practicing speech skills in a classroom decreases the amount of anxiety experienced by a speaker”).

<sup>53</sup> Sirico, *supra* note 8, at 17.

<sup>54</sup> See *supra* note 5. Furthermore, at least one scholar has noted that many professors find that oral argument practice is an excellent way to work on revision of briefs for moot court competitions. See Sanford N. Greenberg, *Appellate Advocacy Competitions: Let's Loosen Some Restrictions On Faculty Assistance*, 49 J. LEGAL EDUC. 545, 546 n.5 (1999).

simulated oral argument exercises require students to learn about a legal problem by actively engaging with it – just as the Reports urge. Again, the benefits should be two-fold: students should learn substance and technique simultaneously, lessons that are reinforced through frequent repetition of these exercises over the course of a legal education.<sup>55</sup>

Indeed, to prepare a case for a classroom oral argument requires students to practice all of the analytical skills we want students to master. It requires them to formulate a position, defend it, and ascertain the position's weak points. It requires them to understand authorities well enough to synthesize them and apply them to any set of facts. Finally, it requires them to interact with the law – not just memorize it, not just read about it, but apply it to new situations not yet examined by any court.<sup>56</sup>

As evidenced in Section III, *infra*, simulated oral argument exercises are a concrete response to the Reports' recommendations and an ideal way to teach students the nuts and bolts of legal analysis: rule synthesis, rule application, weight of authority, analogy and distinction, and extension of the hypothetical.<sup>57</sup> Although Section III of this article describes one exercise intended for use in the first weeks of law school,<sup>58</sup> the same techniques would work well throughout the first-year (and, indeed, throughout the second and third years, as well), especially at the end of a unit.<sup>59</sup>

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<sup>55</sup> See, e.g., *supra* notes 7, 12, 13.

<sup>56</sup> See, e.g., STUCKEY, *supra* note 13, at 143.

<sup>57</sup> See *id.*

<sup>58</sup> The demonstrated exercise works well in the first weeks of law school – even in orientation – because it seeks to teach very basic analytical skills, such as weight of authority, rule synthesis and application, analogy and distinction, and so on.

<sup>59</sup> See, e.g., Sloan, *supra* note 41, at 3. For example, a torts professor could end a unit on battery by telling students that the next day they would argue a hypothetical case before the court. The professor could distribute a fact pattern and instruct students to use the battery cases they had studied to argue the client's case. Alternatively, the professor could give the students only the facts for a case they would cover the following week and ask the students how, based on cases previously covered, the court should decide the new case. Students could then read the court's actual decision and reasoning as a follow-up after the simulation exercise. In actually carrying out the exercise, the professor could require students to prepare questions for advocates and answers to these questions. He could then put two or more students in front of the room to argue, either asking the questions himself or sitting a panel of student judges. If a professor were to use simulation exercises for twenty minutes of class time a few times a semester, several students would get a chance to argue on their feet, and several more would have the chance to serve as judges. If each professor at the school were to use simulated oral argument exercises as described, most students would have a chance to participate

The idea that students learn through a question and answer-based dialogue is not wholly a new one. The Socratic method, in which the professor asks students questions about the cases they have read and put forth hypotheticals about potential future application of already-established rules, is similar to oral argument in many ways.<sup>60</sup> It requires students to talk about the law and teaches them to think more analytically and logically. Indeed, several scholars have noted that students learn better when they are forced to think through answers to questions – even anticipate the questions themselves – rather than rely on teachers to provide answers.<sup>61</sup> Indeed, just as the Reports emphasize, “law school teachers

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actively at least a few times a year, just as they do when called on in a traditional Socratic classroom.

<sup>60</sup> Some scholars expressly or inferentially discuss the Socratic method as, in and of itself, teaching valuable oral argument skills. *See, e.g.*, Rosato, *supra* note 18, at 45 (“[The Socratic method] . . . accomplishes th[e] goal [of “forming a foundation for more sophisticated legal thinking”] while building the students’ oral advocacy skills.” (citing Burnele V. Powell, *A Defense of the Socratic Method: An Interview with Martin B. Louis*, 73 N.C. L. REV. 957 (1995)); Vitiello (2006), *supra* note 8, at 872, 887 (“[T]he Socratic method is an effective tool for teaching essential skills of oral advocacy, especially the ability to respond thoughtfully to questions.”); Vitiello, *supra* note 18, at 981, 989 (“The Socratic method teaches important oral advocacy skills. Traditional law school exams do not determine whether a student has improved her ability to answer questions, a skill that she will need in many areas of practice. . . every time a student is called on in class, she is learning an invaluable litigation skill if the professor demands responsive and thoughtful answers and probes deeply to test the student’s understanding of the material.”). Consider also James Beattie’s description of the Socratic method and its uncanny relevance to oral argument: (“[M]ore than any other pedagogy, the Socratic method closely models fundamental skills required by current legal practice. The current practice of law, for better or for worse, often entails publicly addressing on and responding to difficult questions when the speaker’s reasoning must withstand close scrutiny. . . In order to prepare our students for the rigors of current law practice, we must prepare them for public speaking in difficult situations, often with minimal information and preparation, and with large interests at stake.”). Beattie, *supra* note 16, at 484-85. *But cf.* Jane Korn, *Teaching Talking: Oral Communication Skills in a Law Course*, 54 J. LEGAL EDUC. 588 (2004) (asserting that calling on students may not in fact teach them oral communication skills and describing an employment law seminar in which learning occurs through oral exercises).

<sup>61</sup> Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 211 (1981) (“[Thinking] is even more sharply distinguishable from knowledge . . . it is referred to as a general skill of understanding – one that is essential to develop in some minimum degree before any bridges can be crossed between knowing law and using it in addressing a problem.”).

are teaching their students a skill as much as they are imparting knowledge of the law.”<sup>62</sup>

The literature does address criticisms of and support for the Socratic method. Among the criticisms are the observations that both men and women are intimidated by the method, that the method is often perceived as overly harsh, and that the method does not have any visible concrete connection to the skills that students will need as practicing lawyers.<sup>63</sup> Still, most law school classrooms continue to employ the Socratic method as the primary means of instruction.<sup>64</sup> While the Reports and other scholars note that the Socratic method may help students learn to respond to questions and challenges,<sup>65</sup> it is not the sole effective means of doing so.

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<sup>62</sup> Kearney and Beazley, *supra* note 12, at 908 n.9 (1991). Note that all law teachers teach skills, whether implicitly or explicitly. Therefore, as Sloan notes, “If we can erase the lines and integrate our view of different pedagogical models in legal education, then we will be able to evaluate more clearly the advantages and disadvantages of different approaches in different circumstances. We will be free to choose the techniques that best meet our pedagogical goals without fear that we are crossing lines into dangerous territory, territory in which we do not belong, or territory with which we do not want to be associated.” Sloan, *supra* note 41, at 11. See also generally A.B.A., *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, (1992) (emphasizing the need for students to develop and be instructed in skills).

<sup>63</sup> See, e.g., Lani Guinier, et. al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 47 (1994) (according to a study at the University of Pennsylvania Law School, women and men may find the Socratic method alienating and intimidating); PollyBeth Proctor, *Toward Mythos and Mythology: Applying a Feminist Critique to Legal Education to Effectuate a Socialization of Both Sexes in Law School Classrooms*, 10 CARDOZO WOMEN'S L.J. 577, 588 (2004) (“[A logical criticism of legal education is] that the structure and methodology behind legal education (the Socratic method, issue-spotting exams, large classrooms, unpatrolled and informal networks, unapproachable professors, rigorous and heavily emphasized class ranking, etc.) not only creates an intimidating environment that does not as effectively engage women's initiative or problem-solving abilities, but it also fails to promote the most effective lawyering for either sex.”); June Cicero, *Piercing the Socratic Veil: Adding An Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011 (1989); Steven Childress, *The Baby and the Bathwater: Salvaging a Positive Socratic Method*, 7 OKLA. CITY U. L. REV. 333 (1982).

<sup>64</sup> See, e.g., SULLIVAN, *supra* note 13, at 23-24.

<sup>65</sup> According to Jennifer L. Rosato, the Socratic method, like oral argument, may itself accomplish this goal: “It can be a participatory method because it permits students to be an integral part of the dialogue by offering responses to the questions that the teacher poses. . . . other students are participating silently in the

Rather, supplementing the Socratic method with other teaching methods (such as simulated oral arguments) may address different learning styles and build bridges between otherwise segmented parts of the curriculum.<sup>66</sup> In teaching students properly to analyze a case, then, a simulated oral argument achieves all of the same objectives as the Socratic method - plus one.<sup>67</sup> It seeks to reenergize rather than intimidate, consider the ramifications of a legal rule outside of the context in which it was initially seen, and interact with the law in a thoughtful, curious way.<sup>68</sup> Moreover, consistent with the Reports' recommendations, it obviously serves the purpose of training law students to be empowered lawyers answering to curious judges - rather than teaching them to relinquish control to what some view as a seemingly all-knowing teacher.<sup>69</sup>

The next section proposes a way to begin using oral argument in the law classroom. Rather than drawing on real cases - that will be the next step - it uses fairy tales as precedential authority. However, because the fairy tales are set in a legal context, they serve a valuable purpose in teaching students legal analysis through oral argument.

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dialogue by following in the dialogue, and are thinking about which questions they could ask and answer themselves." Rosato, *supra* note 18, at 43; *see also* STUCKEY, *supra* note 13, at 211; SULLIVAN, *supra* note 13, at 75.

<sup>66</sup> *See, e.g.*, SULLIVAN, *supra* note 13, at 196.

<sup>67</sup> As Beattie notes, the Socratic method is complemented by the use of other problem-solving teaching and learning approaches. James R. Beattie, Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. VA. L. REV. 471, 488 (2003). He further notes that "one should not claim that Socratic teaching is the only teaching technique or the only skill set we need to teach our students. . . role playing, where students might assume the persona of judge, jury, or *litigant* . . . can be used to great effect in Socratic teaching." (emphasis added). *Id.* at 493. Note that, seemingly inconsistently, Beattie goes on to say that "clinical and writing skills play little to no part in traditional Socratic teaching." *Id.*

<sup>68</sup> *See, e.g.*, STUCKEY, *supra* note 13, at 216, citing Davis and Steinglass, *supra* note 36 ("When [a teacher] has explored as many aspects of the presumption of legitimacy as pedagogic judgment counsels her to explore, she may draw from the discussion lessons about the processes of lawyering and judging.")

<sup>69</sup> *See, e.g.*, STUCKEY, *supra* note 13, at 229, quoting Lynn Daggett, *Using Discussion as a Teaching Method in Law School Classes*, in THE SCIENCE AND ART OF LAW TEACHING: CONFERENCE MATERIALS (1995) ("Classes where the professor keeps all the power to herself are unlikely to be good ones for discussion. Students are unlikely to take the risk of speaking candidly in classes where the teacher is authoritarian."). *But see* Beattie, *supra* note 67, at 481-83 (asserting that law teachers are anything but all-knowing, in fact knowing "less than they think").

### III. AN INITIAL EXERCISE TO TEACH LEGAL ANALYSIS THROUGH SIMULATED ORAL ARGUMENT

*[W]hen performed in back-and-forth argument by a professor and an advanced student, the fine points of legal arguments, especially when they serve as the turning points of . . . abstract dramas, can rivet students' attention. At such moments they generate the sort of collective effervescence that burns particular classroom events into the memory, gradually reshaping students into legal professionals.”<sup>70</sup>*

As the foregoing introduction explains, simulated oral argument exercises can be a useful tool to help students analyze the law and think about it as practicing lawyers do.<sup>71</sup> As also previously noted, professors can easily create such simulation exercises using the substantive law of their casebook courses.<sup>72</sup> However, even before students officially begin classes, professors can still introduce students to legal analysis through simulation exercises that do not involve real case law. This section seeks to accomplish two objectives: 1) to demonstrate by example how simulated oral argument exercises function to teach legal analysis; and 2) to provide a ready-made exercise that professors can use to implement the Reports' recommendations on the first day of the first year. Towards those ends, the following exchanges and reflections (written in the style of the transcribed classroom conversations of the Carnegie report)<sup>73</sup> set out to prove one thesis of the Reports: that simulated lawyering in casebook classes can help students see cases from points of view of litigants (rather than judges), furthering their understanding of the law and of the realities of legal practice.<sup>74</sup>

In creating the following demonstrative exercise, I used the story of Goldilocks and the Three Bears. The use of the story in this context is in keeping with the tradition of legal writing classes at law schools across the country, many of which use the timeless fairy tale to teach students to write the Statement of the Case. Scholars and legal writing professors recognize the story's value in teaching students the importance of theme,

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<sup>70</sup> SULLIVAN, *supra* note 13, at 75.

<sup>71</sup> See *supra* notes 5, 12.

<sup>72</sup> See *supra* notes 16, 59.

<sup>73</sup> See, e.g., SULLIVAN, *supra* note 13, at 64-73.

<sup>74</sup> See, e.g., SULLIVAN, *supra* note 13, at 26.

organization, perspective, and character.<sup>75</sup> I elaborated upon the legal themes in Goldilocks, as well as seven other fairy tales, to achieve several additional analytic goals set out in the Reports, namely:

1. To promote better understanding of legal analysis for students who are frightened or intimidated by law school, the Socratic classroom, or the process of reading and synthesizing authorities;<sup>76</sup>
2. To introduce and teach legal analysis skills with a problem that (a) is not based on real cases; (b) is easy to prepare; and (c) is fun for the students.<sup>77</sup>
3. To help students continue to develop skills in the areas of (a) using precedential and persuasive authority; (b) synthesizing rules from multiple authorities; (c) analogizing and distinguishing facts; (d) applying reasoning from precedent cases.<sup>78</sup>
4. To encourage students to begin to predict the types of questions that a judge might ask, and therefore analyze cases and other authorities more deeply than they otherwise would.<sup>79</sup>

#### **A. The Structure of the Exercise**

Most students doing the exercise will be already familiar with the Goldilocks story and its companion fairy tales.<sup>80</sup> To place Goldilocks'

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<sup>75</sup> See Randy Lee, *Writing the Statement of the Case: The Bear Necessities*, 10 WHITTIER L. REV. 619 (1989); see generally Hon. Ronald W. Lowe, *Law-Related Education – One Judge’s Perspective*, 77 MICH. B.J. 792, 793 (1998) (suggesting, *inter alia*, using fairy tale mock trials to educate the public about the law).

<sup>76</sup> See, e.g., SULLIVAN, *supra* note 13, at 7.

<sup>77</sup> See, e.g., STUCKEY, *supra* note 13, at 109, 214.

<sup>78</sup> See, e.g., STUCKEY, *supra* note 13, at 216, citing Davis and Steinglass, *supra* note 36.

<sup>79</sup> I created the exercise described below better to achieve these goals. The exercise appears to work well for three reasons: First, it does not require much preparation (a couple of hours at most) and does not require students to learn a new substantive area of law; second, its fairy tale basis is familiar and non-threatening; and third, it teaches and reinforces major first-year concepts.

<sup>80</sup> Most fairy tales actually derive from other cultures, and fantasy and storytelling occurs cross-culturally, so even international students will likely have sufficient background. See, e.g., MARIA TATAR, *OFF WITH THEIR HEADS!* 230-31 (1992). Furthermore, fairy tales are actually legally relevant. While Katherine J. Roberts notes, “The idea that the fairy tale is worthy of study by legal scholars may seem uncomfortable to many. . . It may be one thing for Kafka to give lessons in law, but the Brothers Grimm?” *Once Upon the Bench: Rule Under the Fairy Tale*, 13 YALE J.L. & HUMAN. 497, 497-98 (2001), several scholars have noted that fairy tales employ legal concepts in teaching a moral or social lesson. For more on why

case<sup>81</sup> in an appropriate legal context, however, the exercise instructs students that:

“The Baer family (Momma Baer, Poppa Baer, and Baby Baer) and Goldilocks are residents of the village of Chicago,<sup>82</sup> state of Enchanted Forest. In December of 2004, Goldilocks entered the Baers’ house without their permission. She broke a chair and ate their food. The Baers returned home from a walk to find Goldilocks sleeping in Baby Baer’s bed.

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fairly tales are especially useful as teaching mechanisms in law and other disciplines, *see* Desmond Manderson, *From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children’s Literature*, 15 *LAW & LITERATURE* 87, at 91-93: “[T]he mythological elements of children’s stories ought *themselves* to be regarded as an essential site for the emergence of particular understandings of law . . . Children’s fables are without a doubt pedagogical and normative; we would not set such store by them were it not so. . . [s]tories transport us. . . the authority of a children’s story . . . derives in part from the way it transgresses the rules in the very process of introducing us to them . . . Children’s literature is not a source of information *about* social structures of subjectivity in our society. It is the very site of their emergence. Children’s literature is not a series of texts *about* the law. ***It is a source of law.*** . . . Perhaps this is not yet mainstream jurisprudence, but it is hardly controversial, either. The school of legal pluralism has done much in recent years to emphasize that law is fundamentally not a product of canonical forms and statutory enactments. It is learned, and practiced, in specific cultural contexts, in diverse and disparate fashions, on an everyday basis.” (emphasis added); *see also* Sarah Hamilton, *Over the Rainbow and Down the Rabbit Hole: Law and Order in Children’s Literature*, 81 *N.D. L. REV.* 75, 78 (2005) (“Through the apparently innocent medium of contemporary children’s entertainment, the jurisprudence contained in [fairy tales] subtly informs the reader’s life-long understanding of morality, justice, and the law.”).

<sup>81</sup> The Goldilocks example seems to be widely used legally. *See, e.g.*, Hamilton, *supra* note 81, at 79 (“[A] child with no understanding of private property rights may not comprehend why it is so important to stay off the neighbor’s lawn, but in a fairy tale, a child who enters another’s property may find herself surrounded by angry bears.”); Lowe, *supra* note 75, at 793 (“Even the prosecution of Gold E. Locks for “bad manners” will provide the students with an understanding of the roles of the judge, prosecutor and defense attorney in a criminal case.”); *see also* Lee, *supra* note 75.

<sup>82</sup> When I was working on this exercise, I turned to my husband, Stephen McElroy, for help. He could not think of any other appropriate fairy tales, but he did suggest that the Baer family should live in Chicago so that they would be the Chicago Baers. I usually don’t point this out to the students until they’ve completed the exercise; when I do, the pun is always good for a laugh.

“Goldilocks was arrested and charged with criminal trespass under a statute that read, in pertinent part:

***“Criminal trespass is the act of knowingly and willingly entering onto the property of another without the owner’s permission.”***

“Her case took some time to come to trial. At trial, she admitted that she had entered the Baers’ house without their permission and damaged their possessions. However, the trial court refused to allow her to introduce evidence supporting two defenses: (1) necessity (i.e., it was a bitterly cold and rainy day, and Goldilocks was afraid she’d get sick because she was not wearing her galoshes); and (2) lack of capacity (i.e., that Goldilocks, as a five-year-old child, could not form the statutorily-required intent to enter the property of another knowingly and willingly).

“In early 2006, Goldilocks was convicted of criminal trespass in the Chicago Superior Court. She has now appealed to the Enchanted Forest Court of Appeals, arguing that she was wrongfully convicted and that the trial court should have allowed her to present her case.”

Through this hypothetical, students can easily discern the legal issues and address each in turn.

However, in order for the students to argue the appeal, they must have case law upon which to rely and build a case. Therefore, when students prepare for oral argument, they must think not only about what happened, but why the facts of the case are relevant in light of the case law. This important first lesson is a critical one for students to understand; indeed, while many of them are accustomed to thinking in narrative, the application of a rule-based system to this narrative may be a new idea with which they initially struggle – another reason the Reports call for professors to make the “law” fun, accessible, and engaging.<sup>83</sup>

## **B. The Case Law**

In creating case law, it would be unrealistic to write entire opinions. Besides the fact that to do so would be an enormous task, new law students should be able to prepare an oral argument for an in-class practice session

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<sup>83</sup> See, e.g., STUCKEY, *supra* note 13, at 125 (suggesting professors “display their delight in teaching” and use humor); SULLIVAN, *supra* note 13, at 75.

in a fairly short amount of time.<sup>84</sup> Therefore, digest squibs, or short summaries containing the key facts, holding, and reasoning of precedent “cases,” work well.<sup>85</sup> So that the parties’ cases depend upon enough precedent for each student to do a 10-15 minute in-class argument, but not so much as to overwhelm them, the exercise includes seven fairy tale cases. The instructions to the exercise tell students that the parties had cited to these cases in their appellate briefs, and that they were limited to these cases in their oral arguments.

The case law sticks to the theme of the exercise: fun, non-threatening, accessible, and maybe even silly. It remains true to Goldilocks’ fairy tale nature.<sup>86</sup> So that students must weigh precedential authority against that which is merely persuasive, the exercise includes three fictional jurisdictions: Enchanted Forest, where most of the action takes place; Sky, where the giants in “Jack and the Beanstalk” live; and Oz, where the Munchkins and witches hang out.

The following seven cases form the heart of the exercise:

*Enchanted Forest v. Big Bad Wolf*, 23 E.F. 403 (1972). Court upheld trespassing conviction of a terrifying 59-year-old creature who entered onto the property of another for the purpose of huffing and puffing and blowing a house down. The court found clear intent on the part of the creature both to enter the property and to cause damage thereon.

*Enchanted Forest v. Hansel and Gretel*, 200 E.F. 85 (2005). Court overturned trespassing conviction of two three-year-old children who entered onto neighbor’s property without permission while wandering happily through the woods. Court noted that the property line was not obviously marked, and that, given the young age of the children, they may not have known that they had entered private property. However, court found irrelevant the fact that the children left a trail of breadcrumbs on the

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<sup>84</sup> Another pedagogical reason for case squibs is to prevent intimidation. For students to read seven cases (each consisting of many pages) would be overwhelming. One or two pages containing squibs may seem manageable.

<sup>85</sup> Another reason that the squibs work well is that they illustrate to a new law student the essential components of an opinion (components with which they will quickly be expected to become familiar and adept): the key facts, the narrow holding, and the reasoning.

<sup>86</sup> It also calls to mind Stephen Sondheim’s “Into the Woods” and the Dream Works movie “Shrek,” in which all of the fairy tale characters live together and interact in an enchanted forest of sorts, giving birth to the state of Enchanted Forest.

property. Court also noted in its review of the facts that the children were later captured by an evil witch who tried to bake them in an oven.

*Enchanted Forest v. Prince Charming*, 8 E.F. App. 12 (1945). Court overturned trespassing conviction of 21-year-old who climbed tower to rescue frightened, imprisoned princess. Court reasoned that princess could consent to Prince Charming's entry although princess' mother, the Wicked Queen, was the record title owner of the property. Court also noted in dicta that, even absent consent, entry would most likely have been justified by necessity if the princess' life had been in danger. State Supreme Court declined to hear case.

*Sky v. Jack*, 112 Sky 14 (1992). State of Sky Supreme Court upheld trespassing conviction of 10-year-old boy who climbed beanstalk from his own yard and ended up on giant's property. Court reasoned that the boy's motive for climbing the beanstalk – to escape his mother, who was threatening to spank him for trading the family's cow for magic beans – did not constitute necessity and was not a defense for trespassing. Court also upheld Jack's larceny conviction, noting that boy stole golden-egg-laying goose and took it home with him.

*Enchanted Forest v. Pinocchio*, 112 E.F. 8 (1996). Court upheld trespassing conviction of seven-year-old wooden-puppet-turned-boy who entered onto neighbor's property without permission as he fled donkeys chasing him. Court reasoned that boy had several other options, including yelling for help and running toward own property. Court acknowledged that boy's decision to trespass occurred in the heat of the moment, but noted that the statute did not call for premeditation.

*Oz v. Dorothy*, 8 Oz 1110 (1952). State of Oz Supreme Court overturned conviction of 12-year-old girl whose house was lifted by a tornado and taken from her Kansas home to property belonging to a commune of dwarves in Oz. Court reasoned that (1) child did not have intent to trespass and (2) tornado was an act of God beyond her control. Court did note that child often dreamed of going over the rainbow, but explicitly stated that mere dreams do not translate into intent to trespass on a specific occasion. In another part of its opinion, court also overturned manslaughter conviction, reasoning that the death of the Wicked Witch was an accident not attributable to criminal negligence.

*Enchanted Forest v. Red Riding Hood*, No. 89-45567, 1989 WL198914, at \*3 (Chi. Super. Apr. 8, 1989). Court denied defendant's motion to dismiss,

holding that a six-year-old's capacity to form the intent to trespass was a question for the jury.

Before the students can argue their case in court, however, they need to prepare, prepare, prepare.<sup>87</sup> In order to adequately prepare, they must begin to master basic legal analysis skills: they must weigh the authority, synthesize several rules and apply them to the parties' facts, come up with a theme, analogize and distinguish the facts of the precedent cases to/from those of Goldy's, organize their arguments, and decide how to rebut opposing arguments. The exercise serves these goals well, as outlined in this section. Furthermore, the exercise will require students to use oral argument as a tool to further understanding and analysis of a case, as demonstrated below and as visualized by the Reports.<sup>88</sup>

### C. Analysis

#### 1. Weight of authority

Throughout the first year of law school, and even beyond, many students are still confused about how to weigh the precedential value of binding cases and how to incorporate persuasive authority.<sup>89</sup> The cases therefore include various precedential factors. Professors may well choose initially not to point out these factors to the students; instead, they may require students to ascertain which cases are most helpful for which issue and why.

#### 2. Recency

To teach students to rely heavily on recent decisions (when available), the exercise involves cases decided as recently as 2005 (*Hansel and Gretel*) and as long ago as 1945 (*Prince Charming*).<sup>90</sup> While the cases seem consistent in their holdings and reasoning, a 60-year spread makes for excellent discussion opportunities. What might change in sixty years?

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<sup>87</sup> Linda Morkan, *Prepping for Showtime*, 2 RHODE ISLAND LAW TRIBUNE 7, 11 (2002).

<sup>88</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

<sup>89</sup> See, e.g., Charles R. Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Setting*, 38 GONZ. L. REV. 33, 36 (2002-2003).

<sup>90</sup> Professors using this exercise in the future could easily update by changing the years of the decisions and of Goldy's conviction.

Would the criminal trespass statute have been amended in that amount of time? Would public policy about crime have changed? Would the public's perception of a child's competence? Do the cases evidence any trends over time?

### 3. Level of court

Students will quickly realize that the cases were decided by several different courts, from a trial court (*Red Riding Hood*), to the intermediate court of appeals (*Prince Charming*), and to the state Supreme Court (*Big Bad Wolf*, *Hansel and Gretel*, *Pinocchio*). However, the students must decipher the citations in order to ascertain which court decided which case. Therefore, the case citations employ correct Bluebook citation form.<sup>91</sup> Because the Enchanted Forest is apparently quite a large state – look at all the characters that live there! – it has its own official reporters and requires citation to these reporters for cases before its own courts.

Because the cases were decided by various courts, the hypothetical presents an opportunity for discussion on this aspect of precedential value, as well. Students will need to look back at the fact pattern: in which court was Goldilocks convicted? Which court will now hear her appeal? Which courts' decisions will be binding on this court (the Enchanted Forest Court of Appeals)? Although by late spring, this exercise would be quite simple for most students, in the first weeks of law school the cases make for a nice introduction to the concept of tiered authority.

### 4. Jurisdiction

The last precedential issue arises when students realize that two cases, *Oz v. Dorothy* and *Sky v. Jack*, were decided by other jurisdictions. Moreover, although most will realize that these cases are not binding on the Enchanted Forest Court of Appeals, some will want to use them as persuasive authority. This tendency gives rise to another interesting point for discussion: do they know the criminal trespass statutes from the other jurisdictions? If not, do the students need to look them up? Why? Students will quickly realize that the Oz and Sky statutes may differ markedly from the Enchanted Forest statute, which requires “intent to enter the property of another knowingly and willingly.”

Still, even if the Sky and Oz statutes are different, might the courts' reasoning in these cases be relevant? Even where states have different

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<sup>91</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18<sup>th</sup> ed. 2005).

statutes, in cases of first impression, state courts often employ public policy reasoning from other states. Therefore, based on the dicta in *Prince Charming* that the risk of death can justify a trespass, can Enchanted Forest attorneys use *Sky v. Jack* to argue that the threat of spanking or other non-life-threatening risks should not be enough to justify non-permissive entry? Could Goldilocks argue that *Oz v. Dorothy* is helpful to her because she, too, was at the mercy of nasty weather conditions? Perhaps so.

##### 5. A final precedential issue

The facts state that Goldilocks committed her alleged trespass in 2004. *Hansel and Gretel* was decided in 2005. Her trial took place in 2006, her appeal in 2008.<sup>92</sup> While Goldilocks is five years old, *Hansel and Gretel* were three. Red Riding Hood was six, and the trial court in that case held that there was a least a triable issue as to whether a six-year-old could have capacity. Therefore, Goldilocks must argue that six years old is the threshold age for capacity and compare herself to *Hansel and Gretel*. The problem? The *Hansel and Gretel* case was decided *after* Goldilocks' conduct but *before* her trial and subsequent appeal. The question arises: May Goldilocks thereby avail herself of the favorable *Hansel and Gretel* decision? Students will need to figure out the answer to that question and decide whether they can still argue that the 2006 court can apply the 2005 holding to Goldilocks' 2004 conduct.<sup>93</sup>

Consider the following exchange between the author and a student in a recent first-year class – the type of exchange anticipated and desired by the Reports' authors:<sup>94 95</sup>

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<sup>92</sup> The appeals system certainly seems clogged in Enchanted Forest! Again, professors using this exercise may want to adjust the dates of the cases and the trespass to make it work in future years.

<sup>93</sup> The Rule of Lenity will likely apply. Black's Law Dictionary defines the Rule of Lenity as "...the judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1359 (8th ed. 2004); *see also* *Moskal v. U.S.*, 498 U.S. 103, 107 (1990).

<sup>94</sup> All transcribed exchanges actually occurred in my first-year classes. They have been edited only for conciseness and clarity. Furthermore, this exercise has also been used at other law schools, including Northwestern, California Western, and Roger Williams. I presented the fairy tale oral argument exercise at the national Legal Writing Institute conference in the summer of 2004. During my presentation, I distributed the cases, instructions for the exercise, and some sample questions for judges. I also invited conference participants to email me for my

**PROFESSOR:** Is *Hansel and Gretel* binding on you?

**STUDENT #1:** No, it's not binding on the appellate court, because it was a District Court case.

**PROFESSOR:** *Hansel and Gretel*?

**STUDENT #1:** Yes, *Hansel and Gretel* is just in the Enchanted Forest Court and not the Enchanted Forest Appellate Court like *Prince Charming*.

**PROFESSOR:** Right, but the Enchanted Forest Court is the Supreme Court of the Enchanted Forest.

**STUDENT #1:** OK

**PROFESSOR:** So, it was a Supreme Court case, but is it binding?

**STUDENT #1:** Yes.

**PROFESSOR:** Really? When did Goldilocks trespass onto the Baers' property?

**STUDENT #1:** It was decided after Goldilocks' trespass, so it wouldn't be binding.

**PROFESSOR:** So, it wouldn't be binding. See, I'm not clear about that. We do have a Supreme Court case that was decided before this argument. You're right that it was decided after Goldilocks' conduct. I guess that's

complete sample class transcript and additional teaching questions and received almost 50 such email requests. Feedback from the professors who used the exercise has been quite enthusiastic ("The students got an opportunity to try out oral argument in a fun way. They became more comfortable with public speaking." Ellen Saideman, Roger Williams University School of Law; "My pre-law students loved it!" Lesley Kagan, Northwestern Law School; "I used this exercise the week before my students had their actual oral arguments in front of the Moot Court Honors Board. I think it was a great way for them to practice synthesizing rules from cases, think about mandatory vs. persuasive authority, to develop a persuasive theme, to practice speaking in public, and to get a taste of what it might be like having a "judge" interrupt and throw questions at them. . . I think the exercise really helped students feel more confident about their [brief-based] oral arguments. In fact, I was told by the Moot Court Honors Board during the oral arguments that my classes were "particularly prepared" and I believe part of this can be attributed to the Goldilocks exercise. . . . I think this exercise definitely helped them . . . and brought things back to them that they had learned about (but perhaps only vaguely remembered) all year (e.g. mandatory vs. persuasive authority, dates of court cases vs. date of current situation, developing an important theme and sticking with it, etc.). I will definitely use this exercise again next year!" Rita Barnett, California Western School of Law).

<sup>95</sup> In a typical class, I have each student argue for about 10 minutes. As my classes are two hours long, at least 12 students have the opportunity to argue in any given class. As they watch each other's arguments and (presumably) learn from them, my questions become more complex and analytically difficult as the class progresses.

an issue I would like for you to brief for me, counselor-- about whether the case is binding.

In this example, the student is confused on two key points. First, she has attributed the *Hansel and Gretel* case to the wrong court, and she has therefore mischaracterized the precedential value of the case. Second, she has not duly considered the precedential authority of an appellate decision arising *after* the conduct in question.

Through class discussion of these cases, however, students can come to see how thorough analysis of the precedential value of key authorities is essential to preparation and organization of an argument, whether the finished “product” is written or oral.<sup>96</sup> Moreover, the oral argument exercise itself provided a vehicle for students to explore the concept of weight of authority – all within the context of the type of simulation exercise called for by the Reports.<sup>97</sup>

## 6. Rule Synthesis

Throughout law school, rule synthesis remains a challenging task for law students. While most are able to read a case and extract a rule, they may have difficulty looking at that rule in the context of other cases and other holdings. Therefore, the simulated oral argument exercise intentionally includes facts that do not fall neatly within the parameters of the rule from any one case. In order to analyze Goldilocks’ situation, the students must use the simulation exercise to discern the parameters of the rules, consider any exceptions, and analyze whether limits articulated by a particular court are true limits or merely holdings expressed in light of the facts of the case before it.

Were students to chart out the holdings of the various cases, their charts might look something like this:

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<sup>96</sup> Certainly, the same would be true for writing an appellate brief, and the lesson is therefore useful in both contexts.

<sup>97</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

**Intent Rule Synthesis Chart**

<b>NO INTENT</b>	<b>INTENT</b>
If <i>not</i> knowingly and willingly (statute)	Statute – knowingly and willingly
<i>Dorothy</i> – Act of God	<i>BBW</i> – going onto property to huff and puff and blow house down
<i>Dorothy</i> – mere dreams, however often they occur	<i>Dorothy</i> – need intent to do it on this specific occasion
<i>HG</i> – trail of bread crumbs irrelevant	<i>PC</i> – climbing tower to rescue princess
	<i>Pinocchio</i> – boy running from donkeys. <i>Premeditation not required, heat of moment OK.</i>

**Capacity Rule Synthesis Chart**

<b>NO CAPACITY</b>	<b>MAYBE CAPACITY</b>	<b>CAPACITY</b>
<i>HG</i> – 3 years old	<i>RRH</i> – 6 years old (a question for the jury)	<i>Pinocchio</i> – 7 years old (because conviction upheld)
		<i>BBW</i> – 59 years old (because conviction upheld)

**Necessity Rule Synthesis Chart**

<b>NO NECESSITY</b>	<b>NECESSITY</b>
<i>Pinocchio</i> – running from donkeys (probably not a vicious animal) <i>because could call for help or run toward own property</i>	<i>PC</i> – Life-threatening situation, although this is in dicta, from Appeals Court, and old
<i>Jack</i> – running from spanking (although this case is from another jurisdiction, reasoning may be persuasive because it doesn't rely on a definition of intent)	Could it be tied to age? A case doesn't say so, but Goldilocks' youth may make her more prone to getting sick.
	<i>Pinocchio</i> – no other options

Even when they chart out the rules, however, students still may not have thought through those rules in adequate detail. Take the following examples:

**STUDENT #2:** I'd like to argue under the necessity defense that my client's health was indeed in jeopardy. She was very young. It was not only cold and raining, but she was not properly clothed. My client did not have any shoes on that would have kept the water out. And, like I said, due to her age, there was potential for her to become very ill if she did not find shelter immediately.

**PROFESSOR:** Stop there for a second. You say that your client does not have on the proper shoes or clothing. My understanding of the application of necessity is that first of all you've got to have some big necessity based on the case law. But second of all, I'm a little bit concerned about it being bad precedent for this court to set if we said there's necessity even when it's really the person's own fault. For example, shouldn't Goldilocks have had her galoshes on?

**STUDENT #2:** I think necessity in this case should be taken with a subjective approach. My client is five years old. The fact that she doesn't have galoshes on would affect her health more than it would someone who is maybe twelve or thirteen.

**PROFESSOR:** Right, but she didn't have her galoshes on. What is the state going to do, go in and dress every child before they go out? I mean, if we allow her to assert a necessity defense because she herself is not dressed appropriately for the weather, it seems to me that is going to open the floodgates of litigation. Do you agree, counselor?

**STUDENT #2:** I agree. However, it is not this court's responsibility to clothe this child. It is my client's responsibility to make sure that she is prepared for any inclement weather. In this case she was not prepared for the inclement weather. But that does not change the fact that necessity was present.

**PROFESSOR:** I disagree. Let's say that, you know, remember a while back when we had that huge snowstorm?<sup>98</sup> It was all over TV. If I had gone outside in my swimsuit and then broken into someone's home and said, "I am not dressed properly," would that have been necessity?

**STUDENT #2:** No, it would not be necessity.

**PROFESSOR:** Right, because it's my own fault that I've got on my swimsuit in a snowstorm, correct?

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<sup>98</sup> The blizzard of February, 2003, which shut down the entire Eastern seaboard, broke records. *See, e.g.,* James Barron, *Storm in the Northeast: the Overview*, N.Y. TIMES, February 19, 2003, at B1.

**STUDENT #2:** Correct.

**PROFESSOR:** So here Goldilocks doesn't have on her galoshes, on a bitterly cold and rainy day. Isn't that her problem, counselor?

**STUDENT #2:** Yes it is, but there is a problem that she was lost in the woods. It was her problem that she wasn't clothed properly to begin with, but she was also lost in the woods. Which...

**PROFESSOR:** You're saying that it's her own fault that she wasn't dressed properly, but then if she ends up lost, she can break into someone's house because she wasn't clothed properly?

**STUDENT #2:** Correct.

**PROFESSOR:** OK, let's keep going with this necessity bit then. I've got to tell you I'm having a hard time with that one though. But let's keep going. Let's say that she could. Even though she was not dressed properly, she had the right to enter into the Baers' house. I need you to get me further, counselor, because as I understand the facts of this case, didn't she enter into the Baers' house for shelter, but then ate their food, broke their furniture and went to sleep in their baby's bed? She really needed to do all that?

**STUDENT #2:** I would say that the necessity defense enables her to enter the house for shelter from the inclement weather.

As we can see from this example, this student has failed to think through the ramifications of a subjective or an objective approach to application of the necessity defense. Although none of the cases have specified which approach the court should employ, subjectivity may be particularly problematic in the necessity context, as different people certainly will have different ideas about what type of crisis constitutes necessity. Students must think clearly and specifically to consider this issue properly, and, just as the Reports suggest that simulation exercises may do,<sup>99</sup> the exercise provides an excellent opportunity for consideration of this problem. Should Goldy be allowed to enter if *she* considers it to be necessary? Or, if the court were to employ an objective approach, should it measure Goldy against other reasonable people? Other reasonable children? Other reasonable five-year-olds? Other reasonable five-year-olds who are lost in the woods? Another possibility would be to discount the defendant's personal characteristics but to consider the type of crisis. Does being lost constitute necessity? Does being cold? Indeed, under Prince Charming, Jack, and *Pinocchio*, the court seems to consider the type

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<sup>99</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

of emergency far more than the type of actor.<sup>100</sup> Students will have to read the cases carefully to understand the distinction, then figure out how Goldy's emergency compares to the Prince's, Jack's, and Pinocchio's. The simulation exercise calls on them to do that careful reading, then do some careful thinking – perhaps more so than would the discussion of any one of these cases in a typical case-dialogue class.

The interplay between the type of actor and the type of crisis is confusing in more ways than one. As we have seen, synthesizing the rule for necessity is a tricky enterprise. Therefore, the exercise will help students figure out which arguments pass the “giggle test,” so to speak. From the following exchange, the student learns that a weak argument may be worse than no argument, even when an unsympathetic judge tries to lead her there:

**PROFESSOR:** In *Prince Charming*, we have a third party aspect. It seems to me that the third party aspect is more important than the case even articulates. Because it seems to me that perhaps what the court was intending to do, and this was a 1946 case so I wasn't on the Court at that time and didn't participate in discussing it, but it seems to me that one objective that the court clearly could have had would have been to allow people to enter onto someone else's property to help someone else without the threat of criminal prosecution. In other words, to enable Good Samaritans. Do you understand what I mean, counselor?

**STUDENT #4:** Yes.

**PROFESSOR:** OK, because otherwise, if that's someone else's property over there on the other side of the courtroom, and you see your sister over there bleeding, you might be afraid to go over there and help her because you'd be afraid you might be prosecuted for trespass, right?

**STUDENT #4:** Yes.

**PROFESSOR:** So it seems to me that one thing the court might have been trying to do would be to create a right to enter on to someone else's property to aid another. We don't have that here, do we?

**STUDENT #4:** No.

**PROFESSOR:** So do we even have the impending death requirement?

**STUDENT #4:** The *Prince Charming* case was saying that the trespass is only allowed when a third party needs help. Here, we don't have that. We have her helping herself and I think that is where the distinction is made. In our case, Goldilocks was not helping a third party she thought would be in

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<sup>100</sup> *Prince Charming* refers to life-threatening emergencies, *Jack* to the threat of spanking, and *Pinocchio* to the fear of chasing donkeys. None of the cases refer to the type of actor as a criterion for necessity.

the house. She was going in for her own safety and that is where the distinction is drawn. In the *Prince Charming* case, the court referred to helping someone else.

**PROFESSOR:** So, you are saying that in *Prince Charming*, this Court was trying to encourage the prince to go help the princess, but we should not encourage Goldilocks to help herself.

**STUDENT #4:** I'm saying that the court is drawing a distinction between third party help and doing something for one's own benefit.

**PROFESSOR:** I'm just trying to understand why that distinction is important, counselor.

**STUDENT #4:** As mentioned before, perhaps the court is trying to create some type of Good Samaritan privilege.

**PROFESSOR:** So that is going to preclude people from entering into someone else's property to help themselves? If Goldilocks had seen a little kid wandering around sick and cold out there, she could have helped the little kid, but she couldn't have helped herself?

**STUDENT #4:** That's the distinction that the *Prince Charming* case makes, that a third party must be involved.

Of course, the *Prince Charming* case does *not* hold that a third party must be involved – it says no such thing. Students may struggle with the idea that just because a rule is *inclusive*, it is not necessarily *exclusive*. In other words, just because *Prince Charming* allows third parties to enter for compelling reasons, that does not mean that it *only* allows third parties to enter. While this analytical concept is initially quite difficult and confusing for students, the simulation exercise works to achieve the first-year goal of unlocking the rule synthesis mystery.<sup>101</sup>

Another issue arising in this exchange is the issue of the defendant's fault. While the *Pinocchio* and *Jack* opinions apparently do not directly refer to those actors' contribution to the situation, both *Pinocchio* and *Jack* were at least somewhat at fault: *Pinocchio* because he willingly interacted with the donkeys, *Jack* because he did the deed (trading the family cow for magic beans) that led to the potential spanking. Indeed, this issue seems to be a likely one for debate, yet one of the above students did not think the issue through completely, as Goldy's lack of galoshes forms the crux of the student's argument for necessity. The issue is ripe with possibilities, especially in the context of setting precedent for application in future cases, a consequence that many students may initially fail to consider.

On the other hand, through careful consideration of the simulated precedent cases, many students will make great strides in the area of rule

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<sup>101</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

synthesis. For example, the following student recognized a subtle but important argument for Goldilocks:

**PROFESSOR:** Goldilocks is saying that she needed to go into the Baers' house because of necessity. Tell me why.

**STUDENT #3:** Well, she was in the lonely woods and there was no one else around...

**PROFESSOR:** I need legal precedent that tells me why.

**STUDENT #3:** In *Enchanted Forest v. Pinocchio*, the court stated that Pinocchio, a seven-year-old boy, had other options than to trespass on the property, but Goldilocks had no other options. She tried to wait for the Baers to come home, but upon their not returning, she entered the premises.

**PROFESSOR:** So you are saying that there are actually two bases for necessity that this court has articulated. The first basis is perhaps in an impending death situation. The second might be when, under *Pinocchio*, there are no other options.

In order to come up with this argument, the student needed to see the other side of the court's holding in *Pinocchio*. In that case, the court held that Pinocchio did not have necessity because he had other options. The student demonstrates mastery of the rule synthesis concept because she sees that the *Pinocchio* holding allows her to argue the opposite, namely, that Goldilocks did *not* have other options. Such analysis may be quite sophisticated for a beginning first-year law student, but the simulation exercise works to increase the student's analytical ability.<sup>102</sup>

Similarly, the following student (arguing for the state) recognizes that Goldy might have reasonable options. This student has thought through the reasonable options, then ventured even further to relate them back to her theme: that Goldy's trespass was particularly egregious and that her conviction was thereby appropriate. Her technique is therefore quite successful, as demonstrated below:

**STUDENT #5:** I do believe that the appellant had reasonable options: 1) she could have walked up to the door of Baers' house, knocked on the door, realized no one was home and waited for the Baers outside; or 2) she could have gone inside and waited just inside the door, where it was warm and dry. What makes this trespassing case so atrocious is that Goldilocks went beyond the necessity of getting out of the rain and took advantage of the Baers' personal affects, using them in such a manner as to destroy them. If Goldilocks had sat on the porch or inside the door and waited for someone to come back, then that might have been a different situation.

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<sup>102</sup> See *id.*; see also Vitiello, *supra* note 8, at 903-04.

Another student effectively uses the simulated *Pinocchio* and *Prince Charming* cases to synthesize the two most important aspects of the necessity rule - reasonable options and the threat of death - and relate them to each other. Indeed, the student recognizes that oral argument may well be an important opportunity for the court to discover more interesting aspects to her case – as well as an opportunity for her to understand her case better, even as she talks through it in the simulated exercise.<sup>103</sup> She does not feel that she must defend her initial position that only the threat of death can ever constitute necessity, or that a potential trespasser must avail himself of *any* options, however impractical; she remains open to the court’s suggestion that the rules can still be useful and workable even if it is a bit broader:<sup>104</sup>

**PROFESSOR:** Let’s look at *Pinocchio*. In *Pinocchio*, the court said there’s not necessity if there is a seven-year-old kid running from a pack of donkeys that are chasing him.

**STUDENT #8:** Yes.

**PROFESSOR:** Now, *Pinocchio* is a very recent case, and I would be very hesitant to overrule it. I’m sure you’re glad about that. But it does strike me that a seven-year-old kid being chased by a pack of donkeys seems kind of drastic to me. I know, counselor, that there must be a point where you would concede necessity here. Can you tell me what that point would be?

**STUDENT #8:** Yes, I would set the line where the *Enchanted Forest v. Charming* began to set it in dicta: if a person’s life is in danger, then trespass is OK.

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<sup>103</sup> See, e.g., STUCKEY, *supra* note 13, at 216, citing Davis and Steinglass, *supra* note 36.

<sup>104</sup> Michael Vitiello notes that student advocates tend to avoid making concessions. Vitiello (2006), *supra* note 8, at 891. Still, concessions should be carefully considered, says Judge Wald. “Making concessions at oral argument...is a two-edged sword. If they are not critical, they can increase your credibility with the judges. Abandoning a losing argument doesn’t hurt you much; it’s better than looking like King Kong batting away a hundred one-engine planes on the top of the Empire State Building. But always remember... any concessions you make...may be cited against you in the opinion. . . . Think hard about the predicates of the judges’ questions – your implicit acceptance of them is often more dangerous than any answers you will give to the main question.” Wald, *supra* note 2, at 19. Justice Ginsburg agrees, but says, “That doesn’t mean lawyers should avoid concessions as inevitably damaging. As Judge Wald has observed, a concession once in a while can enhance a lawyer’s credibility.” Ginsburg, *supra* note 2, at 569.

**PROFESSOR:** Well, the Big Bad Wolf wanders around these parts. We've been hearing about him in the news a lot lately. Say the Big Bad Wolf is chasing you, not a pack of donkeys. He has big teeth, and he can eat you. Is that necessity?

**STUDENT #8:** Not according to *Pinocchio*, where there are other options such as calling for help.

**PROFESSOR:** Well, what if we've got a seven-year-old kid with little short legs and the Big Bad Wolf with his big teeth is chasing him? The kid doesn't have a lot of time here, right? I mean, calling for help is great, but the help had better get there right now, or he is going to be lunch. In that case, is there necessity? Does he have any reasonable options, counselor?

**STUDENT #8:** Reasonable options, such as...

**PROFESSOR:** He would have the option of calling for help. Would it be reasonable under these circumstances? Probably not. So should the court limit it to reasonable options?

**STUDENT #8:** Well, in *Pinocchio*, it's not clear whether there were other people around who perhaps could have distracted the donkeys.

**PROFESSOR:** I doubt anyone is going to want to make themselves bait. "Hey wolf, come chase me!" Doubtful.

**STUDENT #8:** There are...

**PROFESSOR:** Reasonable options, counselor.

**STUDENT #8:** Reasonable options.

**PROFESSOR:** Now let's go back to our Big Bad Wolf chasing Goldilocks or Pinocchio or whomever. The Big Bad Wolf is chasing the child and certainly has the ability to eat him because he is a little kid and the Big Bad Wolf is hungry. But actually, as the Big Bad Wolf is chasing the kid, The Big Bad Wolf says to him, "I'm not all that hungry. I just want a snack. So I am not going to eat you. I am only going to bite off your arm." So, now we do not have impending death, do we? But we still have the Big Bad Wolf, with big teeth, who is going to amputate you. Necessity?

**STUDENT #8:** I would concede that when there is a threat to life and limb, the standard may be to use reasonable options. However, in our case there was no impending life or limb danger. She was just afraid of the cold and rain. So I think that we could distinguish our case from your Big Bad Wolf hypothetical.

**PROFESSOR:** OK, but we don't need death.

**STUDENT #8:** True.

**PROFESSOR:** *Prince Charming* says that if her life is in danger, then there's necessity, probably.

**STUDENT #8:** Yes, there's most likely necessity.

**PROFESSOR:** But then, what you're saying is we don't need to go as far as *Prince Charming* because there could be circumstances less than death that would still constitute necessity.

**STUDENT #8:** Right, like fear of losing an arm or fear of being seriously injured. Which is not being afraid of the cold and rain and perhaps becoming sick or catching a cold...

**PROFESSOR:** OK, so you just really helped me narrow this. *Pinocchio* doesn't mean any options available; it means reasonable options. *Charming* doesn't mean only threat of death; it means the possibility of death or very serious injury.

But one more student, while acknowledging the "reasonable options" standard, finds herself tangled in a difficult web when she allows the court to focus on a single option (calling 911) rather than a whole gamut of other options that might also be reasonable. Once the student becomes flustered, things only go downhill from there. While this simulation is difficult for the student, it is still instrumental in helping her understand the flaws in her analytical process.<sup>105</sup>

**STUDENT #4:** She could have called for help, as the *Pinocchio* case states, but instead she chose to enter the home.

**PROFESSOR:** So you are saying this case is just like *Pinocchio*?

**STUDENT #4:** Your Honor, I am saying that there are many similarities and that Goldilocks had other options, just as Pinocchio had other options available.

**PROFESSOR:** I guess this brings me around to the capacity issue, counselor, because it seems to me that in *Pinocchio* that court was asking, or holding, that Pinocchio had a responsibility or duty to exercise other options, but there we were dealing with a seven-year-old, weren't we? It seems to me that a seven-year-old might be more aware of the options than a five-year-old. Are we going to hold a five-year-old to the same standards? A five-year-old has to exercise options, like calling 911?

**STUDENT #4:** Well, I wouldn't...

**PROFESSOR:** Does she have a cell phone in her little basket?

**STUDENT #4:** I wouldn't say that she would be able to call 911, but I would argue that a five-year-old does have the capacity to know to call for help if she were lost or to keep searching for someone to help her.

**PROFESSOR:** Isn't that what she thought she was doing when she went into the house?

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<sup>105</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

**STUDENT #4:** Yes, Your Honor, but she also could have kept looking around in the forest instead of entering the house.

**PROFESSOR:** It was raining really hard, and it was cold out there. Was that really a good idea?

**STUDENT #4:** Well, also might she entered the home and found there was no help there. She opted to stay, and her purpose for entering the home was no longer necessary.

**PROFESSOR:** She should have gone in, warmed her hands by the fire, and gone back out?

**STUDENT #4:** I'm saying that if the purpose was to look for help, she didn't find help. When she stayed in the Baers' home, her purpose became trespass and not just looking for help.

**PROFESSOR:** It seems to me that where's there's terrible weather outside, staying in the house achieves her purpose.

**STUDENT #4:** I can see that, but I would say that she isn't helping herself by staying in the home. She didn't know if anyone lived there, or how long she would have to stay there. It seems to me that she was...

**PROFESSOR:** Doesn't that go against your argument counselor? If no one lived there, then it would be OK for her to be there wouldn't it?

Because the student sees the judge as intimidating, rather than inquisitive, she strays from her plan and begins to argue any options that spring to mind, without regard for how reasonable they actually are. She therefore plays right into the judge's hands – and the judge's questions seem pro-Goldilocks – and gives the judge the chance to lead the discussion in demonstrating just how reasonable Goldy's actions actually were. This type of mistake may be very common for a first-year student (or for any inexperienced oral advocate, for that matter), but one purpose of the exercise is to allow students to make mistakes in practice, learn from them, incorporate what they have learned into a written product, and excel later in the courtroom or other legal representation situations requiring oral presentation – when it really matters.<sup>106</sup> Furthermore, a simulation exercise like this one encourages students to see judges and professors, not as controlling the conversation, but as facilitating it to a mutually informative conclusion.<sup>107</sup>

## 7. The Intersection between Necessity and Capacity

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<sup>106</sup> See, e.g., SULLIVAN, *supra* note 13, at 26.

<sup>107</sup> See, e.g., STUCKEY, *supra* note 13, at 216, citing Davis and Steinglass, *supra* note 36.

Particularly insightful students may pick up on the fact that, while no court has yet explicitly said so, there may well be an intersection between necessity and capacity. After all, five-year-olds might be more fragile or more susceptible to exterior threats (kidnapping, illness, etc.) than adults. Therefore, an advanced student will seek to find the point at which the two defenses intersect.

The following student uses her simulated oral argument to help her struggle through her analysis of the connection between necessity and capacity:

**PROFESSOR:** Counselor, do you think the *Sky* court was overly tough on Jack? This state hasn't decided that much on this issue, so I am interested in what other jurisdictions are doing. Do you agree with the decision in *Sky v. Jack*?

**STUDENT #7:** I do agree with it to a point. I believe that even though his mother was going to spank him, the fact that he was ten years old meant that he knew that the danger wasn't severe. However, his fear was a temporary punishment. In our case, Goldilocks was substantially younger than Jack. To a five-year-old, the fear of getting sick may be much more severe than the fear of just getting punished.

**PROFESSOR:** That's interesting. What I expected you to say was that the *Sky* court was overly tough on Jack and that he had necessity, too. But you're saying that it doesn't matter whether Jack had necessity, because what happened to Goldilocks was a lot more severe. So, what do you think the standard should be, counselor? Give me a measuring stick that I can use so that I know when there is necessity and when there isn't.

**STUDENT #7:** A lot of it depends on the age of the child. In Jack's case, he was old enough to realize that his punishment was only going to be temporary. A younger child's idea of what is going to hurt her could be substantially less well-formed than what an older child would think. But if...

**PROFESSOR:** So, you are saying that it should really be subjective. If a kid says, "Oh, my, I think that tree is going to fall on me," then they get to rush into somebody's house?

**STUDENT #7:** Possibly, because with a young child...

**PROFESSOR:** So, we don't need an actual necessity or an actual danger or an actual harm because it is all perception.

**STUDENT #7:** Right, because the younger a child is, the more inaccurately she perceives danger.

**PROFESSOR:** So, we are going to say that kids, because they do not understand the dangers of the world, have an automatic right to enter onto other people's property?

**STUDENT #7:** That's what my client would argue.

**PROFESSOR:** Really? Do you have any support for that?

**STUDENT #7:** Well, we have the *Pinocchio* case; he was seven years old, and he had other options other than running onto the property. In Goldilocks' case, she had no other choices, and she was younger.

**PROFESSOR:** OK, so should we base it on whether subjectively the defendant didn't recognize any other options? Or should we base it on whether a typical five-year-old in this situation would recognize other options?

**STUDENT #7:** It should be based on whether a typical five-year-old would recognize that other options.

**PROFESSOR:** So you're saying that Goldilocks is a typical five-year-old and that a typical five-year-old would not recognize any other options.

**STUDENT #7:** Right.

**PROFESSOR:** Do you think a typical five-year-old is able to understand the concept of "mine"?

**STUDENT #7:** Of "mine"? It's possible that a five-year-old would understand that.

**PROFESSOR:** Any five-year-old I've met, any three-year-old I've ever met, understands the concept of "mine." It's not yours, therefore I get to have it and you don't. That seems like a pretty basic concept. I'm wondering if you would say that Goldilocks would say that she did not understand that she was walking into somebody else's house.

**STUDENT #7:** I think that the fear of getting sick or urgency of getting out of the situation she was in would have overridden any fear that maybe was intruding on someone else's property.

**PROFESSOR:** So it's a balancing test.

**STUDENT #7:** Right, because to a five-year-old, the harm they would be doing to someone else's property would not nearly be as great of a consequence as getting sick.

**PROFESSOR:** It seems to me that we have gone from saying that a five-year-old doesn't have much capacity at all to saying that a five-year-old can do a fairly sophisticated analysis. Which way is it going to be, counselor?

**STUDENT #7:** It's not really a sophisticated analysis for a child to look out for herself. To a child, getting sick is a horrible ordeal. If she thinks that there is any way to avoid that, she is going to do so, even if she has to go onto someone else's property.

This student, then, has used the simulation exercise to consider whether the fear of getting sick should always constitute necessity or should only be necessity for a child. Of course, an advocate for Goldilocks

is likely to be more successful convincing the court of the latter argument, as the former requires a fairly broad holding, while the latter requires a much narrower, more case-specific one. Indeed, students need to learn to think narrowly, as asking the court to decide a narrow issue is far more strategic than asking the court essentially to consider the applicability of future cases not currently before it.<sup>108</sup> Courts are generally reluctant to adopt rules where the ramifications are too far-reaching, at least until they have had the chance to consider those implications in several cases or see how other courts have done so.<sup>109</sup>

The following student uses the simulated oral argument exercise to learn that lesson well, as she only asks the court to look at the situation currently before it:

**PROFESSOR:** At what point, counselor, do we say there was a necessity here? Is there legitimately necessity if she is really tired, or if she thinks that a UFO is going to come and take her? Are those legitimate necessities? Should we be giving that much leeway, because that seems to me that this interpretation is going to start to infringe on people's property rights, even if we are talking about small children. There's a reason why parents teach their children, "That's somebody else's house, so don't go in there."

**STUDENT #7:** There has to be a point where you would cut off the privilege.

**PROFESSOR:** Absolutely. What's that point?

**STUDENT #7:** In this instance, this court doesn't have to decide what that point is. It just has to look at the situation we are in and realize that, in Goldilocks' situation, she was afraid she was going to get sick. That was the only thing on her mind at the time.

**PROFESSOR:** So this court should issue a very narrow ruling. You're asking us to say, "If there is a child out in the cold and believes she will get sick, that's necessity."

**STUDENT #7:** That's correct, Your Honor. That's all the court has to decide at this point.

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<sup>108</sup> "If your court is divided philosophically . . . your best bet is to strive for a narrow fact-bound ruling that will not force one or two judges to revisit old battles or reopen old wounds. 'This case is not like . . .' the banner goes. 'It is all by itself; it will not require overruling old precedent, or breaking new ground.'"

Wald, *supra* note 2, at 21.

<sup>109</sup> *Id.*

The student in this example also does a nice job of fielding a softball question. The judge's question was designed to help the student make her case. Rather than arguing with the judge, the student took the judge up on her offer and agreed. While many new advocates are initially suspicious of a judge's friendly offerings, they would do well to learn to accept them eagerly and use them to support their case, a lesson they are likely to learn through the collaborative approach of a simulated oral argument.<sup>110 111</sup>

Through the simulation, good students will also come to understand one other intersection between necessity and capacity: if Goldilocks can prove one, she need not prove the other. Take the organizational strategy of the student below; the student could begin by dismissing one argument entirely, pointing out that it is unnecessary if the court finds in her client's favor on the other. Her simulated argument experience leads her to a better understanding of that analytical strategy.

**STUDENT #2:** The Chicago Superior Court wrongfully convicted my client of criminal trespass. At trial, my client wasn't even allowed to present her defenses. If she had been able to do so, the court would have found that, despite the inclemency of the weather on the day in question, my client is simply too young to have the intent necessary to be willful.

**PROFESSOR:** So, counselor, you are saying that we don't even need the necessity defense?

**STUDENT #2:** No, that is not what I am saying at all.

**PROFESSOR:** Because you said regardless of the inclemency of the weather.

**STUDENT #2:** Yes.

**PROFESSOR:** So, if we are disregarding the weather, we are disregarding the necessity, right? Why should we have not convicted this kid anyway?

**STUDENT #2:** Because she was five years old, Your Honor.

**PROFESSOR:** And, the relevance of that is...

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<sup>110</sup> See e.g., Roberts, *supra* note 1 at 7-5 (“[Advocates should] not assume that [a] question is hostile . . . don't fire on the lifeboats coming to save you.”); Ginsburg, *supra* note 2, at 569.

(“Sometimes we ask questions with persuasion of our colleagues in mind, in an effort to assist counsel to strengthen a position. Other times, we try to cue counsel that an argument he or she is pursuing with gusto is a certain loser, so that precious time would be better spent on another point. All too often, counsel intent on a planned spiel misses the cue.”)

<sup>111</sup> This exchange provides an excellent example of the dual functions of oral argument exercises: to teach analysis and (as here) to teach oral advocacy skills.

**STUDENT #2:** My client was five years old on the day in question; she was not able to form the willful intent for any malicious mischief she might have caused in the house.

**PROFESSOR:** So what you are saying is that you don't need necessity?

**STUDENT #2:** No.

**PROFESSOR:** But you don't need necessity. You understand that, right? Why don't you need necessity?

**STUDENT #2:** She needs one or the other. Necessity or capacity.

**PROFESSOR:** Why?

**STUDENT #2:** Because if the court decides that she is too young to have capacity then we don't need necessity. If it finds necessity, then her age is irrelevant.

**PROFESSOR:** Good analysis.

### 7. Faulty Rule Synthesis and Interpretation

Many students will struggle with just which potential rules are relevant. For example, some students will undoubtedly note that, in the state of Enchanted Forest, only the convictions of "creatures" are upheld on appeal (*Pinocchio* and *Big Bad Wolf*). The convictions of humans (*Hansel and Gretel*, *Prince Charming*) are routinely overturned. Some students will try to argue that, as Goldilocks is human, her conviction should be overturned. This misinterpretation of the law provides a wonderful opportunity for discussion of rule application through extension of the hypothetical.<sup>112</sup> Did the court intend to excuse *all* humans? a professor

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<sup>112</sup> Indeed, as Justice Ginsburg notes, extension of the hypothetical is a primary purpose of oral argument. "My colleague on both the D.C. Circuit and the Supreme Court, Justice Antonin Scalia, finds particularly unsettling lawyers' aversion to one category of question--the hypothetical question, meant to test the limits of an argument. There are, he said, many ways one might refuse to answer such a question, ranging from, 'Your Honor, that raises an issue quite different from the one I was discussing and, frankly, not sufficiently relevant to the case at hand,' to the more terse, 'Your Honor, that's a silly question.' But we never hear responses of this variety. Instead, the response we get, as Justice Scalia described it, is so uniform, so invariable, judges suspect that a conspiracy among appellate advocates must be at work. 'Your Honor,' counsel intones, sometimes solemnly, sometimes smugly, but always with the same five dread words: 'That is not this case.' The judge moves on, chastened by the lesson in rationality. She knows, of course, that her hypothetical is not this case, but she also knows the opinion she writes generally will affect more than this case. The precedent set may reach her hypothetical." Ginsburg, *supra* note 2, at 569-570. Bob Foster makes the same point: "If you are thrown a hypothetical question, don't tell the justices that those

might ask. If a creature trespassed in order to perform a life-saving act, would it be excused? If a human entered onto property with an ax and proceeded to destroy property, would she be excused? Through the simulation and the pursuant discussion, students will realize that not all potentially discernable rules are legally relevant.

Similarly, a professor seeking to teach rule synthesis could focus her students on the gender of the trespassers. Under the case law, are males more likely to trespass than females? It would appear not, and it would also appear that the Enchanted Forest courts do not use gender as a basis for their trespass reasoning, whereas they do use age to analyze capacity.

Indeed, the simulation exercise presents several opportunities for professors and students to work through errors in reading and rule synthesis. Consider the following:

**PROFESSOR:** Counselor, I am really interested in this necessity piece. It seems to me that this court has spoken a couple of times to the issue of necessity. I know we spoke to it in *Pinocchio* and *Prince Charming* cases. And I would like to hear your read on when is there necessity.

**STUDENT #3:** Certainly, Your Honor. In *Enchanted Forest v. Prince Charming*, a 21-year-old was justified due to the princess's life being in danger.

**PROFESSOR:** Did the court hold that?

**STUDENT #3:** Yes, they held that the grandmother would have allowed the prince onto the property if she had the option to do so.

**PROFESSOR:** I think you may have misread *Prince Charming*, counselor. I think in *Prince Charming* this court said that the princess could consent because she was a resident of the tower. We didn't need the wicked queen to consent at all.

**STUDENT #3:** I might have misread the case.

**PROFESSOR:** Also, I don't think that they actually held that the Prince would have been justified here, because the princess life was not in danger here, right? So, it was really more dicta. Wasn't it?

**STUDENT #3:** Yes, I agree.

In the above exchange, the student has probably read the Prince Charming case too quickly and without enough attention to detail, a

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are not the facts of the case at bar. They know that. They want to test the implications of the position you are advocating." Foster, *supra* note 5, at 23. Carter Phillips jokes, "If a Justice gives you a hypothetical, do not say, 'Well, that is not this case.' Of course that is not this case: that is why it is called a hypothetical. The Justices know that." Phillips, *supra* note 4, at 191.

common error for first-year students. However, it is also possible that the student froze on her feet, a typical issue for new oral advocates. Whatever the problem, the student will learn from this error.<sup>113</sup> Indeed, the goal of an in-class simulation oral argument exercise is not perfection, but rather an exploration of each student's strengths and weaknesses.<sup>114</sup> Such an exercise should be an opportunity for critique and improvement.<sup>115</sup> Still, a student who is still making basic reading errors like those illustrated above can reflect upon the simulation experience to understand how serious an analytical problem such errors can be.

Another typical student error occurs when students read more into the cases than is actually there, resulting in faulty rule synthesis. The student below wrongly supposes that the number of children involved is relevant to the capacity rule:

**STUDENT #1:** In *Hansel and Gretel*, though there is a two-year difference, the law did find that a three-year-old doesn't have capacity. In *Hansel and Gretel*, there were two children. Here, Goldilocks was alone.

**PROFESSOR:** So we had two kids out there, so they could have helped each other out. That's an interesting distinction. In this case, Goldilocks was alone, and she only had her brain to work with.

**STUDENT #1:** Yes.

**PROFESSOR:** So if there are two five-year-olds together, do they have capacity?

**STUDENT #1:** Depending on all the circumstances, they may.

**PROFESSOR:** I thought you were saying that a five-year-old as a matter of law does not have capacity?

**STUDENT #1:** Well, I'm saying that one five-year-old as a matter of law does not have the capacity. Depending on the circumstances, two five-year-olds may.

**PROFESSOR:** So, where there are two kids, we might say that we are going to require kids who are out in dangerous situations, who could freeze to death, who might be at risk of encountering the Big Bad Wolf, to have a

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<sup>113</sup> Scholars note that students typically learn well from their mistakes. *See generally, e.g.,* William Berman, *When Will They Ever Learn? Learning And Teaching From Mistakes In The Clinical Context*, 13 CLINICAL L. REV. 115 (2006).

<sup>114</sup> *See, e.g.,* Calleros, *supra* note 89, at 36.

<sup>115</sup> *Id.*; *see also* STUCKEY, *supra* note 13, at 125 ("Prompt feedback allows students to take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and to adjust their approaches to future learning endeavors.").

conversation with each other? “Well, let’s see: would it be OK to go in this house or not?”

**STUDENT #1:** Well, that would not be what we are requiring here because we are dealing with one five-year-old child.

In the above exchange, the student tries hard to escape her own faulty logic when she realizes that it does not make sense. Such an analytical error, however basic, is likely to expose itself in a rehearsal situation.<sup>116</sup> Therefore, this exchange provides an excellent opportunity to discuss with students the value of careful analysis and of practice, practice, practice<sup>117</sup> before the real oral argument takes place.

#### 8. Analogy and Distinction

The preceding section outlined the value of the exercise in teaching rule synthesis. Simulation exercises may also extremely useful in teaching the integral analytical skills of analogy and distinction.<sup>118</sup> Because the facts of Goldy’s case fall somewhere in the middle of the rule spectrums – it *might* be necessity, but it might not; it *might* be lack of capacity, but it might not – students will have an opportunity during the simulation to analogize Goldy’s facts to and distinguish them from the facts of the relevant precedent cases.<sup>119</sup>

Indeed, this is an area where novice law students may be tempted to make blanket statements without offering support. For example, a student arguing for Goldilocks must argue that a five-year-old is more similar to three-year-olds than she is to six-year-olds (as Hansel and Gretel had no capacity but Red Riding Hood possibly did). However, the courts in *Hansel and Gretel* and *Red Riding Hood* do not offer any reasoning for their decisions other than age. In this situation, it would be fine for students to speculate upon potential ways in which five-year-olds and

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<sup>116</sup> But how the professor handles the error is as important as the process of correcting it. See STUCKEY, *supra* note 13, at 229.

<sup>117</sup> “How do you get to Carnegie Hall? Practice, practice, practice.” (classic joke, source unknown).

<sup>118</sup> “In law as in other fields, . . . judgment is reasoning not from a set of rules but by analogy to model cases and precedents so as to bring the particularities of each case into an illuminating relationship to the legal tradition’s central principles and defining commitments.” SULLIVAN, *supra* note 13, at 8-9.

<sup>119</sup> See Sarah Ricks, *You Are in the Business of Selling Analogies and Distinctions*, 11 NO. 3 PERSP. TEACHING LEGAL RES. & WRITING 116, 116 (2003) (“[An advocate’s] job is to get the busy partner, and ultimately, the court, to buy [his] analogy to a case and to buy [his] distinction of a case.”).

three-year-olds are similar, despite the big chronological and developmental leaps that would seem to occur in this two-year time span. However, students cannot simply argue that they are alike or different without support for that position – an important realization they may reach through the simulation.

Toward that end, then, as part of their preparation for the simulation, students may benefit from charting out similarities and differences between Goldy and the defendants in the precedent cases and weighing the persuasiveness of arguing each.

### Capacity

THREE-YEAR-OLDS	FIVE-YEAR-OLDS	SIX-YEAR-OLDS
Do not go to school	May not go to school	Go to school
Are still learning about proper boundaries	Probably know more about proper boundaries	Probably understand boundaries
May not understand the consequences of their actions	Are better able to understand the consequences of their actions	Are probably better than five-year-olds at understanding the consequences of their actions

Given the rule parameters, a student arguing for Goldilocks will likely have a tough time with the analogy and distinction. Consider the following example:

**PROFESSOR:** Counselor, Hansel and Gretel were young children, weren't they? They were even younger than Goldilocks, right? Weren't they three years old? Don't you think there is a big difference between a three-year-old and a five-year-old, honestly?

**STUDENT #5:** No, I don't.

**PROFESSOR:** You don't. Really?

**STUDENT #5:** Between three and five, children have the same capacity. There is a big difference between a five-year-old and a six-year-old.

**PROFESSOR:** There is a big difference between a five-year-old and a six-year-old, but not between a three-year-old and a five-year-old?

**STUDENT #5:** No.

**PROFESSOR:** Does that seem completely reasonable to you? It's going to be a hard point to support with the case law.

As a judge, it would be easy to feel sorry for the student in the above example. She is forced to argue that Goldilocks does not have capacity even though she is closer in age to Red Riding Hood, who possibly did have capacity, than to Hansel and Gretel, who did not. However, the student's temporary frustration in the simulation may well be useful; through it, she may learn that she does not have to make her point in such an extreme way. For example, she could argue that Goldy has much in common with Red Riding Hood, *but also* much in common with Hansel and Gretel. The court *could* correctly conclude, then, that Goldy did not have capacity. In other words, the student need not push the point too far and insist that Goldy is much more like the far younger children. Her error here is thereby instructive and memorable.<sup>120</sup>

Some weaker students may choose to analogize and distinguish to *any* case, not merely the best cases. This tendency exhibits their underlying confusion about the purpose of analogy and distinction: to convince a court to decide in their favor. To do so, they must make the best arguments possible by comparing the facts of Goldy's case to those of the precedent cases with the most favorable outcomes, while distinguishing Goldy's facts from those of the precedent cases with less favorable outcomes. They may recognize how to make stronger arguments as the simulation continues.

For example, the below student misunderstands the goal of analogy and distinction and simply compares her client's case to other cases without regard for the value of the analogy:

**PROFESSOR:** I'm trying to understand what the state's interest is in prosecuting this kid. I mean, your brother argued that she was little and it was cold. We have to factor in her age and the circumstances, counselor. Why aren't you willing to do that? Why are you pressing this so hard? I'm actually going to tell you what my theory of it is; from looking at your briefs, it looks like there have been a lot of instances of trespass in the Enchanted Forest. Are you trying to make a point with this case, or do you legitimately think that this kid is guilty of criminal trespass?

**STUDENT #6:** The state legitimately believes that this young girl, Goldilocks, committed an act of criminal trespass.

**PROFESSOR:** Can you offer support for that?

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<sup>120</sup> See STUCKEY, *supra* note 13, at 229, quoting Daggett, *supra* note 69, at 14-16 (“Students should not be left with the wrong impression, but the teacher also should not exacerbate the loss of face for the student whose comment includes something inaccurate. Find something worthwhile and positive in what was said, and praise the students for that at the same time you correct the wrong part.”).

**STUDENT #6:** Yes, I can. She entered the Baers' home, abused their furniture, ate their food, destroyed their property, and had the arrogance of falling asleep in their child's bed.

**PROFESSOR:** But the statute requires that you do so knowingly and willingly. Isn't that right, counselor?

**STUDENT #6:** Yes.

**PROFESSOR:** So you're really going to attribute that level of intent to a five-year-old?

**STUDENT #6:** Yes, I would.

**PROFESSOR:** Can you back that up with any law?

**STUDENT #6:** Yes, I believe the eating of the food, trashing of the furniture and lying in the child's bed is intent.

**PROFESSOR:** Ok, but those are facts. I need some law that says she could form the intent.

**STUDENT #6:** In *Enchanted Forest v. Big Bad Wolf*, the court upheld a trespass conviction and found that the wolf did have intent and caused...

**PROFESSOR:** He was fifty-nine years old.

**STUDENT #6:** However, the fright imposed on the Baers was equal to what the Wolf did to the...

**PROFESSOR:** Right, but I think the court in that case relied on the fact that the Wolf went on to the property intending to cause damage, intending to terrify people, or pigs, right?

**STUDENT #6:** Yes. However, in *Sky v. Jack*, which is not precedent but is persuasive to this Court, a boy who climbed up on a beanstalk. He was a young boy, and his conviction was still upheld.

**PROFESSOR:** He was ten, which is twice Goldilocks' age, right?

Some first-year students tend to analogize and distinguish to somewhat irrelevant facts, as did the student in the below example.<sup>121</sup> Perhaps the student was driven by her impression that she had to find something to compare, so the nature of the comparison was less important than was performing the task itself.

**PROFESSOR:** In *Hansel and Gretel*, we had three-year-olds, as your sister counsel<sup>122</sup> stated, and they did not have capacity, or at least their

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<sup>121</sup> Ricks, *supra* note 119, at 131 ("If the fact was not outcome determinative in the decided case, then neither will the presence or absence of that fact in the client's case affect the outcome.").

<sup>122</sup> Some students may be initially confused about the New England tradition of referring to opposing counsel as "brother" or "sister."

conviction was overturned. Can you explain how Goldilocks was different?

**STUDENT #5:** I think the distinction is going to be the fact that they were three year olds and they only trespassed onto the property. They didn't actually go into the house. Here, Goldilocks actually entered the Baers' home and did damage to it, whereas Hansel and Gretel only entered onto the property.

**PROFESSOR:** But counselor, I thought you were saying there is a difference based on age. Now you are talking about a difference based on the extent of the trespass.

**STUDENT #5:** No, I believe that the age is an issue being that Hansel and Gretel were three and Goldilocks was five.

**PROFESSOR:** Now, you brought in this thought about the property line and the woods and the house and all of that. Does the three-year-old factor enter into that argument at all?

**STUDENT #5:** I think so, because a three-year-old walking around the woods wouldn't know the difference between the paths they were walking on and someone's property.

**PROFESSOR:** Well, say we have the gingerbread house that the witch lived in. That's where Hansel and Gretel were headed, right? If they had entered the house, would that have made a difference in the court's holding?

No precedent case discusses the extent of the trespass, and the statute does not refer to it. Furthermore, the extent of the trespass does not relate at all to the capacity issue, in that capacity is related to age, not to actions. Therefore, the above student, in struggling with analogizing and distinguishing facts to support the capacity defense, improperly decides to avoid her struggle by basing her argument on facts that *sound* relevant but in fact do not matter under the case law. Tempting, but improper.

The simulation exercise will also help students realize that they may analogize and distinguish Goldilocks to other children outside the precedent cases, as the court will certainly compare Goldilocks to other like children in deciding whether or not she had capacity. The student below had not thought through the ramifications of her analogy in terms of the real world (if the Enchanted Forest can really be called that):

**PROFESSOR:** If I explained to a five-year-old, "You are not allowed to go into another person's house," your contention is that a five-year-old would be incapable of understanding that? It's not just that she's ignorant of the law, it's that she *can't* understand the law?

**STUDENT #1:** Yes.

**PROFESSOR:** So a five-year-old is unable to understand that you don't go into other people's houses?

**STUDENT #1:** Yes.

**PROFESSOR:** Does Goldilocks have her own room?

**STUDENT #1:** I'm not sure.

**PROFESSOR:** OK, well, let's say she does for the sake of argument. Do you think she tells other people to keep out of her room?

**STUDENT #1:** Yes.

**PROFESSOR:** So, you know she has a concept of *her* room and no one else can come in it. Seems like a pretty basic five-year-old concept to me.

Like capacity, the necessity defense also provides a great opportunity for students to learn the art of analogy and distinction. A student's preliminary analysis might look something like this:

### Necessity

LIFE-THREATENING	GETTING PNEUMONIA	SPANKING
People's lives are more important than people's property rights	Probably not life-threatening, but still serious	Property rights are sacred and shouldn't be violated for something like a parent's discipline

Some students will seize the opportunity to find middle ground, exactly the goal of analogy and distinction. Of course, a judge who does not favor the client's position will want to read the case law more narrowly, and students participating in the simulation must be prepared to defend a more moderate approach while acknowledging the stricter interpretation. Consider the following example:

**PROFESSOR:** This court has hinted, strongly, in dicta, that Prince Charming's entry would have been justified if the princess life had been in danger. So, where does that get us with the rule for necessity? What do you think the rule for necessity ought to be?

**STUDENT #3:** If there were a substantial reason that Goldilocks had reason in this case to go onto the premises in order to continue her existence and to avoid the harshness of her reality, then she would be justified in entering the premises.

**PROFESSOR:** That's how you read it?

**STUDENT #3:** Yes.

**PROFESSOR:** It seems to me that it can also be read more narrowly, counselor. The narrower reading is that there is only necessity if your life is in danger.

**STUDENT #3:** In this case, her life was in danger, Your Honor.

**PROFESSOR:** Goldilocks' life was in danger? Those weren't the facts, as I understood them. The facts as I understood them were she was afraid she was going to get sick. I didn't see anything about impending death there.

**STUDENT #3:** That's true, Your Honor, but a five-year-old girl's life is definitely in danger if she gets sick . . .

**PROFESSOR:** You're getting yourself backed into a corner aren't you? You are realizing it and now you are trying to get yourself out of it. One of the toughest things that we have to figure out is when to concede something in our argument? So, what should our argument be here? See if you can articulate it to me. When we are talking about *Prince Charming*, what does the argument really have to be?

**STUDENT #4:** *Prince Charming* is talking about rescuing a third party.

**PROFESSOR:** A narrow reading of *Prince Charming* is that you have got to have a risk of death to have necessity. Opposing counsel, what is your argument going to be?

**STUDENT #4:** Necessity in general, she had other options.

**PROFESSOR:** OK, so, Goldilocks, it seems to me that the only time this court has found – or hypothesized that there was - necessity has been in the case of impending death. And counselor, I am going to tell you right off the bat that I disagree with you. I do not think it is in the record anywhere that Goldilocks life is in danger, right? Given that, do you have any argument you can make that there was necessity here? Now, counselor, here's the thing. You have to have an argument ready!

While she began her argument with a moderate reading of the cases, this student allowed herself to be manipulated by a judge who did not agree with her. Instead of telling the judge, "I respectfully disagree, Your Honor, and I think that the case law can be read more broadly," the student found herself agreeing with the judge that *Prince Charming* was the be-all and end-all, requiring an actual risk of impending death. She then, unconvincingly, tried to argue that Goldy's life was in fact in danger. After the simulation, the student may realize that a better approach could be to acknowledge the *Prince Charming* dicta, but argue that the case is not limiting. After all, none of the precedent cases concern the risk of illness or the fear accompanying being lost in potentially very frightening woods, and, if a court were presented with such a case, it would possibly consider such circumstances quite compelling.

## 9. Theme

In order to argue a case persuasively, advocates should begin with a theme.<sup>123</sup> Both the preparation process and the argument itself must begin with development of a clear, concise theme statement, as such a statement will inform the judges about the advocate's theory of the case (and why her client should win) as well as aid the advocate in organizing an argument around a cohesive idea.<sup>124</sup> Of course, once the theme is concrete in an advocate's mind, it will help her decide the best way to respond to certain key questions and bring the answers to these questions back to the central theme.<sup>125</sup> What's more, when an attorney can clearly articulate a theme, he is a long way down the analytical road – another reason why oral argument helps develop the analysis of a case and why simulated oral argument exercises help students understand legal analysis.

As Randy Lee notes, "Finding the best theme is no easy task. To do so, one must first understand the facts and also the motivating factors behind them. The attorney should talk to laymen about the facts and see how their sympathies are shaped."<sup>126</sup> John G. Roberts, Jr., agrees: "[An

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<sup>123</sup> Roberts, *supra* note 1, at 7-4: "Try to have one opening sentence that tees up the issue in an advantageous way . . . When arguing bottom side, prepare several different openings, and use the one that most closely corresponds to the court's interest, as evidenced by the judges' questions to your adversary." Bob Foster agrees: "Of critical importance is for counsel to have a theme. Study your case in advance and ascertain exactly what the major unifying theme is for your presentation. This is the theme that you will try to weave into your remarks and your responses to questions." Foster, *supra* note 5, at 23. Carter Phillips agrees, as well: "[I]f you are going to try to say something such as a speech, it is probably best to get to a serious point rather than merely telling the Justices that the case comes by way of certiorari. That is not going to help you any. You are going to have only thirty seconds, so you might as well say why you think you ought to win or try to focus on the legal issue immediately." Phillips, *supra* note 4, at 190.

<sup>124</sup> Indeed, as Randy Lee states, "The theme of a story is the idea upon which the story focuses." Lee, *supra* note 75, at 623.

<sup>125</sup> Sometimes this involves focusing on the real-life implications that an adverse outcome in the case would produce. As the now-Chief Justice recommended during his career as a Supreme Court advocate, "If an adverse decision in your case would truly lead to catastrophic consequences, by all means begin your oral presentation by highlighting those." Roberts, *supra* note 1, at 7-1. Furthermore, any legal oral presentation, such as those described *supra* at note 18, requires an advocate to organize her ideas, create a theme or story for her legal proposition, and rely on that theme to convince the listener.

<sup>126</sup> Lee, *supra* note 75, at 624.

advocate's] approach [should be] calculated to win the hearts and minds of the judges."<sup>127</sup>

Of course, a theme may be largely fact-driven, or it may be based on a strong case or two.<sup>128</sup> For example, advocates for Goldilocks may want to assert that:

*"This is a case that pits property rights against the health and safety of a little girl."*<sup>129</sup>

This fact-based theme emphasizes Goldy's health and safety and appeals to the judges' "hearts and minds."<sup>130</sup>

On the other hand, an advocate for Goldilocks might also want to state:

*"Under the Supreme Court's decision in Pinocchio, a potential trespasser must avail herself of reasonable options. Goldilocks had no reasonable options other than to trespass, and therefore her necessity should be grounds for overturning the conviction."*

This theme turns on the law set forth in *Pinocchio* and represents that law as controlling in this case.

Similarly, advocates for the state may want to stress that:

*"Goldilocks' life was not in danger. Therefore, under this court's decision in Prince Charming, her circumstances did not constitute necessity."*

This legally-based theme quite convincingly depends upon dicta in *Prince Charming*.

Alternatively, the state may wish to argue the extent of Goldy's trespass:

*"This defendant did more than trespass onto the Baers' property. She ate the Baers' food, broke their furniture, and slept in their beds. No amount of necessity could compel these actions, and no five-year-old could possibly think that her actions were all right."*

<sup>127</sup> Roberts, *supra* note 1, at 7-2.

<sup>128</sup> *Id.* at 7-1 ("If you believe the result you seek is compelled by a recent Supreme Court decision . . . begin and end with that controlling decision.").

<sup>129</sup> Professor Libby White, Villanova Law School, at the December 2002 New England Consortium of Legal Writing Teachers meeting at Suffolk Law School.

<sup>130</sup> Roberts, *supra* note 1, at 7-2.

As students will learn through the simulation exercise, all further statements should harken back to the theme of the case. For example:

**PROFESSOR:** Your first sentence, “To commit an act of trespass you must have intent,” is the thing that is really at issue, isn’t it? But you are arguing for the state. When you began, it almost sounded like you were arguing for Goldilocks and I thought that the next thing you were going to say was that she didn’t have intent. What do you want to stress in your theme statement? What is your goal? To uphold the lower court, right? So what is the first thing you should be telling me? The first thing you should be telling me is that the conviction was absolutely proper and that this court should uphold it. That’s your theme; after you get that across, then you can get into the capacity and intent. But what you want to say is, “Look, Your Honor, she is not going to be able to make a case for herself here.”

In her statement about intent, the student accurately describes the rule for trespass, but not in a way that is persuasive for her case. She also fails to tell the court how it should decide the case. These omissions may seriously undermine her ability to get the court’s attention at the very beginning of her argument, when she is likely to have the most time to speak before active questioning begins.<sup>131</sup> Her experience in learning how best to characterize her case will be instructive as she proceeds to analyze her case further, better to support her persuasive theme, or to modify her theme in light of the new concepts she has grasped through the simulation exercise.

## 10. Answering Questions

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<sup>131</sup> Chief Justice Roberts has commented that the justices on the current Supreme Court are working hard to allow advocates to answer questions fully before another justice jumps in with an additional question. Always modest and self-effacing, the Chief did note after one oral argument that he was the only justice who accidentally forgot to grant this courtesy. Roberts, *supra* note 3. Similarly, Richard Lazarus, Georgetown Law Center professor and co-Director of the Supreme Court Institute, notes that, “The tone has changed . . . they’re not stepping on each other . . . they take longer before someone asks the first question. They give the lawyers more time to answer.” Linda Greenhouse, *In the Roberts Court, More Time for Argument*, N. Y. TIMES, MAY 3, 2006, at A19. Judge Patricia Wald notes that this custom of interrupting varies from court to court: “[I]n our court we rarely if ever cut counsel off when he is answering judges’ questions.” Wald, *supra* note 2, at 17.

Preparation for oral argument is certainly key. However, as we have seen up to this point, a thorough reading of the precedent cases is not enough to prepare students for oral argument. After a student has thought through her case in detail, as outlined above, there is still much more work to be done through simulation. At this juncture, a student should begin to consider what questions the judges might ask her about her case during the simulation.<sup>132</sup> Such preparation will aid her in analyzing the case from the point of view of a neutral or even hostile party.<sup>133</sup>

Of course, as any good advocate knows— and as any law student will learn through the simulation — a judge’s questions are likely to be about the case’s holes. In Goldy’s case, because the outside parameters of the capacity and necessity defenses are already well-established, the judges are likely to be most interested in the gray area falling between the parameters. “Yes,” a judge might say. “I know that what *is* necessity, and I know what it *isn’t*, but I’m still not sure about *maybe*.” Therefore, a well-trained oral advocate will spot areas of concern for judges and consider ahead of time how best to respond to judges’ questions about these areas.<sup>134</sup>

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<sup>132</sup> See, e.g., Roberts, *supra* note 1, at 7-5 (“Perhaps the most important skill for today’s oral advocate is handling questions. . . . you should have prepared very concise answers to every question you can reasonably anticipate.”); Ginsburg, *supra* note 2, at 569 (“Questions should not be resented as intrusions into a well-planned lecture. . . . Judges pose testing questions generally not to display their wit, but to let counsel know what troubles the court, or at least the questioner, about the case or the issue on which counsel is holding forth.”).

<sup>133</sup> Rosato, *supra* note 18, at 44 (students learn from preparing questions, from answering them aloud, and from listening as others answer them).

<sup>134</sup> See, e.g., Roberts, *supra* note 1, at 7-2. Many judges and advocates note that questions from the bench are, in fact opportunities for advocates. As Judge Joel F. Dubina of the Eleventh Circuit notes, “[R]ather than becoming exasperated with the active questioning from the bench, attorneys should be grateful for an additional opportunity to advocate a client’s position.” Dubina, *supra* note 4, at 8. Foster agrees: “If you do get questions, immediately and directly answer the question posed. Do not duck, do not tell the justice you will get to that point, do not refer to the briefs -- answer the question! . . . Welcome questions because they indicate the court’s interest and give you an opportunity to persuade the court.” Foster, *supra* note 5, at 23. Carter Phillips, who has argued before the Supreme Court many times, also agrees: “[T]he worst attitude that you can have at oral argument is to ignore the Justices’ questions, because you have these great points that you need to make. I hear this all the time. People walk out of the Court and say, ‘That was unbelievable. I got up there with five brilliant points that I just had to make, and those guys just kept interrupting me. They would not let me say two words.’ Instead, one should realize that that was the greatest opportunity. You now

The below exchange is a fine example of the value of a simulation exercise in teaching law students to learn to engage in dialogue about the law:

**PROFESSOR:** You've got to think about the tough questions the Justices are going to ask you. This is the kind of thing that you have to anticipate. Now, I intentionally wrote this problem so that its not there exactly as a five year old has intent. You show me where it says that a five-year-old has intent; that a five-year-old could really form the intent to trespass onto somebody else's property. So what we have to do is analogize or distinguish, right? Towards the end of her argument, this advocate's case became much stronger. However, when I asked her to cite to a supporting authority, she got nervous, and she cited to *Big Bad Wolf*, which probably wasn't her best starting point, right?

**STUDENT #6:** No.

**PROFESSOR:** It's probably the least analogous case here. In fact, who could use that case pretty effectively?

**STUDENT #6:** Goldilocks.

**PROFESSOR:** Why would your brother here be able to effectively use that case in arguing for Goldilocks?

**STUDENT #6:** Because it is someone much older.

**PROFESSOR:** Yes, it seems to me that in *Big Bad Wolf*, we have got a clear-cut case. He's old. Like me.

**STUDENT #6:** [Laughs]. Yeah.

**PROFESSOR:** So you have to say to the court: "In *Big Bad Wolf*, absolutely we convict the guy. We've got a guy who goes on to do damage to the property, he's old, and he's scary." But if you're arguing for the state, you can't use *Big Bad Wolf* very effectively, because nothing in that case's facts helps you say that Goldilocks should therefore be convicted, too. There are two lessons we can learn from this. The first lesson is: prepare, prepare, prepare. Figure out the questions ahead of time. Second: you are going to have figure out how to deal with it when you get stuck. How are you going to handle that? You might want to have a fall back position, in order to give yourself a little more time while your mind's wheels are turning. Maybe you could choose to take an opportunity to relate the question back to your theme.

In this example, it is easy to see that the student is using the simulation exercise to think on her feet, to consider the implications of the

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have a perfect window into the minds of the Justices. They are telling you exactly what is bothering them." Phillips, *supra* note 4, at 190.

various analogies and distinctions she could make. While students often fear the mooting process, then, both because it causes them to commit to their ideas and because they are required to argue on their feet in front of their colleagues, they come to see the value of simulation in that it helps them develop their case more thoroughly. For all of these reasons, the Reports stress the frequent use of simulation exercises such as this one.<sup>135</sup>

#### IV. CONCLUSION

*The moment of speech, when knowledge is made active, calls for art . . . and does so because the circumstances to which one speaks are never those to which one has spoken before. The young lawyer is surprised to discover that in practice virtually no case comes to him as a clean-cut paradigmatic case, but always has uncertainties, ambiguities, rough edges, and paradoxes built into it. This is so because the case comes from life, not from the exposition of a theory, and these are the qualities of actual human experience. To deal with the fact that circumstance and culture constantly change, the mind needs not a grid of established moves but the capacity to invent new moves. Lessons and advice wear quickly thin; no science exists upon which one's cognition of the world can rest; the only possible guide is internal, a kind of gyroscope that may enable the vessel to maintain stability and direction in a world that is entirely fluid, and relative, without external landmarks – the capacity of an Odysseus, confident that he can meet a new situation with intelligence by focusing on what it actually is.*<sup>136</sup>

In the end, what do Carnegie and *Best Practices* teach us? That students who are engaged and involved in the classroom, who are encouraged to participate in simulation exercises, who are challenged and critiqued in concrete ways beyond the typical Socratic dialogue, are more likely to synthesize key legal concepts, to remember what they learn, and to apply what they learn in the law school classroom to legal practice. Indeed, as James Beattie has stated, “Our students must be able to address the problems presented, analyze applicable legal doctrine, evaluate the underlying concerns and commitments of those affected, effectively respond to the questions asked, and ask the right questions in turn, all the while thinking on their feet.”<sup>137</sup> With all due respect to Prof. Beattie, however, this article – in agreement with the Carnegie and *Best Practices*

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<sup>135</sup> See, e.g., STUCKEY, *supra* note 13, at 221; SULLIVAN, *supra* note 13, at 26.

<sup>136</sup> JAMES BOYD WHITE, *Doctrine in a Vacuum*, in FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION, 8, 18 (2000).

<sup>137</sup> Beattie, *supra* note 67, at 485.

reports - seeks to disprove his final premise: “Socratic teaching uniquely prepares students for such important legal tasks.”<sup>138</sup> In fact, just as Beattie asserts that the Socratic method “internalizes in students the analytical and doctrinal problem solving skills they will be tested on and use in more sophisticated legal reasoning,”<sup>139</sup> so, too, according to this article, may simulated oral argument exercises. Through oral argument simulation exercises, we may begin to realize the goals of the Reports: [to enable] students to grasp what the law is, as well as how to think within it, . [to give] students experience of practicing the varied roles lawyers play while coming to appreciate the engagements of self and the world that these entail.”<sup>140</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> SULLIVAN, *supra* note 13, at 85-86.